UN-ERASING RACE: INTRODUCING SOCIAL NETWORK DISCRIMINATION TO THE LAW*

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Race-based affirmative action in college admissions was a longstanding and hotly debated policy that allowed universities to use race as one factor in admissions decisions. With the landmark 2023 Supreme Court decision in Students for Fair Admissions *("*SFFA*"), many believe the era of race-conscious policies in university admissions has effectively ended.*

Yet the rationale behind the Supreme Court's affirmative action jurisprudence has so far completely omitted the substantial implications of social network discrimination: discrimination in which minorities suffer disadvantages in social and economic opportunities, all else equal, simply because their social group is smaller. This Article introduces social network discrimination, a phenomenon newly described in economics scholarship, to legal scholarship and by doing so challenges the perspective deeply held by many that race-blind (or "colorblind") policies inherently promote individual merit. Social network discrimination is important for the law insofar as it suggests that there may be a source of injustice that has not previously been considered by the courts. Since there may be new, previously unrecognized disadvantages for minority groups untied to past slavery or other historical injustices, the contemporary debate on affirmative action can be seen in a new light. In fact, this Article examines the question of whether remedying social network discrimination represents a new merit-based rationale for race-conscious policy—a new compelling government interest both that is distinct from diversity and that survives the Court's holdings in SFFA *that invalidated the Harvard and UNC race-based admissions programs. Due to social network discrimination, race-based policies may serve as necessary correctives for present-day lapses in fairness—for persisting deviations from what people across the political spectrum would view as a just system of merit.*

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This new source of disadvantage resides outside of existing jurisprudence as no courts have yet considered the legal implications of it. As such, this Article offers preliminary intellectual groundwork to practically design policy to remedy social network discrimination in ways that could survive the Supreme Court's strictest standards for constitutional review. The sweeping implications of social network discrimination extend well beyond the hot button issue of affirmative action—even beyond the boundaries of contemporary legal discourse—to challenge basic conceptions of "equal opportunity" that are foundational to America's national identity.

INTRODUCTION

In June 2023, the Supreme Court upended another longstanding policy[1]: race-based affirmative action in college admissions.[2] In *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* ("*SFFA*"),[3] the Supreme Court deemed the race-based admissions programs at both the University of North Carolina ("UNC") and Harvard College as unconstitutional, for several reasons.[4] First, the Court held that the schools' compelling interests were insufficiently measurable.[5] Second, the Court held that both schools failed to articulate a meaningful connection between the means they employed and their diversity goals.[6] Third, the Court held that the admissions programs failed strict scrutiny by using race as a stereotype and as a negative factor.[7] And lastly, the Court held that the admissions programs failed strict scrutiny because they lacked a "logical end point."[8] *SFFA* greatly restricts the capacity for schools to pursue race-based admissions policies in pursuit of diversity. Without an alternative rationale for race-based policies, this decision could sound the death knell for race-based affirmative action in college admissions. Furthermore, removing the diversity rationale for race-conscious college admissions without introducing another allowable justification could challenge the societal commitment to diversity in other areas such as private hiring and promotions.[9]

1. In 2022, the Supreme Court issued sweeping decisions on issues ranging from gun rights to abortion. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284–85 (2022).

2. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2175–76 (2023).

3. 143 S. Ct. 2141 (2023).

4. *Id.*

5. *Id.* at 2166.

6. *Id.* at 2167.

7. *Id.* at 2168.

8. *Id.* at 2170.

9. Adam Liptak, *College Diversity Nears Its Last Stand*, N.Y. TIMES (Oct. 15, 2011), https://www.nytimes.com/2011/10/16/sunday-review/college-diversity-nears-its-last-stand.html [https://perma.cc/V7QD-KMKJ (staff-uploaded, dark archive)].

Facing these circumstances, should we celebrate—or lament? Affirmative action remains a hotly debated issue in the United States. Though research has supported the benefits of affirmative action for historically-marginalized groups[10]—along with the benefits of racial diversity for people more broadly[11]—many view affirmative action as offensive to notions of individual merit.[12] Opponents of affirmative action often contend that preserving and promoting fairness instead requires implementing race-blind (or "colorblind") policies.[13]

Yet the national discussion surrounding affirmative action has overlooked a critical element—namely, key insights from recent economics research about social networks. To be sure, there is a strand of legal literature that has critiqued the diversity rationale, as well as offered alternative justifications for affirmative action.[14] Breaking from these past accounts, I offer a new one grounded in social science research that not only is compatible with existing Supreme Court jurisprudence, but also directly confronts one of the most persistent arguments against race-conscious policies. Simply put, new evidence challenges the perspective held by many in the Court and in the public that race-blind policies inherently promote individual merit.[15]

Specifically, Okafor's recent economics research offers a different perspective on this line of reasoning: colorblind policies do *not* inherently

10. For example, a recent study found that, in ending affirmative action through Proposition 209 in 1998, California caused underrepresented minority freshman applicants to attend lower-quality colleges more frequently, which led to decreased degree attainment and lower average wages in their twenties and thirties. *See* Zachary Bleemer, *Affirmative Action, Mismatch, and Economic Mobility After California's Proposition 209*, 137 Q.J. ECON. 115, 156–57 (2022).

11. A meta-analysis of various research studies presents further evidence that several types of diversity experiences are positively correlated to cognitive outcomes, such as reductions in prejudice and racial bias. *See* Nicholas A. Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 REV. EDUC. RSCH. 4, 22–23 (2010); *see also* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (demonstrating that the Court itself acknowledged the "educational benefits that flow from a diverse student body").

12. *See, e.g.*, ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 163–65 (2010).

13. *See, e.g.*, *id.*

14. *See, e.g.*, Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003); Sally Chung, *Affirmative Action: Moving Beyond Diversity*, 39 N.Y.U. REV. L. & SOC. CHANGE 387, 387–88 (2015); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 427–34 (2014); Note, *Discrimination Blocking: A New Compelling Interest for Affirmative Action*, 136 HARV. L. REV. 690, 690–91 (2022); Selena Dong, Note, *"Too Many Asians": The Challenges of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 STAN. L. REV. 1027, 1027–31 (1995); Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. C.R. & C.L. 171, 171–72 (2005).

15. Chika O. Okafor, *Seeing Through Colorblindness: Social Networks as a Mechanism for Discrimination*, 68 J.L. & ECON. (forthcoming 2025) (manuscript at 30–32) (on file with the North Carolina Law Review) [hereinafter Okafor, *Seeing Through Colorblindness*]; Chika O. Okafor, Seeds of Societal Progress: Essays on Economic Inequality, Criminal Justice, and Climate Change 3–4 (Apr. 4, 2024) (Ph.D. dissertation, Harvard University) (on file with the North Carolina Law Review).

promote merit.[16] This is a main implication of *social network discrimination*.[17] To understand social network discrimination, envision a utopian setting in which there are no achievement gaps between majority and minority groups: all racial groups share the same average ability and have the same average welfare. This utopian setting does not bear the "original sins" of slavery, prejudice, or historical discrimination, and employers and schools cannot differentiate members of the majority from members of the minority. In other words, there is complete colorblindness in policy. In summary, this utopian state of the world mirrors the vision *not only* of the NAACP Legal Defense and Educational Fund and ACLU on the left,[18] but also of Supreme Court Justices Samuel Alito and Clarence Thomas on the right.[19]

However, true utopia remains elusive. Recent research in economics has shown that even in such settings with both initial equality *and* colorblind policies, minorities suffer disadvantages over time.[20] Economic opportunity is increasingly distributed *unequally*, due to distortions caused by homophily—the persistent tendency for people to associate more with others similar to themselves.[21] Homophily fosters fewer social ties for minorities, all else equal, given their smaller group size and has been shown to lead to racial disparities in job referral opportunities.[22] Homophily in race/ethnicity creates the strongest social divide—even more than homophily in gender or occupation.[23]

16. Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 1).

17. *Id.* (manuscript at 2). For a short video that explains social network discrimination, see Research Lab, *Social Network Discrimination (explainer video)*, YOUTUBE (Oct. 12, 2023) (on file with the North Carolina Law Review), https://www.youtube.com/watch?v=7JqOGVXesGo [https://perma.cc/JY9T-QVMY].

18. For example, the NAACP Legal Defense and Educational Fund, Inc. articulates that its own mission "has always been transformative: to achieve racial justice, equality, and an inclusive society." *History: We Are the Country's First and Foremost Civil and Human Rights Law Firm*, LEGAL DEF. FUND, https://www.naacpldf.org/about-us/history [https://perma.cc/SNJ6-5C8D]. The ACLU campaigns include economic justice and education equity. *Systemic Equality: Equal Access, Better Futures*, ACLU, https://www.aclu.org/campaigns-initiatives/systemic-equality-addressing-americas-legacy-of-racism-and-systemic-discrimination [https://perma.cc/U3UD-PMR4] (last updated July 3, 2023).

19. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 316 (2013) (Thomas, J., concurring) ("Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that [racial] classifications ultimately have a destructive impact on the individual and our society." (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in judgment))); Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 399 (2016) (Alito, J., dissenting) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995))).

20. Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 2–4).

21. *Id.*; Miller McPherson, Lynn Smith-Lovin & James M. Cook, *Birds of a Feather: Homophily in Social Networks*, 27 ANN. REV. SOCIO. 415, 420–21, 425 (2001).

22. Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 5 n.9).

23. McPherson et al., *supra* note 21, at 420–21.

These disparities in how opportunities are distributed are termed "social network discrimination." Social network discrimination falls outside the two traditional models of discrimination in economics—taste-based and statistical discrimination. Social network discrimination can be eliminated if minorities: (1) have sufficiently stronger homophily than the majority, and/or (2) have sufficiently large representation in the setting—in other words, if minorities become less of a minority.[24] Potentially choosing between greater self-segregation (from sufficiently stronger levels of homophily) or persistent inequality obviously contrasts starkly with the lofty post-racial vision of society held by many who promote fully "colorblind" policies. And research on social network discrimination, which focuses on labor markets,[25] can easily be generalized to other settings where opportunities similarly depend on social networks. Such alternative settings include workplaces, professional schools, or—as relevant to *SFFA*—college campuses. Because social network discrimination can be mitigated, consideration of it can assist the role that the law plays in promoting a more just distribution of social and economic opportunity.

Social network discrimination is consistent with the broader nascent economics literature on the role homophily plays in exacerbating inequality;[26] yet, social network discrimination should not be confused with extant research on implicit bias.[27] Social network discrimination can arise from the fact that there are shared attributes that simply make it easier for some people to form social ties with each other than with others. For example, consider the natural bonding that occurs when two people meet who share the same cultural traditions. In turn, this natural bonding leads to distortions in how opportunities are distributed. Here, disparities result from social network formation and not from implicit or explicit racial biases; people outside of one's network are viewed the same regardless of race, and people within one's network are also viewed the same regardless of race. Implicit bias, in contrast, reflects how unconscious mental biases in favor or against racial groups can directly

24. Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 5).

25. *Id.*

26. *See, e.g.*, Antoni Calvó-Armengol & Matthew O. Jackson, *The Effects of Social Networks on Employment and Inequality*, 94 AM. ECON. REV. 426, 426–28 (2004); Lukas Bolte, Nicole Immorlica & Matthew O. Jackson, The Role of Referrals in Immobility, Inequality, and Inefficiency in Labor Markets 1–7 (Mar. 2024) (unpublished manuscript) (on file with the North Carolina Law Review).

27. *See, e.g.*, Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 969–73 (2006); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318–27 (1987); Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* 40 CONN. L. REV. 931, 956–66 (2008); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1029–38 (2006); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 965–68 (2006).

contribute to racial disparities.[28] This distinction is important because implicit bias from employers is not needed for the unmeritocratic distributions of social and economic opportunity that arise from social network discrimination—nor is it even possible. In the utopian setting explored in the research, those offering economic opportunities cannot distinguish between who is of the majority and who is a minority.[29]

Consideration of social network discrimination can transform the ongoing debate surrounding race-based affirmative action. *Remedying* social network discrimination represents a new *merit*-based justification for race-conscious policies—a justification that does not equate to remedying historical discrimination, which the Supreme Court has already rejected as an allowable rationale for affirmative action.[30] Rather, social network discrimination arises from *present-day* social interactions; so, unlike Justice Powell's caution in *Regents of the University of California v. Bakke*[31] against unfairly harming innocent applicants today for transgressions of yesterday, social network discrimination addresses present-day interactions in which we *all* consistently contribute, for better or worse, to the underlying dynamics.

To be sure, social network discrimination alone does not mean that racial minorities will be disadvantaged in *all* settings. History has shown scenarios where racial minorities thrive (e.g., white South Africans) or where a local racial majority does not (e.g., Black workers in certain U.S. metro areas).[32] However, these groups did not begin from an initial state of equality, but involve instead the distorting influence (and legacy) of racial prejudice.[33]

Social network discrimination is important for the law insofar as it suggests that there may be a source of injustice that has not previously been considered by the courts. From this space—the recognition that there may be new, previously unrecognized disadvantages for minority groups untied to past slavery or other historical injustices—the contemporary debate on affirmative action and other race-conscious policies can be seen in a new light. Social network discrimination challenges the perspective that race-conscious policies

28. *See, e.g.*, Irene V. Blair, John F. Steiner & Edward P. Havranek, *Unconscious (Implicit) Bias and Health Disparities: Where Do We Go from Here?*, 15 PERMANENTE J. 71, 71–78 (2011).

29. Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 8).

30. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978) ("Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, *who bear no responsibility for whatever harm* the beneficiaries of the special admissions program are thought to have suffered." (emphasis added)).

31. 438 U.S. 265, 310 (1978).

32. *See, e.g.*, Gregory N. Price, *South African Apartheid, Black-White Inequality, and Economic Growth: Implications for Reparations*, 71 S. AFR. J. ECON. 611, 611 (2003); Elizabeth Ananat, Fu Shihe & Stephen L. Ross, *Race-Specific Urban Wage Premia and the Black-White Wage Gap*, 108 J. URB. ECON. 141–53 (2018).

33. *See Bakke*, 438 U.S. at 401 (White, J., concurring).

simply represent policies where some individuals of today are unfairly "harmed" to promote diversity (or to remedy bygone harms).[34] Rather, race-conscious policies may serve as a necessary corrective for *present-day* lapses in fairness—and for *present-day* deviations from what people across the political spectrum would agree is a more just system of merit. Though remedying social network discrimination need not mean implementing public affirmative action to remedy private discrimination, legal scholarship has demonstrated that doing so is not necessarily counterintuitive, nonviable constitutionally, nor unprecedented in U.S. historical memory.[35]

Research suggests social network discrimination fosters inequality in the United States predominantly along racial lines (as that is a predominant source of homophily)[36]—with race being a protected classification under the law. And because race correlates with entrenched cultural and historical attributes, there is likely *long-term* homophily among U.S. racial groups—meaning homophily extending beyond the foreseeable future. Long-term homophily could, in turn, yield persistence of social network discrimination—resulting in ingrained deviations from what most would deem fair and just outcomes. These long-term implications of social network discrimination span various complex areas of law, including employment discrimination, civil rights law, constitutional law, education law, and public law in general.

In Part I, this Article explains the intellectual landscape of race-based affirmative action in college admissions, exploring the Court's reasoning in landmark Supreme Court cases. In Part II, this Article introduces the model of social network discrimination to the legal literature and explains the basic intuition behind its findings. There, the Article explains how remedying social network discrimination represents a new merit-based rationale for race-conscious policy in university admissions, one that could satisfy the Court's most exacting standard of strict scrutiny. This proposed rationale is distinct

34. Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 1) (noting that, since social network discrimination arises in circumstances in which there are no historical injustices or "bygone harms," some might claim race-conscious policies that remedy social network discrimination are not "unfair").

35. *See, e.g.*, Ian Ayres & Fredrick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577, 1638–41 (1998). Ayres and Vars articulate three justifications derived from Supreme Court precedent for remedying private discrimination through public affirmative action:

> (1) to ensure that government spending does not directly or indirectly facilitate private discrimination (the 'causal' justification); (2) to correct for the depressive effect of private discrimination on the capacity of minority-owned firms (the 'but-for' justification); and, most radically, (3) to compensate for shortfalls in private sales caused by purely private discrimination . . . (the 'single-market' justification).

Id. at 1585–89.

36. McPherson et al., *supra* note 21, at 420–22.

from the extant diversity rationale. In Part III, the Article explores whether past Supreme Court reasoning that limited race-based affirmative action still applies in light of social network discrimination, and then lays the intellectual groundwork for designing constitutionally viable policy to remedy social network discrimination. In Part IV, the Article makes the important point that acknowledging social network discrimination can transform popular conceptions of race-conscious policy—allowing these policies to be viewed more broadly as merit-*enhancing*. The Article then re-envisions race-conscious policy more expansively in light of social network discrimination, situating it within larger discussions of colorblindness. Doing so not only informs contemporary popular and political discourse, but also—as the Article concludes—challenges common conceptions of "equal opportunity" that are foundational to America's national identity.

I. INTELLECTUAL LANDSCAPE OF RACE-BASED AFFIRMATIVE ACTION IN COLLEGE ADMISSIONS

Strict scrutiny is the legal standard the Supreme Court has applied to cases involving race in university admissions—including in the landmark cases of *Bakke*, *Grutter v. Bollinger*,[37] *Gratz v. Bollinger*,[38] and *SFFA*.[39] This part begins by first defining the strict scrutiny standard and describing how it has been applied by the Court in various cases. Next, this part explains the background, reasoning, and significance of these landmark Supreme Court cases—how the cases first enshrined the diversity rationale for the use of race in university admissions, and then greatly restricted the rationale with the 2023 *SFFA* decision. Justice Powell's 1978 opinion in *Bakke* argued that the diversity rationale survived the strict scrutiny test[40]—a perspective later affirmed in *Grutter*[41]—which in turn guided admissions policies in universities leading up to 2023.

Yet with *SFFA*, the Court amended its stance. First, the Court held that the compelling interests asserted by Harvard and UNC in pursuing their race-based admissions program were not sufficiently measurable.[42] Second, the Court held that the colleges did not sufficiently establish a connection between the means they employed and their diversity goals.[43] Third, the Court held that the admissions programs failed strict scrutiny because they used race as a

37. 539 U.S. 306 (2003).

38. 539 U.S. 244 (2003).

39. Regents of the University of California v. Bakke, 438 U.S. 265, 290–91 (1978); *Grutter*, 539 U.S. at 326–27; *Gratz*, 539 U.S. at 270; Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2162 (2023).

40. *Bakke*, 438 U.S. at 317.

41. *Grutter*, 539 U.S. at 329.

42. *Students for Fair Admissions*, 143 S. Ct. at 2166.

43. *Id.* at 2167.

stereotype or negative factor.[44] And lastly, the Court held that the admissions programs failed strict scrutiny because they lacked a logical end point.[45] Yet, as this part later notes, the *SFFA* decision did *not* hold that race-conscious policies in university admissions fail to pass strict scrutiny by definition. This means other rationales or admissions programs—especially if assessed by an ideologically-balanced Court—could survive strict scrutiny in the future without overturning precedent. This part concludes by summarizing the historical evolution of the concept of colorblindness and how it intersects with relevant equal protection jurisprudence.

A. *Strict Scrutiny Standard of Review for Government Racial Classifications*

The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution states that no State shall "deny to any person within its jurisdiction the equal protection of the laws."[46] Because the Fourteenth Amendment "protect[s] *persons*, not *groups*," the Court has affirmed that all "governmental action based on race—a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited'—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed."[47] In light of this perspective, strict scrutiny—which is the highest and most stringent standard of judicial review—is the level of review for all government racial classifications.[48]

Importantly, though strict scrutiny remains the highest and most stringent level of judicial review, it is not "strict in theory, but fatal in fact."[49] In other words, the Court has affirmed that the purpose of strict scrutiny is not to bar the use of race in public policy, but rather to provide a framework through which to evaluate the importance and fastidiousness of the government in using race in a specific context. Thus, to date, the Court has not mandated full "colorblindness" in government action; the explicit incorporation of race in policy is sometimes allowable, but only in carefully considered contexts.[50]

44. *Id.* at 2168.

45. *Id.* at 2170.

46. U.S. CONST. amend. XIV, § 1.

47. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (citation omitted) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

48. *Id.*

49. *Id.* at 237 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980)). Also, legal scholarship has tested the empirical validity of this quotation by surveying the federal affirmative action jurisprudence of public employment from 1989 to 2001, and it has shown how federal courts have affirmed many affirmative action plans even under the exacting test of struct scrutiny. *See* John Cocchi Day, Comment, *Retelling the Story of Affirmative Action: Reflections on a Decade of Federal Jurisprudence in the Public Workplace*, 89 CALIF. L. REV. 59, 61 (2001).

50. *See, e.g.*, *Adarand*, 515 U.S. at 227 (holding, in part, that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny").

Under strict scrutiny, race-conscious state action that furthers a compelling state interest does not violate the Equal Protection Clause as long as the action is narrowly tailored to further that interest.[51] This standard thus comprises two main elements: (1) a compelling state interest and (2) narrow tailoring.[52] Though the Court avoids furnishing a comprehensive definition of what constitutes a compelling state interest, past decisions suggest that a state interest is compelling when it is sufficiently important, necessary, or essential—for example, some instances of state interests that the Court has held to be compelling include national security and protecting the country from foreign terrorism,[53] preserving the integrity of the judiciary,[54] and diversity in university admissions.[55]

The other element of the strict scrutiny standard of judicial review is that government action is narrowly tailored to achieve the compelling state interest.[56] In some cases, this element can mean that the government action constituted the "least restrictive" means of furthering the compelling state interest.[57] In others, such as in the landmark cases involving the use of racial classifications in university admissions, the Court has stated that using such racial classifications must be "specifically and narrowly framed" to accomplish the compelling state interest.[58]

The following section describes in more depth the development of the Court's reasoning in the landmark affirmative action cases. Whether or not affirmative action should be admissible in college admissions has generated ongoing and heated public, legal, and political debate.

51. *See, e.g.*, Shaw v. Hunt, 517 U.S. 899, 908 (1996).

52. At times, the Court has articulated an alternative requirement for strict scrutiny: that the government action be the "least restrictive" means for achieving that interest. *See, e.g.*, McCullen v. Coakley, 573 U.S. 464, 478 (2014). However, the "least restrictive means" requirement is not explicitly articulated in landmark higher education affirmative action cases and is likely subsumed in the "narrow-tailoring" requirement. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

53. *See, e.g.*, Holder v. Humanitarian L. Project, 561 U.S. 1, 34 (2010).

54. *See, e.g.*, Williams-Yulee v. Florida Bar, 575 U.S. 433, 444 (2015).

55. *Grutter*, 539 U.S. at 328.

56. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995) ("When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases.").

57. *See, e.g.*, McCullen v. Oakley, 573 U.S. 464, 478 (2014).

58. *Grutter*, 539 U.S. at 333 (quoting Shaw v. Hunt, 517 U.S. 899, 908 (1996)).

B. *The Landmark Affirmative Action Cases:* Bakke*,* Grutter*,* Gratz*, and* Students for Fair Admissions

1. *Regents of the University of California v. Bakke*

The Court first established the diversity rationale for race-conscious university admissions in *Regents of the University of California v. Bakke*.[59] In that case, a white male whose application was denied filed suit against the University of California at Davis Medical School, challenging the legality of their race-conscious admissions policy.[60] The policy admitted students through two different programs: the "regular" one (open to all applicants) and the "special" program (only open to applicants who self-classified as "economically and/or educationally disadvantaged" or members of a "minority group"—Blacks, Chicanos, Asians, or American Indians).[61] Sixteen of the 100 positions in the medical school class were reserved for the special admissions program.[62] The minimum requirements for students admitted through the special program were lower than those admitted through the regular process.[63] And while a candidate from a targeted minority group could gain admission through either the special or regular admissions program, white candidates could only gain admission through the regular process.[64] As the Court wrote, in the four years the program was in place no "disadvantaged whites . . . received an offer of admission through [the special] process."[65]

Of note, the *Bakke* case fragmented the Justices: six opinions were offered, with the judgment written by Justice Powell.[66] An enduring impact of *Bakke* is that it introduced one (sufficiently) compelling interest for race-conscious policies in college admissions that could survive the strict scrutiny standard—namely, the diversity rationale. In short, the Powell opinion held that a university may use race as one factor in admissions decisions to reap the educational benefits diversity affords, as long as the use of race is sufficiently narrowly tailored.[67] Two different blocs of four Justices joined various parts of Powell's opinion, with no majority joining any one part.[68] The lack of a strong consensus led to various interpretations in the lower courts of the scope of the

59. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 265 (1978).
60. *Id.* at 276–78.
61. *Id.* at 272–74.
62. *Id.* at 276 n.6.
63. *Id.* at 275.
64. *Id.* at 274.
65. *Id.* at 276.
66. *Id.* at 267–68.
67. *Id.* at 299.
68. *Id.* at 267–68.

Court's holding,[69] a matter ultimately resolved with the twin cases *Grutter* and *Gratz* (discussed in more depth below).

The controlling Powell opinion rejected three of the four rationales that University of California put forward in defending its special admissions program (in addition to finding that the program was not sufficiently narrowly tailored).[70] Specifically, Powell found that three rationales for using race in university admissions did not overcome the constitutional restrictions of the Fourteenth Amendment:

> (i) Reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession
>
> (ii) Countering the effects of societal discrimination
>
> (iii) Increasing the number of physicians who will practice in communities currently underserved[71]

Before discussing the diversity rationale in more depth, it is important to recognize that Powell rejected the remedial rationale for affirmative action in college admissions; specifically, he rejected the rationale for affirmative action that hinged on correcting for past discrimination.[72] The foundation of his rejection of remedial justifications was that he viewed white students as representing innocent victims of attempts to remedy discrimination that arose from historical transgressions.[73] The Powell opinion in *Bakke* supported the legal position that a classification that aids persons who are perceived as members of a relatively victimized group at the expense of other innocent individuals is only admissible under certain conditions.[74] Namely, there must be judicial, legislative, or administrative findings of constitutional or statutory violations—only then is the government interest in preferring members of the victimized groups sufficient.[75] The perspective that white applicants to the

69. *See, e.g.*, Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234, 1245–48 (11th Cir. 2001), *abrogated by* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023); Hopwood v. Texas, 236 F.3d 256, 274–75 (5th Cir. 2000), *abrogated by* Grutter v. Bollinger, 539 U.S. 306 (2003); Hopwood v. Texas, 78 F.3d 932, 941–44 (5th Cir. 1996), *abrogated by* Grutter v. Bollinger, 539 U.S. 306 (2003).

70. *Bakke*, 438 U.S. at 305–06.

71. *Id.* at 306.

72. *Id.* at 310 ("Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, *who bear no responsibility for whatever harm* the beneficiaries of the special admissions program are thought to have suffered." (emphasis added)).

73. *See id.* at 298 ("[T]here is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.").

74. *Id.* at 307 ("We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.").

75. *Id.*

University of California were "innocent"[76] of the perceived injuries of Black applicants is important. Because white students were deemed as bearing no responsibility for whatever harm the beneficiaries of special admissions program were believed to have suffered, some Justices found the remedial justifications to be insufficiently justified.[77]

The Powell opinion almost entirely considers rationales for the race-conscious admissions program that were discussed in the petitioner's briefs;[78] the Court does not resolve whether there might be *additional* alternative rationales for race-conscious policies in college admissions that might survive strict scrutiny. This leaves the door open for the Court to consider other plausible government rationales for race-conscious college admissions policies.

The Court in *Bakke* held that the University of California admissions policy was unconstitutional because it was not "precisely tailored."[79] According to the Court, the use of racial quotas in higher education admissions disregarded individual rights as guaranteed by the Fourteenth Amendment.[80] Instead, race could be used as one of many potential factors in a holistic assessment of individual applicants.[81] In explaining the diversity rationale, Powell held up the Harvard admissions process as a prototype of how race could be applied—but not used as a mechanistic quota—in making admissions decisions.[82]

2. *Grutter v. Bollinger* and *Gratz v. Bollinger*

The *Bakke* case included six separate opinions, none of which was joined by a majority of Justices;[83] this created confusion about which elements of Powell's opinion held the force of law. The *Grutter* and *Gratz* cases resolved this confusion, clarifying the constitutional bounds of affirmative action in higher education.

In the *Grutter* case, a white applicant to the University of Michigan Law School argued that the school impermissibly discriminated against her on the basis of race in violation of the Fourteenth Amendment, Title VI of the Civil

76. *Id.*

77. *Id.* at 310.

78. *Id.* at 305–06.

79. *Id.* at 299 ("When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest."); *id.* at 320 ("But when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. For this reason, that portion of the California court's judgment holding petitioner's special admissions program invalid under the Fourteenth Amendment must be affirmed.").

80. *Id.* at 314.

81. *Id.* at 317.

82. *Id.* at 316–17.

83. *Id.* at 268–69.

Rights Act of 1964, and 42 U.S.C. § 1981.[84] Though "the District Court found the Law School's use of race unlawful, the Sixth Circuit reversed, holding that Justice Powell's opinion in *Bakke* was binding precedent establishing diversity as a compelling state interest, and that the law school's use of race was sufficiently narrowly tailored to survive strict scrutiny."[85] The Sixth Circuit's reasoning was based on the perspective that the Law School's program was nearly identical to the Harvard admissions program lauded in Powell's *Bakke* opinion.[86] The Supreme Court largely agreed with the Sixth Circuit, holding that neither the Equal Protection Clause, Title VI, nor § 1981 prohibited the "Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body" is not prohibited by the Equal Protection Clause, Title VI, or § 1981.[87]

The Court in *Grutter* confirmed that diversity represents a compelling government interest for the use of race in university admissions largely due to the fact that "student body diversity promotes learning outcomes and 'better prepares students for an increasingly diverse workforce and society' . . . ."[88] The Court explained that it is important that the paths to leadership in society must appear open to qualified people of all races and ethnicities for legitimacy in the eyes of the citizenry.[89] Everyone in the heterogenous society of America "must have confidence in the openness and integrity of the educational institutions that provide this training."[90]

Yet, according to the strict scrutiny standard, the use of race in admissions must be narrowly tailored. The Court in *Grutter* held that for a race-conscious admissions policy to be narrowly tailored, it cannot use a quota system.[91] For example, a university cannot ascribe points for belonging to one race versus another.[92] Instead, the university may consider race or ethnicity only as a

84. Grutter v. Bollinger, 539 U.S. 306, 316–17 (2003) ("The [University of Michigan admissions'] policy does not restrict the types of diversity contributions eligible for 'substantial weight' . . . . The policy does, however, reaffirm the Law School's longstanding commitment to . . . 'diversity with special reference to the inclusion of . . . African-Americans, Hispanics, and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.' By enrolling a '"critical mass" of [underrepresented] minority students,' the [policy] seeks to 'ensur[e] their ability to make unique contributions to the character of the Law School.' The policy does not define diversity 'solely in terms of racial and ethnic status.'" (second and fourth alteration in original) (citation omitted)).

85. *Id.* at 321.

86. *Id.*

87. *Id.* at 373.

88. *Id.* at 330 (quoting Brief of the Am. Educ. Rsch. Ass'n et al. as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 398292).

89. *Id.* at 332.

90. *Id.*

91. *Id.* at 334.

92. *Id.*

potential "plus" factor within a larger holistic assessment of candidates.[93] In short, the admissions program must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."[94]

In contrast to *Grutter*, the *Gratz* decision—issued at the same time—found the use of race in violation of the Equal Protection Clause, because under the selection method at issue, applicants from underrepresented racial or ethnic groups were automatically awarded points used in determining admissions.[95] This automatic granting of points led the Court in *Gratz* to view the use of race as not sufficiently narrowly tailored.[96]

In addition to clarifying the bounds of the diversity rationale for the use of race in university admissions, the majority opinion in *Grutter* limits its duration. The majority opinion explicitly states that "race-conscious admissions policies must be limited in time."[97] Furthermore, the Court expresses that it expects that in 25 years, the use of racial preferences "will no longer be necessary to further the interest approved today."[98] This statement highlights the disposition of the Court at that time—that the promotion of diversity through race-conscious admissions may represent a temporary policy prescription for university admissions in securing a diverse student body.

3. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*

In *SFFA*, a nonprofit organization named Students for Fair Admissions brought an action for declaratory and injunctive relief against Harvard and UNC.[99] The nonprofit alleged that the schools' race-based admissions program violated the Equal Protection Clause, Title VI of the Civil Rights Act, and a federal statute barring racial discrimination in contracting.[100]

At the time of the Supreme Court case, Harvard applicants were initially screened by a first reader who assigned them a score in each of six categories: "academic, extracurricular, athletic, school support, personal, and overall."[101] For the "overall" category, a reader could and did consider the applicant's race (among other factors).[102] Then, Harvard reviewed all applicants by geographic

93. *Id.*

94. *Id.* (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978)).

95. Gratz v. Bollinger, 539 U.S. 244, 270, 275 (2003).

96. *Id.*

97. Grutter v. Bollinger, 539 U.S. 306, 342 (2003).

98. *Id.* at 343.

99. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2156 (2023).

100. *Id.*

101. *Id.* at 2154–55.

102. *Id.*

region, making recommendations to the full admissions committee while taking race into account.[103] The full admissions committee then deliberated, discussing the relative breakdown of applicants by race.[104] According to Harvard, the goal of this process was to guard against a significant decline in minority admissions from the prior class.[105] For those who were tentatively admitted, four pieces of information included were shared: "legacy status, recruited athlete status, financial aid eligibility, and race."[106]

UNC had a similar admissions process. Every application was reviewed first by an admissions officer, assigning a numerical score based on several categories.[107] This officer considered the applicant's race as one factor in their review, which could provide a "plus" depending on the race.[108]

The Supreme Court held, in part, that Harvard's and UNC's admissions programs violated the Equal Protection Clause of the Fourteenth Amendment.[109] First, the Supreme Court held that respondents failed to operate their race-based programs in a way that was sufficiently measurable to permit review under strict scrutiny.[110] The Court said it remained unclear how it was supposed to measure any of the goals put forth by respondents—including "training future leaders, acquiring new knowledge based on diverse outlooks, promoting a robust marketplace of ideas, and preparing engaged and productive citizens."[111] The Court said that even if those goals could be measured, it would be unclear how to tell when the goals had been reached to the extent that racial preferences could end.[112]

Second, the Supreme Court held that the respondents' admissions programs failed to articulate a meaningful connection between the means they employed and their stated goals.[113] For example, the racial categories used by the schools did not distinguish between South Asian and East Asian.[114] Also, the Supreme Court found some of the racial categories "arbitrary or undefined" (e.g., example the use of "Hispanic" as a category) or underinclusive (for example no category for Middle Eastern students).[115]

Third, the Supreme Court held that race-based admissions programs failed to comply with the Equal Protection Clause's mandate that race never be used

103. *Id.*
104. *Id.* at 2155.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 2166.
110. *Id.*
111. *Id.* at 2151.
112. *Id.* at 2166.
113. *Id.* at 2167.
114. *Id.*
115. *Id.* at 2167–68.

as a "negative," nor operate as a stereotype.[116] According to the Court, Harvard's consideration of race led to lower admissions for Asian-American students, and, since "college admissions are zero-sum—[a] benefit provided to some applicants but not to others advantages the former at the expense of the latter."[117] Furthermore, the Court claimed that race-based admissions automatically presume that students of the same race think alike.[118]

Fourth, the Supreme Court held that the respondents' admissions program lacked a "logical end point" as *Grutter* required. It found the respondents' admissions policies skirted too close to racial balancing, which is "patently unconstitutional."[119] The Court also said it was unclear for it to determine if or when such goals as proposed by respondents would be adequately met.[120]

The Court's holdings across the landmark affirmative action cases do not preclude the possibility of other (perhaps previously unconsidered) compelling state interests for using race in admissions that would survive strict scrutiny. Although the Court does not allow the use of race to compensate minorities for *past* harms, according to the landmark affirmative action cases of *Bakke*, *Grutter*, *Gratz*, and *SFFA*, in none of these cases have petitioners, respondents, or the Court itself offered an argument similar to the one in this Article: that there is a *merit*-based justification for race-conscious policies, one that seeks to correct inherent disadvantages that arise from *present-day* social structure (and relatedly the *present-day* decisions of college admissions officers).

C. *Historical Context of Colorblindness and Equal Protection*

At the turn of the twentieth century, amidst rampant overt racism in policy and practice, colorblindness was chiefly a progressive demand, promoted in civil rights language and speeches; yet by the end of the twentieth century, colorblindness had shifted to a solidly reactionary demand.[121] The moral support that the civil rights movement gave to the concept of colorblindness was subverted and recast to challenge the very same goals of racial justice that civil rights advocates were working to achieve.[122]

Given this historical context, some scholars have noted that various Supreme Court Justices have viewed a "moral and constitutional equivalence" between the Jim Crow laws of yesterday (designed to reinforce racial division)

116. *Id.* at 2168.

117. *Id.* at 2168–69.

118. *Id.* at 2169–70.

119. *Id.* at 2172 (citing Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 311 (2013)).

120. *Id.*

121. Ian F. Haney López, "*A Nation of Minorities*": *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 988–90 (2007).

122. *Id.* at 989.

and race-conscious policies of today (designed to foster racial equality).[123] Regardless of the merits of such an equivalence, this purported perspective undergirds the Court's anticlassification interpretation of the Equal Protection Clause—an interpretation presented by Powell's opinion in *Bakke*—which has become a cornerstone not only in subsequent landmark affirmative action cases, but also in contemporary colorblind reasoning.[124]

The evolution in the usage of the term "colorblindness" relates to the emergence of conflicting intellectual traditions in legal theory: antisubordination and anticlassification. With the article *Groups and the Equal Protection Clause*, Owen Fiss helped establish the antisubordination legal tradition.[125] According to antisubordination theory, the preservation of equal citizenship is linked with the removal of pervasive social stratification.[126] Antisubordination theory argues that law should reform institutions and practices that lead to the marginalization of historically oppressed demographic groups.[127] In short, antisubordination theorists embrace the traditional and original conception of colorblindness championed by civil rights practitioners.

In stark contrast to antisubordination, the anticlassification principle roughly holds that "the government may not classify people either overtly or surreptitiously on the basis of a forbidden category: for example, their race."[128] According to Jack Balkin and Reva Siegel, "[t]he anticlassification principle impugned affirmative action, while legitimating facially neutral practices with a racially disparate impact, while the antisubordination principle impugned facially neutral practices with a racially disparate impact, while legitimating affirmative action."[129] In short, when it comes to its landmark affirmative action rulings, the Court has consistently vindicated anticlassification over antisubordination.[130] And it is this anticlassification principle[131] that is closely

123. *See, e.g.*, *id.* at 985.

124. *Id.*

125. *See, e.g.*, Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 9 (2003); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 107 (1976); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336 (1988); Angela P. Harris, *Forward: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 753–54 (1994).

126. Balkin & Siegel, *supra* note 125, at 9 ("Antisubordination theorists contend that guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and argue that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups.").

127. *Id.*

128. *Id.* at 10.

129. *Id.* at 12 (footnotes omitted).

130. *Id.* at 12–13.

131. *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2166 (2023) ("'Classifying and assigning' students based on their race 'requires more than . . .

linked with the evolution of the social meaning of colorblindness from the early twentieth century to today.

It is this modern reactionary take on colorblindness that has shaped the Court's approach to interpreting the Fourteenth Amendment in affirmative action cases.[132] And it is the Court's anticlassification interpretation of the Equal Protection Clause that has presented a significant challenge to affirmative action policies, with such policies at times being doctrinally equated to Jim Crow racism—even among Justices who support affirmative action.[133] For example, Justice William Brennan—a supporter of affirmative action—conceded that race-conscious policies raise troubling issues of fairness and merit, foster divisive politics, and lead to negative stigmas toward racial minorities.[134] Yet, as Fiss argued, the anticlassification principle represents just one potential interpretation of the Equal Protection Clause; nevertheless, history shows it represents the prevailing interpretation embraced and made into law by the Court.[135]

The anticlassification interpretation of the Equal Protection Clause has contributed to diversity being the sole justification able to pass strict scrutiny. Some legal scholars have lamented how the Court's reliance on diversity as the sole justification has forced advocates of affirmative action to emphasize relatively weak arguments.[136] According to this perspective, the strongest arguments for affirmative action can only be weakly alluded to, as they do not fall within the Court's narrow definition of constitutionality.

The Court's embrace of the anticlassification interpretation is defended by a seeming preconception held by many that race-conscious policies inherently undermine or threaten individual merit.[137] Although a broader debate may be warranted on whether opportunity should be solely (or primarily) distributed based on commonsense notions of merit, few would debate that individual merit remains a central value in American culture—and in turn, of American law.[138] For example, a goal of fair employment laws is to prevent non-meritorious factors from influencing decisions; government hiring regulations explicitly state their meritorious goals; and Powell's opinion in *Bakke* basically attests that

an amorphous end to justify it.'" (quoting Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 735 (2007))).

132. López, *supra* note 121, at 989.

133. *Id.*

134. *Id.*

135. Fiss, *supra* note 125, at 108.

136. Richard Thompson Ford, *Affirmative-Action Jurisprudence Reflects American Racial Animosity but Is Also Unhappy in Its Own Special Way*, U. CHI. L. REV. ONLINE (Oct. 30, 2020), https://lawreviewblog.uchicago.edu/2020/10/30/aa-ford/ [https://perma.cc/9TY4-ZRFD].

137. *See, e.g.*, ANDERSON, *supra* note 12, at 163–65.

138. Richard H. Fallon, Jr., *To Each According to His Ability, from None According to His Race: The Concept of Merit in the Law of Antidiscrimination*, 60 B.U. L. REV. 815, 815–16 (1980).

educational institutions have at times a responsibility to admit students in accordance with merit.[139] The Court's anticlassification perspective throughout the landmark affirmative action cases is, in effect, consistent with the wedding of the preservation of "individual merit" with the modern reactionary take on colorblindness.

As such, a key contribution of this Article is that it divorces this myopic union and demonstrates that individual merit and colorblindness may, in truth, not be compatible. This is because, all else being equal between majority and minority groups, social network discrimination arises in settings *with* fully colorblind policies (as explained later in Section II.B). In other words, this Article provides convincing evidence *against* the notion that colorblindness is inherently merit-promoting. In fact, in certain settings, it is race-blind or colorblind policies that contribute to deviations from the ideals of fairness and merit. The remainder of this Article illustrates why this is the case.

II. INTRODUCING "SOCIAL NETWORK DISCRIMINATION"

This part establishes a potential new merit-based rationale for race-conscious policy: the remediation of social network discrimination. This part begins by describing the traditional models of discrimination in economics—taste-based and statistical discrimination. The part continues by introducing a new model of discrimination recently developed in the economics literature: social network discrimination. "Social network discrimination" is a new term this Article introduces to legal scholarship that captures the phenomenon in which members of a social group experience differential treatment in how opportunity is distributed due to distortions from social network dynamics.[140]

One way social network discrimination manifests is by minorities receiving fewer social and economic opportunities, all else equal, simply because their social group is smaller.[141] This part introduces a simplified numerical example to explain the intuition behind how social network discrimination manifests, and then situates it in the ongoing debate surrounding race-conscious policy. This part also explains how remedying social network discrimination can represent a new merit-based justification for race-conscious policy.

A. *Traditional Discrimination Categories in Economics: Taste-Based and Statistical*

Within economics, labor-market discrimination can be defined as a situation in which equally productive people are treated unequally on the basis of an observable characteristic—such as race. The two dominant paradigms for

139. *Id.* at 816.

140. Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 2).

141. *Id.* (manuscript at 1).

labor-market discrimination in economics are taste-based discrimination (often deriving from prejudice) and statistical discrimination (often deriving from rational responses to imperfect information about others).[142] Meanwhile, within the legal arena of employment discrimination, the two main categories are disparate treatment and disparate impact.[143] Exploring these existing paradigms will uncover one of the main contributions of this Article: namely, that there is another cognizable and demonstrable manifestation of discrimination that falls outside both current economic paradigms and previous Supreme Court decisions.

Taste-based discrimination refers to discrimination that arises from people's individual tastes, or what economists often refer to as individual preferences.[144] Taste-based discrimination encompasses overt racism, sexism, and classism.[145] For example, a Black job candidate who is not hired because the employer prefers white employees represents taste-based discrimination. Though cases such as this one are illegal in employment discrimination law under a disparate treatment claim, not all examples of taste-based discrimination are illegal. For instance, voting for a male presidential candidate over a more capable female one simply because one prefers men over women represents taste-based discrimination that is not illegal. Similarly, choosing to date someone who conforms with one's preferences for round faces over long faces is also related to taste-based discrimination that is not illegal.

The second dominant paradigm of discrimination in economics is statistical discrimination.[146] Statistical discrimination is a theorized behavior in which inequality results when decision makers have imperfect information about others whom they interact with; simply put, it is discrimination based on a *valid* statistical inference.[147] For example, let us say a mortgage lender does not have full information on the creditworthiness of a potential home buyer who is Latino. Given public information on the average foreclosure rates of Latinos, the mortgage lender applies the riskiness of the average Latino to the risk of the individual Latino applicant they are assessing. Doing so can lead to discriminatory outcomes, even if the mortgage lender is rational and

142. Kevin Lang & Ariella Kahn-Lang Spitzer, *Race Discrimination: An Economic Perspective*, 34 J. ECON. PERSPS. 68, 69 (2020).

143. *See, e.g.*, Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL'Y. REV. 95, 96 (2006). For additional relevant context on how the concept of discrimination has been handled in the law, see Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 892–96 (2001); Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 921–23 (2003); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 698–99 (2001); Mark Kelman, *Defining the Antidiscrimination Norm To Defend It*, 43 SAN DIEGO L. REV. 735, 773–74 (2006).

144. Lang & Spitzer, *supra* note 142, at 69.

145. *See id.*

146. *Id.*

147. *Id.*

nonprejudiced. Similarly, police officers may view a resident of a lower-income neighborhood as more dangerous because of the higher crime rates in the neighborhood, independent of the characteristics of the individual resident themselves. This is another example of statistical discrimination, in which police officers may be acting rationally and without prejudice; nonetheless, their mental heuristics result in discriminatory outcomes for some individuals.

Okafor's new model for discrimination in the economics literature falls neither within taste-based nor statistical discrimination; it is termed *social network discrimination*.[148] Social network discrimination is a phenomenon in which minorities suffer economic and social disadvantages simply because their social group is smaller—even in the absence of historical injustice or discriminatory intent on the part of the majority.[149] Social network discrimination is important for the law insofar as it suggests that there may be a source of injustice that has not previously been considered by the courts. Taste-based discrimination, even if not explicitly mentioned, has long been a focus of Court opinions—ranging from disparate treatment claims in employment discrimination to the wide swath of Equal Protection Clause cases that bar usage of protected classifications like race.[150] Similarly, legal action for statistical discrimination in certain contexts can be found in the disparate impact claims of employment discrimination law.[151] Yet the new model of discrimination this Article introduces to the legal literature—social network discrimination—presents important new implications for popular and legal conceptions of justice.

In the context of college admissions, it is very doubtful that furthering taste-based discrimination (e.g., a prejudiced admissions officer preferring white applicants to Black applicants) or statistical discrimination (e.g., an admissions officer using white racial identity as a proxy for being a better student) would represent permissible uses of race in the college admissions process.[152] Neither model advances the compelling state interest necessary to satisfy the strict scrutiny standard for incorporating race—a protected

148. Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 2).

149. *Id.* (manuscript at 1).

150. *See, e.g.*, Stephen v. PGA Sheraton Resort, 873 F.2d 276, 279 (11th Cir. 1989); Grutter v. Bollinger, 539 U.S. 306, 311 (2003).

151. *See, e.g.*, Seiner, *supra* note 143, at 108 ("While noting the 'legally-cognizable statistical disparity' in the company's hiring practices, the court indicated that to prove disparate impact, 'the EEOC still was required to show a causal link between some *facially-neutral* employment practice of [the company] and the statistical disparity.'" (alteration in original) (emphasis added) (footnotes omitted) (quoting EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1277–78 (11th Cir. 2000))).

152. *See, e.g.*, *Grutter*, 539 U.S. at 326 ("We have held that all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.' This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." (citation omitted)).

classification—into college admissions.[153] It could similarly be argued that policies incorporating social network discrimination (e.g., an admissions officer admitting white students to strengthen their social networks) would not represent a permissible use of race in the college admissions process.[154] Yet what has not been fully resolved is whether it would be a permissible use of race in college admissions to *mitigate* disadvantages minority groups face arising from social network discrimination. Since such disadvantages manifest from present-day social dynamics, they are wholly distinct from the remedial justifications for race-conscious policies that the Court has already deemed unconstitutional.[155]

Recognition that there may be new, previously unrecognized disadvantages for minority groups untied to past slavery or historical injustices allows the contemporary debate on affirmative action and other race-conscious policies to be seen in a new light. As the next section begins to articulate, social network discrimination challenges the perspective that race-conscious policies simply represent policies where some individuals of today are unfairly "harmed" to promote diversity (or to remedy bygone harms). Rather, race-conscious policies may serve as a necessary corrective for *present-day* lapses in fairness—and for *present-day* deviations from what people across the political spectrum would agree is a more just system of merit.

B. *Social Network Discrimination: A New Discrimination Category*

Recent research has uncovered a phenomenon termed "social network discrimination"—a new category of discrimination distinct from both dominant models in economics (taste-based and statistical discrimination). The formal mathematical proof highlighting this new category will not be reproduced in this Article; rather, this section presents a simplified numerical example that illustrates the key intuition driving the social phenomenon. Then, this section

153. *Id.*

154. None of the landmark affirmative action cases support the proposition that policies with the sole purpose of *increasing* inequality between groups—such as what might be fostered by social network discrimination—represent a compelling state interest. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978); *Grutter*, 539 U.S. at 334; Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2173–74 (2023)

155. *See, e.g.*, *Students for Fair Admissions*, 143 S. Ct. at 2173–74 ("Permitting 'past societal discrimination' to 'serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group.' Opening that door would shutter another—'[t]he dream of a Nation of equal citizens . . . would be lost,' we observed, 'in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.' '[S]uch a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.'" (alterations in original) (citations omitted) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505–06 (1989))).

explains how social network discrimination is consistent with other economics research on social networks, homophily,[156] and referrals.[157]

First, let us imagine a racial utopia—one in which there are no economic disparities. In this utopian world, there are no vestiges of slavery, Jim Crow or racism. All racial groups share the same average ability, the same levels of employment, and proportional representation across professions. Also, all economic and social policies do not consider race. In other words, policies are fully "colorblind," and all opportunities initially are distributed purely based on "merit." In short, this utopian world mirrors the vision not only of institutions like the NAACP LDF and ACLU on the left (by having no socioeconomic inequality between demographic groups), but also of institutions like the Heritage Foundation and Supreme Court Justices Clarence Thomas and Samuel Alito on the Right (by having full "colorblindness," in policy and in practice).

In this utopian world, let us consider a simple example in the employment context.[158] Suppose there are trusted employees from a company who go to a professional event with qualified prospective job applicants. There is full equality between majority and minority people in this setting—i.e., employment for both majority and minority groups is proportional to their share of the population, there are equal qualifications between groups, and there is equal ability between majority and minority people. Also, suppose there is full colorblindness in the policies the company uses to hire people for jobs.

Like what often happens in the United States, this company relies on referrals in making hiring decisions, which means people can refer others they know for jobs. Economics has long recognized the value of referrals in hiring.[159] By relying on the recommendation of existing employees who might have better information about the candidate, referrals minimize employers' risk in assessing a candidate's ability and "fit" for a job.[160] Research has estimated that a

156. *See supra* notes 21–23 and accompanying text. Social science research suggests that race and ethnicity create the strongest social divide in the United States (representing the greatest driver of homophily), with "age, religion, education, occupation, and gender following in roughly that order." *See* McPherson et al., *supra* note 21, at 415.

157. *See, e.g.*, Dan Zeltzer, *Gender Homophily in Referral Networks: Consequences for the Medicare Physician Earnings Gap*, 12 AM. ECON. J.: APPLIED ECON. 169, 169 (2020); Matthew O. Jackson, Social Structure, Segregation, and Economic Behavior 11 (Feb. 5, 2009) (unpublished manuscript) (on file with the North Carolina Law Review); Bolte et al., *supra* note 26, at 1.

158. This example is from Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 1–2).

159. *See, e.g.*, James D. Montgomery, *Social Networks and Labor-Market Outcomes: Toward an Economic Analysis*, 81 AM. ECON. REV. 1408, 1408–10 (1991) (footnote omitted) ("Analyzing data from the youth cohort of the National Longitudinal Survey, he finds that contacting friends and relatives generates a job offer with relatively high probability . . . . While firms might recruit through employee referrals solely because this is less expensive than more formal methods, researchers have argued that employee referrals also serve as a useful screening device. . . . Finally, Rees (1966) and others have argued that an employee will refer only well-qualified applicants, since his reputation is at stake.").

160. *Id.* at 1409–10.

significant number of jobs in the United States are filled via referrals, with some estimating the number to be half.[161]

The company asks their trusted employees to refer candidates who might be a good fit. Suppose each trusted employee interacts with each prospective job applicant at the professional event, and later makes referrals based on the social ties they form. To understand how these social ties might form, it is important to understand the concept of homophily.

Homophily is a social phenomenon[162] that has been widely studied in the social sciences; it corresponds to the adage that "birds of a feather flock together." In other words, people are more likely to form social ties with other people with whom they share more characteristics.[163] Research has shown that in the United States, homophily in race and ethnicity has the greatest influence on the formation of social ties.[164]

With this in mind, suppose homophily is equal across both groups. Specifically, for each one-on-one social interaction, there is a two-thirds chance of forming a social tie if people are of the same group, and a one-third chance of forming a social tie if people are of different groups.[165] Lastly, suppose both that two out of three employees and applicants are in the majority group, while one out of three people is in the minority group. In this example, we will look

161. Harry J. Holzer, *Hiring Procedures in the Firm: Their Economic Determinants and Outcomes*, at 19–20 (Nat'l Bureau of Econ. Rsch., Working Paper No. 2185, 1987); Peter V. Marsden & Karen E. Campbell, *Recruitment and Selection Processes: The Organizational Side of Job Searches*, *in* SOCIAL MOBILITY AND SOCIAL STRUCTURE 59, 66–73 (Ronald L. Breiger ed., 1990); Montgomery, *supra* note 159, at 1409; TRUMAN F. BEWLEY, WHY WAGES DON'T FALL DURING A RECESSION 296 (1999); Jack Flynn, *25 Incredible Employee Referral Statistics [2023]: Facts About Employee Referrals In The U.S.*, ZIPPIA (Feb. 27, 2023), https://www.zippia.com/advice/employee-referral-statistics/ [https://perma.cc/NW6J-WY5B].

162. Homophily can be conceptualized as capturing the fact that shared attributes among those of similar backgrounds simply make it easier to form social ties with each other than with others. For example, let us say there are three students, two of who are from cultural group #1 and one of who is from cultural group #2. Each student speaks one-on-one with each of the other students for 5 minutes. In that five-minute conversation, there is plausibly a greater likelihood that the two students from cultural group #1 have formed a social tie with each other than the students from different cultural groups, simply because the students from the same cultural group share more elements in common to establish the foundation of a relationship. Their social tie does not necessarily represent favoritism toward a demographic group—in fact, conditional on forming a social tie, the students might treat all people in their network the same, regardless of their background. Yet research shows that given the same opportunity for social interaction—a five-minute conversation in this example (or in real university settings, a semester in the same classroom)—the students who belong to the larger social group have a higher likelihood of forming more social ties, all else being equal. And, as the economics model shows, this increased likelihood of a social tie translates into disproportionate economic and social advantages. *See* Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 3).

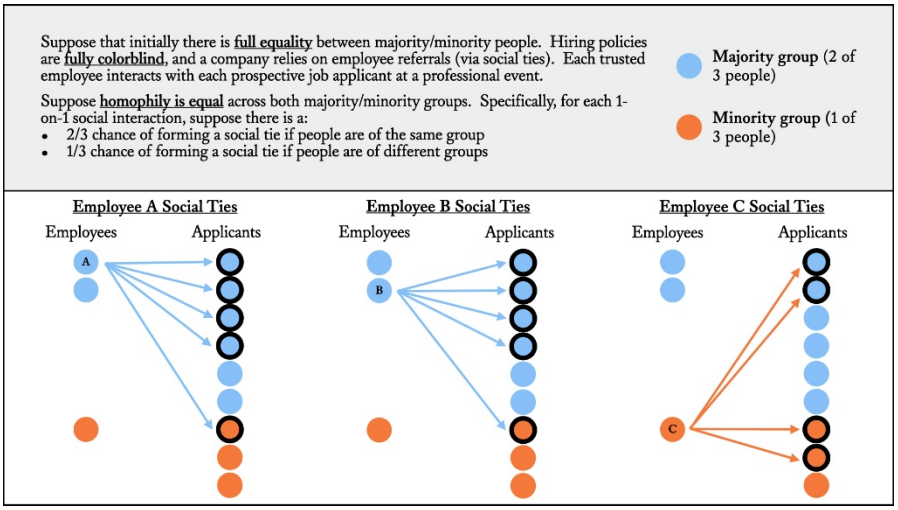
163. McPherson et al., *supra* note 21, at 416.

164. Social science research suggests that race and ethnicity create the strongest social divide, with "age, religion, education, occupation, and gender following in roughly that order." *See id.* at 415.

165. This fraction is arbitrary; what is important is that the fraction for forming same-group social ties is greater than the fraction for forming ties between different social groups.

at three trusted employees—A, B, and C—who interact with nine prospective job applicants.

Figure 1. Example of Social Network Discrimination[166]



First, let us look at the social ties for Employee A. Employee A is in the majority group, so they will have a two-thirds chance of forming a social tie with each majority applicant at the professional event. Since there are six majority applicants at the event, they will form four social ties with majority applicants. Also, Employee A will have a one-third chance of forming a social tie with each minority applicant, since they belong to different groups. Since there are three minority applicants at the event, they will form one social tie with minority applicants.

Now let us look at the social ties for Employee B. Employee B is also in the majority group, so the number of their social ties will look identical to Employee A. They will also form four social ties with majority applicants and one social tie with minority applicants at the event.

Now let's look at the social ties for Employee C. Unlike Employee A and Employee B, Employee C is in the minority group. As a result, they will have a two-thirds chance of forming a social tie with other minority people. Since there are three minority applicants at the event, Employee C will form two social ties with minority applicants. Also, Employee C has a one-third chance

166. This example and corresponding figure are taken from Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 2). For a short video that explains social network discrimination, see Research Lab, *supra* note 17.

of forming a social tie with people in the majority group, since they belong to different groups. Therefore, since there are six majority applicants, Employee C will also form two social ties with majority applicants.

Across all employees and job applicants, this means there will be four minority social ties formed, out of a total of fourteen social ties, which is less than 29% of social ties being formed with minorities. Since social ties lead to referrals in this example, less than 29% of referrals will go to minorities.

Yet, recall that minorities are over 33% of the population (since they are one out of three people in the population). So, as this example shows, there will be disproportionately fewer social ties formed with minorities, despite both groups starting off equal and the company using fully colorblind hiring policies. This disparity in social ties for minorities reflects *social network discrimination*.

Social network discrimination matters—especially when it comes to how we think about college admissions, race, and merit. Social network discrimination can arise in various settings in which opportunities are distributed via social networks—such as within workplaces, in professional schools, or on college campuses.[167] Opportunities while still in school are often distributed based on social networks. For example, many opportunities are guided by informal information channels—who you know telling you information on what you need to know.[168] Given social network discrimination, all else equal, minorities may hear less frequently about the personal, educational, and career opportunities that are a hallmark of the college experience.[169] Being less connected to important information channels could magnify disparities between majority and minority students not only in college but later in life.[170]

Also, the very nature of college admissions—which involves university officials manufacturing an immersive academic and social community for years during a formative stage of life—creates for many people the foundational network of lifelong personal and professional social ties. As recent economics research suggests, applying facially race-neutral or "colorblind" policies in the construction of such social networks may in fact lead to a form of racial discrimination between majority and minority groups.[171] Minorities might form disproportionately fewer social ties in college. If that happens, minorities who attend college might have fewer future job prospects, lower lifetime earnings, and fewer personal relationships compared to the majority group.

167. Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 30–31).
168. *Id.* (manuscript at 31).
169. *Id.*
170. *Id.*
171. *Id.*

Though social network discrimination has been uncovered and termed by Okafor,[172] past social science research has demonstrated—both theoretically and empirically—how inequality between social groups can be fostered by homophily, either along racial or gender lines. For example, Zeltzer finds that the gender gap in physician earnings may be driven by the fact that doctors more often refer patients to specialists of their own gender.[173] Since most doctors are male, this behavior generates lower demand for female specialists compared to male specialists.[174] Thus, homophily can exacerbate already-present inequalities between social groups. Previous research has also explored homophily as a social phenomenon, including its causes,[175] as well as how it influences friendships,[176] interethnic marriages,[177] and social inequality.[178] These areas of homophily research relate to a robust economics literature on how referrals impact inequality.[179] Not only is there widespread use of friends, relatives, and acquaintances to search for jobs and related opportunities, but these networks also often vary by location and by demographic characteristics.[180] One study finds that differences in the number of social ties "can induce

172. *Id.* (manuscript at 2).

173. Zeltzer, *supra* note 157, at 170.

174. *Id.*

175. Andreas Wimmer & Kevin Lewis, *Beyond and Below Racial Homophily: ERG Models of a Friendship Network Documented on Facebook*, 116 AM. J. SOCIO. 583, 585 (2010); Lars Leszczensky & Sebastian Pink, *What Drives Ethnic Homophily? A Relational Approach on How Ethnic Identification Moderates Preferences for Same-Ethnic Friends*, 84 AM. SOCIO. REV. 394, 397 (2019).

176. *See* Moin Syed & Mary Joyce D. Juan, *Birds of an Ethnic Feather? Ethnic Identity Homophily Among College-Age Friends*, 35 J. ADOLESCENCE 1505, 1506 (2012). *See generally* PETER M. BLAU, INEQUALITY AND HETEROGENEITY: A PRIMITIVE THEORY OF SOCIAL STRUCTURE (1977) (reporting that friendships are influenced by common attributes such as sex, age, race, religion, and class background).

177. John Skvoretz, *Diversity, Integration, and Social Ties: Attraction Versus Repulsion as Drivers of Intra- and Intergroup Relations*, 119 AM. J. SOCIO. 486, 490 (2013).

178. Paul DiMaggio & Filiz Garip, *Network Effects and Social Inequality*, 38 ANN. REV. SOCIO. 93, 94 (2012).

179. *See, e.g.*, KENNETH J. ARROW & RON BORZEKOWSKI, LIMITED NETWORK CONNECTIONS AND THE DISTRIBUTION OF WAGES 8 (2004); Yannis M. Ioannides & Linda Datcher Loury, *Job Information Networks, Neighborhood Effects, and Inequality*, 42 J. ECON. LITERATURE 1056, 1074 (2004); Patrick Bayer, Stephen L. Ross & Giorgio Topa, *Place of Work and Place of Residence: Informal Hiring Networks and Labor Market Outcomes*, 116 J. POL. ECON. 1150, 1176–77 (2008); Judith K. Hellerstein, Melissa McInerney & David Neumark, *Neighbors and Coworkers: The Importance of Residential Labor Market Networks*, 29 J. LAB. ECON. 659, 689–90 (2011); Luc Renneboog & Yang Zhao, *Us Knows Us in the UK: On Director Networks and CEO Compensation* 1 (Eur. Corp. Governance Inst., Working Paper No. 302, 2011); Stephen V. Burks, Bo Cowgill, Mitchell Hoffman & Michael Housman, *The Value of Hiring Through Employee Referrals*, 130 Q.J. ECON. 805, 808 (2015); Amanda Pallais & Emily Glassberg Sands, *Why the Referential Treatment? Evidence from Field Experiments on Referrals*, 124 J. POL. ECON. 1793, 1793–97; Conrad Miller & Ian M. Schmutte, *The Dynamics of Referral Hiring and Racial Inequality: Evidence from Brazil* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29246, 2021); Arun G. Chandrasekhar, Melanie Morton & Alessandra Peter, *Network-Based Hiring: Local Benefits; Global Costs* 9 n.17 (Nat'l Bureau of Econ, Rsch., Working Paper No. 26806, 2020).

180. Ioannides & Loury, *supra* note 179, at 1057.

substantial inequality and can explain roughly 15% of the unexplained variation in wages."[181]

Economics research has found other ways homophily can foster inequality apart from disparities in the usage of referrals. For example, homophily can lead to segregation of groups, which leads to different equilibrium investment decisions in areas like education,[182] which in turn fosters inequality in areas such as post-secondary education. Also, inequality due to homophily can arise as a function of historical employment disparities that are exacerbated over time.[183]

However, social network discrimination is distinct from prior economic and sociological findings about traditional conceptions of discrimination.[184] Unlike past research, social network discrimination yields disparities even in contexts in which there are no discriminatory motives and in which implicit biases are not only absent but impossible. Furthermore, social network discrimination and the disparities it fosters need not rely on the historical sins of slavery, Jim Crow, or racial animus.

Although homophily can theoretically influence social network formation along any shared attribute, research finds that the dominant attribute that creates social groupings in the United States is race.[185] This suggests that social network discrimination fosters inequality in the United States predominantly along racial lines—with race being a protected classification under the law. And because race correlates with entrenched cultural and historical differences, there is likely *long-term* homophily among racial groups—i.e., homophily that persists beyond the foreseeable future. Long-term homophily would in turn yield long-term persistence of social network discrimination—resulting in long-term deviations from what most would deem fair and just outcomes.

C. *An Overlooked Compelling Interest for Race-Conscious Policy*

Social network discrimination remains an under-explored lever for many of the racial inequalities studied throughout the social sciences—and one that has not been expressly mentioned by the courts. While racial disparities may be greatly linked to the residual effects of slavery and traditional taste-based

181. ARROW & BORZEKOWSKI, *supra* note 179, at 4.

182. Jackson, *supra* note 157, at 11.

183. Bolte et al., *supra* note 26, at 3.

184. *See generally* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004) (finding evidence of discrimination due to differential treatment of prospective job candidates by employers based on perceived race); Devah Pager, Bruce Western & Bart Bonikowski, *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOCIO. REV. 777 (2009) (finding evidence of discrimination because Black job candidates were half as likely as equally qualified white candidates to receive a callback or job offer).

185. Peter V. Marsden, *Core Discussion Networks of Americans*, 52 AM. SOCIO. REV. 122, 126–27 (1987); McPherson et al., *supra* note 21, at 415.

discrimination (e.g., Jim Crow), social network discrimination highlights that such historical causes need not exist for inequality between racial groups to persist. Significantly, unlike with historical causes—in which the direct perpetrators of the harms may be long dead—social network discrimination inherently arises from current-day people who participate in social dynamics today. In *Bakke*, a majority of Justices agreed that the remedial justification for affirmative action in college admissions—namely remedying societal discrimination—was unjustifiable because it imposed disadvantages upon white applicants who bore no responsibility for whatever harms the beneficiaries of affirmative action were thought to have suffered.[186] This reasoning in *Bakke* precluded a remedial justification for affirmative action because there was not deemed to be a clear nexus between "innocent" white students today negatively impacted by race-conscious policy and the white people of the past who were responsible for the harms caused to Black people.[187]

This reasoning from *Bakke* does not hold when applied to remedying social network discrimination as a rationale for race-conscious policy. First, the very nature of college admissions, a process that forms the foundational lifelong personal and professional networks of many Americans, means that social network discrimination can be directly magnified by the decisions of college admissions officers. Second, *everyone* participates in the social dynamics that either give rise to or mitigate social network discrimination—due to homophily, people today *collectively* create the conditions necessary for unfair outcomes. Hence, remedying social network discrimination would not render white students "innocent" in the sense that courts have viewed them to be with regard to remedying historical discrimination.

Social network discrimination is distinct from past societal discrimination for many reasons. First, social network discrimination—as the recent economics research finds—does not rely on, or even sprout from, past injustice. Even in the absence of slavery or Jim Crow or any other legacy of subjugating minorities, social network discrimination can naturally arise. Hence, social network discrimination eludes the finger-pointing and blame associated with many other discussions surrounding the correction of societal "wrongs." Second, social network discrimination is persistent, and consistent, as long as there are social groups of vastly different sizes in which people demonstrate homophily along the dimension the social groups are formed. As long as there are racial minorities—as long as race remains a central identity for group formation in the United States—social network discrimination and its impacts on racial minorities might remain. Consequently, social network discrimination

186. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978).

187. *Id.* at 298 ("[T]here is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.").

can itself represent a form of racial discrimination—one that is directly impacted by the decisions of college admissions officers. Especially for a more ideologically balanced Court, remedying social network discrimination thus may represent an overlooked compelling state interest, one that could present a new allowable rationale for race-conscious policy even in the absence of the diversity rationale (for, as the Court itself proclaimed in *SFFA*, "eliminating racial discrimination means eliminating all of it").[188]

Social network discrimination manifests over time even in settings in which opportunities are originally distributed fairly and proportionally among racial groups in a population—not to mention when minority groups are underrepresented. Yet research also finds that if the minority group exhibits greater homophily than the majority group—or has more social ties—then the disadvantage arising from being in a smaller social group can be mitigated.[189] Similarly, if a minority group is *over*-represented in a particular setting, then social network discrimination can also be mitigated. These considerations suggest social network discrimination may differentially impact different minority groups based on their relative levels of over or underrepresentation in a particular setting, which is relevant to the *SFFA* decision. In particular, this decision involves minority groups (i.e., Blacks and Asians) who have widely different levels of representation in the respective schools.

Social network discrimination introduces a new rationale for race-conscious policy that eludes the starkest criticisms of affirmative action. Social network discrimination inherently leads to outcomes that few people would consider fair: individuals of the same ability but of different social groups receiving different outcomes, simply because one's social group is of a different size than another's. Given social network discrimination, because you are a racial minority, you may not have access to the same coveted opportunities—even if you have the same education, the same drive, the same dedication. The consequences of social network discrimination affront commonsense conceptions of fairness and merit, in a similar way that affirmative action presumably does for many of its conservative critics. In short, social network discrimination complicates the presumed unfairness of race-conscious policies.

Not only does remedying social network discrimination introduce a potential new compelling state interest for implementing race-conscious policies,[190] but it also bolsters the preexisting diversity rationale. The Court in

188. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2161 (2023).

189. *See, e.g.*, Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 5).

190. Though the Court avoids furnishing a comprehensive definition of what constitutes a compelling state interest, past decisions suggest that a state interest is compelling when it is sufficiently important, necessary, or essential—and not simply a matter of choice, preference, or discretion. Some

Grutter mentions the value of having a diverse labor force in leadership, and how it is important for the avenues of leadership to appear open to individuals of all backgrounds.[191] The Court's perspective was informed by the wide swath of amicus briefs—from leading businesses and the military, among others—that described how access to a diverse labor force was instrumental to performing their work in the best possible way.[192] Social network discrimination highlights another previously latent factor that complicates attempts to achieve this diverse labor force. Social network discrimination bolsters the import of incorporating race in university admissions for purposes of achieving diversity. It also suggests that such corrective policies may be needed longer-term—perhaps until social groups no longer strongly exhibit homophily along racial lines. Thus, the discovery of social network discrimination does not mean that race-conscious policy must be permanent; but it does suggest a much longer time horizon than what the Court and prevailing legal scholarship has suggested.[193] As long as race remains a salient driving force guiding social groupings, then, all else being equal, social network discrimination will persist. And as long as social network discrimination persists, corrective race-conscious policies in turn may be needed—particularly if equality of opportunity is deemed worthy of pursuit.

III. IMPLICATIONS OF SOCIAL NETWORK DISCRIMINATION ON RACE-BASED AFFIRMATIVE ACTION

This part both looks to the past and draws lessons for the future. First, the part will briefly revisit the Court's affirmative action jurisprudence and will show how some of its presumptions should be updated in light of social network discrimination. Second, the part looks to the future and lays the intellectual

examples of state interests that the Court has held to be compelling include national security and protecting the country from foreign terrorism, preserving the integrity of the judiciary, and diversity in university admissions. *See, e.g.*, Holder v. Humanitarian L. Project, 561 U.S. 1, 28–29 (2010); Williams-Yulee v. Florida Bar, 575 U.S. 433, 444 (2015); Grutter v. Bollinger, 539 U.S. 306, 325 (2003) ("[The Court] endorse[s] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.").

191. *Grutter*, 539 U.S. at 330.

192. *Id.* at 371 (Thomas, J., concurring in part and dissenting in part) ("The Court spends considerable time discussing the impressive display of *amicus* support for the Law School in this case from all corners of society.").

193. *See, e.g.*, Kimberly Jenkins Robinson, *Fisher's Cautionary Tale and the Urgent Need for Equal Access to an Excellent Education*, 130 HARV. L. REV. 185, 187–88 (2016) (arguing some legal scholarship presumes that eradicating achievement gaps or other gaps in socioeconomic status between majority and minority groups will in turn obviate the need for race-based affirmative action). The novel contribution of the finding of social network discrimination is that it highlights that even in a situation in which there is initial equality between majority and minority groups, minorities would still suffer disadvantages over time. Hence, the claim in some scholarship that eradicating educational and other socioeconomic gaps will fully remedy the reasons colleges use race-based affirmative action, *id.*, may not, in fact, hold true given social network discrimination.

groundwork for designing race-conscious policies to remedy social network discrimination—in a way that satisfies the second prong of the strict scrutiny standard of review: narrow-tailoring.

A. *Revisiting the Past: What the Court Gets Wrong About Affirmative Action*

This section describes how social network discrimination impacts past Court opinions regarding the use of race in university admissions. The section first explores some concerns articulated in Powell's opinion in *Bakke*, as well as concerns articulated by other Justices. The section then describes how social network discrimination relates to the key holdings in the *SFFA* decision.

1. Compelling State Interests

Social network discrimination complicates the Court's prevailing thinking on the drawbacks associated with race-conscious admissions policies. For example, in *Bakke*, the Powell opinion mentions several potential negative consequences of race-conscious admissions policies, one of which is that preferential programs "may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."[194] However, if preferential policies were instead justified as a means to remedy social network discrimination, "special protections" would no longer be based on factors having no relationship to individual worth. In fact, the preferential policies would be directly tied to individual worth—namely, they would be operating in service of promoting *more* meritocratic outcomes between majority and minority students, given the distorting influence of social network discrimination.[195] Furthermore, as mentioned earlier, the Court's claim that preferential policies impose burdens on innocent students for grievances not of their making[196] does not apply when one considers social network discrimination. Social network discrimination does not arise from discrete and bygone historical injustices, but rather manifests due to contemporary social network dynamics, dynamics in which all people participate.

The Supreme Court in *Bakke* advances the proposition that "[p]referring members of any one group for no reason other than race or ethnic origin is

194. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978).

195. Though social network discrimination may not always constitute public affirmative action used to remedy private discrimination, scholarship has explored that doing so is "neither counter-intuitive nor unprecedented in our historical memory." *See* Ayres, *supra* note 35, at 1578.

196. *Bakke*, 438 U.S. at 310 ("Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, *who bear no responsibility for whatever harm* the beneficiaries of the special admissions program are thought to have suffered." (emphasis added)).

discrimination for its own sake. This the Constitution forbids."[197] But given the implications of social network discrimination, it appears that, all else being equal, *not* preferring members of particular races or ethnic groups who are minorities may itself yield discriminatory outcomes.[198] Of course, since the Fourteenth Amendment prohibits most discrimination on the basis of race—*but only when practiced by the government*—using race-conscious policy to remedy social network discrimination could be deemed allowable only under the powers of Congress—which include powers under the Thirteenth Amendment, the power of the purse, and the power to regulate interstate commerce.[199]

Remedying social network discrimination through race-conscious policy would not amount to "racial balancing"—which the Court has rejected as a permissible use of race in admissions policies.[200] Remedying social network discrimination can more appropriately be characterized as promoting fairness in the landscape of educational and economic opportunities among those equally deserving. It is not about ensuring equal racial representation within colleges, but about protecting equal access to opportunities across races.

In 2007, Justice John Roberts famously quipped in *Parents Involved in Community Schools v. Seattle School District No. 1*[201] that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[202] This perspective—common among some conservatives—holds, in effect, that the absence of race-conscious policy precipitates the end of discrimination on the basis of race. Yet the discovery of social network discrimination upends that assumption; social network discrimination can lead to disadvantages for smaller social groups (i.e., racial minorities), even if there is no traditional discrimination as such among policies or people. By complicating the deceptive simplicity of Justice Roberts's quote and its underlying sentiment, the concept of social network discrimination creates space for more meaningful dialogue on—and responses to—the myriad factors that contribute to discrimination on the basis of race.

The Court in *Grutter* stated that narrow tailoring requires good faith consideration of feasible race-neutral alternatives for achieving the diversity goals sought by the university.[203] Despite this standard, it is unlikely that if

197. *Id.* at 307.

198. *See, e.g.*, Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 1) ("But new evidence from this paper . . . reveal[s] that all else being equal (e.g., equal education, employment, income), *with* 'colorblind' policies, members of the minority group receive fewer economic and social opportunities simply because their social group is smaller.").

199. The Civil Rights Cases, 109 U.S. 3, 17–20 (1883) (determining the constitutionality of the Civil Rights Act of 1875).

200. Grutter v. Bollinger, 539 U.S. 306, 329–30 (2003).

201. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 701 (2007).

202. *Id.* at 748.

203. *Grutter*, 539 U.S. at 339.

remedying social network discrimination were deemed a compelling state interest, then the Court would advocate for workable race-neutral alternatives. According to social science research, the predominant phenomenon that yields social network discrimination—homophily—most strongly arises from racial/ethnic differences.[204] Racial minorities not only occupy a smaller fraction of the labor force, but also have smaller network sizes on average,[205] meaning they are less likely to have social ties at all. Hence, a workable *race-neutral* corrective measure may be difficult, as racial dynamics in social networks catalyze social network discrimination in the first place. Consequently, if remedying social network discrimination were deemed a compelling state interest by the Court in strict scrutiny analysis, it is easy to imagine that the explicit use of race could be viewed as sufficiently narrowly tailored.

The Court has already established in *Grutter* that the need for minority leadership in business and the military strengthens the justifications for universities to pursue diversity.[206] As the Court admitted, "law schools 'cannot be effective in isolation from the individuals and institutions with which the law interacts.'"[207] The justification for businesses to pursue diversity may not simply derive from a need for greater global competitiveness or improved problem-solving, but rather from a desire for a "fairer" allocation of talent. This Article proposes a new justification, one distinct from the rationales given by the majority opinion in *Grutter*, the various filed amicus briefs,[208] subsequent legal scholarship,[209] and social science research.[210] Businesses could be allowed to pursue race-conscious policies via an interest that is transparently *merit-based*, correcting disadvantages to social and economic opportunities from being in less advantageous social networks.[211] In other words, without having a diverse labor force, businesses that rely on referrals would not have access to certain social networks, diminishing their capacity to fill vacancies with the most qualified candidates. Thus, the "business case" for diversity and the "meritocratic" one proposed in this Article can overlap. That is, having a diverse workforce may improve the likelihood that *other* talented minorities seeking employment are not disproportionately left out of the pool of referred candidates for a vacant position.

204. Marsden, *supra* note 185, at 126–27; McPherson et al., *supra* note 21, at 415.

205. *Id.* at 129.

206. *Grutter*, 539 U.S. at 331.

207. *Id.* at 332.

208. *Id.*

209. *See, e.g.*, Cynthia L. Estlund, *Putting* Grutter *to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 2 (2005); Kimberly A. Pacelli, Case Note, Fisher v. University of Texas at Austin*: Navigating the Narrows between* Grutter *and* Parents Involved, 63 ME. L. REV. 569, 571 (2011).

210. *See, e.g.*, Stephen Kershnar, *Experiential Diversity and* Grutter, 17 PUB. AFFS. Q. 159, 159 (2003).

211. Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 37).

Social network discrimination may also broaden how the Court has viewed the relationship between diversity, discrimination, and merit. According to Justice Powell's controlling opinion in *Bakke*, imposing discriminatory policies as a way of correcting "societal discrimination" does not pass constitutional muster.[212] Yet in the idealized labor market of the economic paper's model, there is no "societal discrimination" in the same sense.[213] There is no past prejudice or preferential policies; in the initial time period, there is true equality among all social groups in both ability and employment. The model begins with no underrepresentation.[214] Yet it still predicts that, over time, a smaller chance of getting a job through referral and a lower expected wage emerges for individual minority workers, all else being equal.[215] These findings do not simply show how inequality manifests as some abstract outcome in some theoretical world. Rather, they illustrate how social network distortions may continue influencing the real world—affecting real opportunities for real people—in under-explored, under-appreciated, and (previously) unisolable ways.

The Court has discouraged policies that cause anyone to "suffer harm" in correcting for past societal discrimination.[216] However, this Article's argument suggests that the beneficiaries of underrepresentation in the labor market *are also* active contributors to a degree—even if unwittingly. The majority group contributes to the disadvantage, even if they do not intend to do so. The natural tendency to associate with others with similar characteristics, homophily (which may ironically be termed a *lack of diversity*), means parties contribute to the reinforcement of "unfair" allocations of opportunity. Thus, applying social network discrimination to United States racial classifications complicates (and may undermine) traditional fairness arguments with regard to preferential remedial policies.[217] These fairness arguments often go as follows: those who benefit from underrepresentation are not the same individuals who historically committed the harm to underrepresented groups, and thus should not be made to suffer any "damages" in correcting the underrepresentation.[218] Disadvantages persist due to homophily, the tendency for *all* groups to associate with others who share similar characteristics. Unlike the claims of Justice Powell in *Bakke* about societal discrimination, regarding social network discrimination the

212. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978).

213. Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 1).

214. *Id.*

215. *Id.* at 1–2.

216. *See Bakke*, 438 U.S. at 307–08 ("Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.").

217. *See, e.g.*, *id.* at 298 ("[T]here is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.").

218. Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1068 (2006).

majority group should not be similarly viewed as "bear[ing] *no* responsibility for whatever harm the beneficiaries of the . . . [preferential policies] are thought to have suffered."[219] This is because the "responsibility"[220] for social network discrimination derives from current behavior and interpersonal interactions themselves—from our tendency to self-segregate.

This Article introduces an opportunity for the Court both to fashion a new merit-based rationale for the use of race in university admissions and to bolster its preexisting defense of diversity as a compelling government interest by appealing to more timeless principles and traditional American values, ones closely tied to conceptions of merit. Because the model surfaces inequality derived from human tendencies that are pervasive yet unintentional, the findings allow a healthier dialogue on preferential policies by not depending on the continued specter of historical blame and guilt that often polarizes those who participate in contemporary conversations on race in the United States. These findings, if popularized, could also allay another concern of Justice Powell's—namely, that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship with individual worth."[221] As social network discrimination implies, factors "having no relationship with individual worth" *already* unequally affect outcomes between groups, all else being equal. If public discourse better recognized the influence of social networks on individual success, perhaps fewer people would look unfavorably on the recipients of preferential policies. The majority would harbor fewer negative stereotypes toward the beneficiaries of preferential policies, especially in the educational and employment contexts.

2. Governmentally-Imposed Racial Discrimination

Race-based affirmative action can—consistent with the "core purpose" of the Equal Protection Clause articulated in *SFFA*—help in "doing away with all governmentally imposed discrimination based on race."[222] As a form of discrimination, social network discrimination should be included in this mandate, by the Court's own reasoning. For, as the Court establishes, "[e]liminating racial discrimination means eliminating all of it."[223]

At a fundamental level, the central implication of the role of college admissions officers is that they manufacture an immersive academic and social community at a formative stage of their students' lives—and in doing so create

219. *Bakke*, 438 U.S. at 310 (emphasis added).

220. *Id.*

221. *Id.* at 298.

222. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2161 (2023) (citing Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (alterations omitted)).

223. *Id.*

for many the foundational personal and professional social ties that last well beyond graduation (if not for a lifetime).[224] Colleges are not simply educational institutions; they are environments that establish the foundational professional networks for their graduates. Given this, universities inherently foster—or inhibit—the conditions for social network discrimination to manifest, particularly when it comes to short- and long-term economic opportunities. This is true not only for college admissions, but also for admissions to professional schools—such as law schools, business schools, and medical schools. The social networks formed in these institutions have substantial impacts on the outcomes of their graduates.

If colorblind policies are used in the construction of such social networks, past research on social network discrimination dictates that, all else being equal, minorities will suffer disadvantages in social and economic opportunities.[225] The magnitude of social network discrimination is directly tied to the admissions decisions made by colleges and universities. As such, social network discrimination can be viewed as a form of governmentally-imposed discrimination (as it naturally surfaces from the admissions decisions of federally-funded higher-education institutions).

The implications of social network discrimination create a contradiction. On one hand, the presumption of the Supreme Court in *SFFA*—a presumption that has been expressed in past cases such as *Parents Involved in Community Schools*[226]—is that colorblind policies prevent discrimination on the basis of race. Yet on the other hand, a major implication of recent research on social network discrimination is that *with* colorblind policies, all else being equal, minorities suffer disadvantages in economic and social opportunities simply because their social group is smaller. Courts have not yet acknowledged the existence and role of social network discrimination; doing so might force them to resolve the contradiction between (a) past Supreme Court presumptions about how to stop racial discrimination and (b) recent economics research about social network discrimination along racial lines. In summary, given the nexus between social network discrimination and college admissions policies, *remedying* social network discrimination through race-based admission policies may in fact accord with the "core purpose" of the Equal Protection Clause as articulated by the majority opinion in *SFFA*.

224. *See, e.g.*, Adalbert Mayer & Steven L. Puller, *The Old Boy (and Girl) Network: Social Network Formation on University Campuses*, 92 J. PUB. ECON. 329, 329–31 (2008); Maureen T. Hallinam, *Social Capital Effects of Student Outcomes*, *in* SOCIAL CAPITAL: REACHING OUT, REACHING IN 145, 145–59 (Viva Ona Bartkus & James H. Davis eds., 2009).

225. Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 1).

226. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (statement of Chief Justice John Roberts for the Court) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race,").

3. Key Holdings from *Students for Fair Admissions*

As previously noted, in *Students for Fair Admissions*, the Supreme Court held (among other things) that:

> 1. the compelling interests asserted by Harvard and UNC were not sufficiently measurable;
>
> 2. Harvard and UNC failed to articulate a meaningful connection between the means they employed and their diversity goals;
>
> 3. their admission programs failed strict scrutiny by using race as a stereotype or negative; and
>
> 4. the admissions programs failed strict scrutiny by lacking a logical end point[227]

This section will explore whether remedying social network discrimination—instead of pursuing diversity as a compelling interest—would elude some of the issues the Court articulated with the race-based admissions programs at Harvard and UNC.

a. Compelling Interests Not Sufficiently Measurable

Remedying social network discrimination squarely satisfies this condition of being sufficiently measurable, given the capacity to estimate social network discrimination using tools from the social sciences.[228] Periodic audits could be implemented to identify whether race-conscious policies remain needed to ensure meritorious distribution of opportunities given the distortions from social network discrimination. In contrast to the Court's laments about measuring the educational benefits that accrue from diversity, there are clear (and increasingly more sophisticated) methods for measuring social network discrimination. In fact, one preliminary way is included in the calibration exercise developed by Okafor, in which a nationally representative survey is used to estimate the magnitude of social network discrimination.[229]

b. No Meaningful Connection Between Means and Diversity Goals

Unlike the Court's criticism in *SFFA* that the "respondents' admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue[,]"[230] in remedying social network discrimination the nexus between the admissions policies and the goals would be clear. The economics research identifies three ways to mitigate social

227. *Students for Fair Admissions*, 143 S. Ct. at 2167.

228. Studies have already estimated disparities along various demographic dimensions resulting from homophily. *See, e.g.*, Zeltzer, *supra* note 157, at 169.

229. Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 31–36).

230. *Students for Fair Admissions*, S. Ct. at 2167.

network discrimination: (1) increase minority representation; (2) increase the relative number of social ties minorities have; and/or (3) increase how relatively close-knit the minority social network is. Any measure that furthers one or more of these goals would directly link the means employed with the underlying goal of mitigating social network discrimination.

In *SFFA*, the Court also mentioned that the racial categories that Harvard and UNC used were overbroad (e.g., not distinguishing between East Asian and South Asian), arbitrary or undefined (e.g., using the category of "Hispanic"), or underinclusive (e.g., no category for Middle Eastern students).[231] Remedying social network discrimination would elude such criticism, as long as the characteristics were empirically grounded. For example, past research has already explored what dimensions have the largest impact on the formation of social ties. In remedying social network discrimination, the target demographic categories could be selected through empirical research on the strongest drivers of homophily in contemporary American society. In tying the policy to research insights, one would escape the risk of having racial categories be overbroad *or* too narrow; arbitrary *or* undefined; and underinclusive *or* overinclusive.

c. Race Used as a Stereotype or Negative

In *SFFA*, the Court explained that *Grutter* identified two dangers of race-based government action: (1) the use of risk will devolve into "illegitimate . . . stereotyp[ing]"[232]; and (2) "race would be used not as a plus, but as a negative—to discriminate *against* those racial groups that were not the beneficiaries of race-based preference."[233] The first danger could be invalidated if an understanding of social network discrimination were popularized. Past research illustrates that theories of discrimination—along with the language used in discussing them—can rationalize or challenge stereotypes.[234] The ongoing debate in the United States about affirmative action often derides race-conscious policies as deviations from fairness, which in turn fosters "illegitimate stereotyping" toward its beneficiaries. Yet, wider awareness of social network discrimination could challenge these biases, while highlighting the difficulties in appropriately invoking the complex concept of "merit" in conversations about affirmative action.

The second danger is also complicated by the fact that admissions decisions implicate social network discrimination. *Not* incorporating social network discrimination into admissions decisions, perhaps by simplistically

231. *Id.* at 2167–68.

232. *Id.* at 2165.

233. *Id.*

234. András Tilcsik, *Statistical Discrimination and the Rationalization of Stereotypes*, 86 AM. SOCIO. REV. 93, 113–16 (2021).

applying race-neutral standards, may actually lead to racially biased longer-term outcomes. In other words, facially race-neutral admissions policies may be racially neutral in intention but not in fact, inadvertently contributing to social network discrimination against particular racial groups.

Lastly, according to the Court in *SFFA*, "when a university admits students 'on the basis of race, it engages in the offensive and demeaning assumption that students of a particular race, because of their race, think alike.'"[235] This criticism does not hold if race-based policies are justified as a remedy of social network discrimination. In such a case, one is not making any assumptions about the similarity of how students *think*; one is simply making a statement about the similarity of students' backgrounds—which is easily verifiable. As has been explained previously, social science research finds that homophily based on race and ethnicity contributes much to the formation of social ties in the United States.[236]

d. No Logical End Point to Race-Conscious Policy

The Court in *SFFA* appeals to the *Grutter* decision in establishing that race-based policies must be time-bound.[237] Yet, the Court in *Grutter* imposes the restriction for race-conscious policies to be temporary because, by their assessment, the "deviation from the norm of equal treatment" must be "a temporary matter."[238] Yet the model of social network discrimination suggests that the presumption that facially race-neutral admissions policies constitute "equal treatment" is false. So social network discrimination complicates the Court's reasoning for mandating the temporary nature of race-conscious policies on two fronts: (1) it undermines the veracity of the underlying rationale for why race-conscious admissions policies should be temporary; and (2) even if that underlying rationale were applied, remedying social network discrimination is inherently time-bound, as there are measurable conditions upon which social network discrimination would disappear.

Remedying social network discrimination does not violate the mandate that race-based admissions programs must end; however, it moves the end point past some arbitrarily defined "25 years"[239] and instead sets a measurable condition upon which remedying social network discrimination will no longer be needed. In accordance with the durational requirement suggested by the Court in *Grutter* surrounding the use of race in admissions,[240] sunset provisions

235. *Students for Fair Admissions*, 143 S. Ct. at 2170 (citing Miller v. Johnson, 515 U.S. 900, 911–12 (1995)).

236. *See* McPherson et al., *supra* note 21, at 415.

237. *Id.* at 228–29.

238. Grutter v. Bollinger, 539 U.S. 306, 342 (2003).

239. *Id.* at 343.

240. *Id.*

could still be implemented in admissions practices if the social network dynamics of incoming classes are such as to no longer reasonably expect social network discrimination to manifest among its student body. Similar to the suggestion of the Court, periodic reviews could still be implemented to determine whether the prevalence of social network discrimination exists in a particular college or institution. Thus, race-based admissions policies to remedy social network discrimination need not undermine the Court's goal of barring permanent use of race in university admissions; nevertheless, this Article does weaken the Court's stance that race-conscious policies should end in the near term. If disadvantages inherently arise from how social networks form, and if networks most strongly form around protected classifications like race or ethnicity, then the distorting effects on welfare may similarly be longer-term.[241]

Remedying social network discrimination not only contains a "logical" end point, it contains a *mathematically-defined* end point. Promoting hallowed "equality of opportunity" may thus require a longer-term commitment to pursuing diversity than originally intended—from the Court, from universities, and/or from employers.

B. *Designing the Future: Narrowly-Tailored Remedies for Social Network Discrimination*

This Article has introduced social network discrimination to the legal literature, highlighting how it has not yet been considered in Court opinions and falls outside the traditional models of discrimination in economics. Having asserted that social network discrimination occurs, and is contrary to commonsense notions of justice, this Article has argued that the government might have a compelling interest in correcting or alleviating this phenomenon, which would justify the use of race-conscious policies. The strict scrutiny test requires not only that the government has a compelling interest, but also that any race-conscious policy should be "narrowly-tailored" in furtherance of the compelling interest.[242] Here, this section provides several options for how such an affirmative action program could be constructed in such a way that would be narrowly-tailored. Afterward, the section discusses important policy considerations that must be confronted in working to remedy social network discrimination.

241. Some have argued that the Supreme Court enforces unrealistic timelines for racial remedies (which has particular relevance when considering legal remedies for social network discrimination). *See, e.g.*, Yuvraj Joshi, *Racial Time*, 90 U. CHI. L. REV. 1625, 1625–43 (2023).

242. *See, e.g.*, Shaw v. Hunt, 517 U.S. 899, 908 (1996).

1. Three Options for Narrow-Tailoring

As previously discussed, the narrow-tailoring element can mean that the government action constituted the "least restrictive" means of furthering the compelling state interest.[243] In others, such as in the landmark cases involving the use of racial classifications in university admissions, the Court has stated that the means in using such racial classifications must be "specifically and narrowly framed" to accomplish the compelling state interest.[244] This section uses the latter interpretation in suggesting potentially narrow-tailored policies to remedy social network discrimination.

Since social network discrimination is inherently a social phenomenon, it is reasonable to rely on social science research in crafting the appropriate narrowly-tailored policy to mitigate it. The economic model developed by Okafor finds that in a world of initial equality between majority and minority workers, social network discrimination yields inequality between groups over time.[245] Yet to explore implications of a world with initial equality, the model assumes that various elements of network structure are equal between the majority and minority groups (which may not be the case in the contemporary U.S. context). For example, the model assumes that network density—which measures the likelihood of having a social tie in the first place—is equal, but in fact network density differs on average between majority and minority workers.[246] In addition, the strength of homophily was also assumed equal but may also differ in reality between demographic groups.[247] These elements of network structure, in turn, impact the magnitude of social network discrimination. The calibration exercise Okafor performs uses a nationally representative sample to create more realistic estimates of these elements of network structure.[248] It is helpful, and perhaps necessary, to rely on social science research to appropriately estimate the magnitude of social network discrimination—not only in labor markets but also in other settings, such as in how some opportunities are allocated via informal information networks in post-secondary education.

243. *See, e.g.*, McCullen v. Coakley, 573 U.S. 464, 467 (2014) ("To meet the narrow tailoring requirement, however, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests.").

244. *Grutter*, 539 U.S. at 333.

245. Okafor, *Seeing Through Colorblindness*, *supra* note 15, at 36.

246. Marsden, *supra* note 185, at 128.

247. One exercise in calibrating the model parameters, which include the estimated magnitude of the majority and minority group, can be found in Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 32–33). The calibration exercise is derived from data found in KATHLEEN MULLAN HARRIS & J. RICHARD UDRY, NATIONAL LONGITUDINAL STUDY OF ADOLESCENT TO ADULT HEALTH (ADD HEALTH), 1994–2018 [PUBLIC USE] (2022).

248. Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 34).

The economic model developed by Okafor identifies several ways to mitigate social network discrimination—all of which pose opportunities for crafting race-conscious policy that would be sufficiently narrowly-tailored.[249] The model finds that social network discrimination can be mitigated by: (1) the minority group having sufficiently more social ties than the majority group; (2) the minority group being sufficiently more closely knit than the majority group; and/or (3) the minority group having greater representation in the environment under consideration (i.e., the minority group being less of a minority).[250]

Option (1) illustrates that race-conscious policies that explicitly target how social ties are formed between demographic groups may mitigate social network discrimination and would be "narrowly-tailored." For example, a policy that provides comparatively and sufficiently more opportunities for minority groups to form social ties—both with each other and with the majority group—could represent a narrowly-tailored policy to mitigate social network discrimination. But it remains an empirical question on how to sufficiently increase the volume of ties for members of the minority group compared to the majority; as a result, this corrective option (1) may require much more than low-cost interventions like establishing more affinity groups. Importantly, race-based policies that satisfy option (1) would likely still represent an imperfect and incomplete solution to social network discrimination. According to Okafor, increasing the number of social ties for the minority group does not fully mitigate social network discrimination if there is a sizeable enough gap in size between the majority and minority.[251] As such, in some settings, race-conscious policies that promote option (1) alone may be insufficient to fully remedy social network discrimination. So, in reality, in some contexts option (1) may be *too* narrowly-tailored to adequately further the underlying compelling interest.

Option (2) illustrates that race-conscious policies that foster greater homophily among minority groups than among majority groups may mitigate social network discrimination and would be "narrowly-tailored." In other words, race-conscious policies would be narrowly-tailored so that they promote minority members to refer or share opportunities with other minority members significantly more than majority members do with other majority members. Such an outcome can be achieved through at least two means: either encouraging minority group members to self-segregate *more* than majority group members or encouraging majority group members to self-segregate *less*

249. *Id.* (manuscript at 34–36).

250. To see the sensitivity of social network discrimination to these different elements, see Chika O. Okafor, *Social Network Discrimination*, SHINY APPS, https://justiceinsights.shinyapps.io/Social_Network_Discrimination/ [https://perma.cc/RR67-CUL8 (staff-uploaded archive)].

251. Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 22 fig. III) (explaining that if the gap between majority and minority groups is too large, then one cannot fully mitigate social network discrimination simply by increasing the relative number of social ties for minorities).

than minority group members. An immediate issue with the former approach—encouraging greater self-segregation among minority group members—is that it may not be desirable as a matter of public policy. The Court has established in past decisions the pursuit of diversity in higher education as a compelling interest.[252] Linked to this pursuit of diversity is fostering cross-cultural interactions and relationships. Race-conscious policies that encourage minorities in educational settings to self-segregate more aggressively run counter to this pursuit of diversity—regardless of whether such race-conscious policies further the new compelling interest proposed in this Article of remedying social network discrimination. An alternative and perhaps more palatable approach would be to instead encourage less self-segregation among the majority group. In other words, appropriately following option (2) could mean implementing race-conscious policies that result in members of the majority group sharing more social and economic opportunities with minorities, without decreasing the volume of opportunities that minorities share with each other. The challenge with this approach is that it implies disrupting entrenched networks—such as "old boy networks"—that have historically not included minorities.[253] As a consequence, it may be very difficult to successfully design an effective race-conscious policy to satisfy this option of decreasing the relative homophily of the majority group compared to the minority group.

Option (3) illustrates that race-conscious policies that increase the representation of minorities in a particular environment may mitigate social network discrimination and would be "narrowly-tailored." Given the fact that social network discrimination is exacerbated by under-representation of minorities, one obvious corrective race-conscious policy would be to increase the number of minorities admitted/selected in a given setting. Yet as was mentioned earlier, the Court in *Bakke* has already held that the use of racial quotas in higher education admissions is impermissible, because the Court believes quotas disregard individual rights as guaranteed by the Fourteenth Amendment.[254] It remains unlikely that the Court would deem a strictly mechanistic rebalancing of minority representation in university admissions to be permissibly narrowly-tailored. Yet, in line with the landmark affirmative action cases, the Court may be more amenable to race-conscious policies that incorporate an individualized holistic review of applicants that incorporates race as a single—but not dispositive—factor.[255] Such an individualized review might

252. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 314 (1978).

253. There has been a large body of research on the impact of "old boy networks"—often described as entrenched networks that are mostly comprised of high-status white men—on inequality between racial and gender demographic groups. For one such article, see Steve McDonald, *What's in the "Old Boys" Network? Accessing Social Capital in Gendered and Racialized Networks*, 33 SOC. NETWORKS 317, 317 (2011).

254. *Bakke*, 438 U.S. at 320.

255. *Id.* at 316.

help immunize race-conscious admissions policy to Equal Protection challenges. Similar to how race was once used as part of the individualized review in promoting diversity, race could be used in individualized review in remedying social network discrimination. This individualized review becomes even more attractive as a remedy if option (3) were pursued in conjunction with option (1) and/or option (2). This "mixed strategy" approach to remedying social network discrimination could look at the level of minority representation as a benchmark in estimating the magnitude of social network discrimination in a particular setting, to inform how aggressively to promote options (1), (2), and (3)—and *not* as an input to mechanistically crafting a numerical target for the racial composition of a particular environment, workplace, or university.

A carefully balanced promotion of options (1), (2), and (3) presents a plausible avenue through which the proposed compelling government interest of remedying social network discrimination can be furthered while passing the narrow-tailoring requirement of strict scrutiny. As described above, it is doubtful that promoting options (1) and (2) alone will fully remedy social network discrimination. Although option (3) has the most direct impact on furthering the proposed compelling government interest, it also bears the greatest risk of being deemed insufficiently narrowly tailored by the Court.

2. Important Considerations for Crafting Policy

There are additional important considerations to crafting appropriate policy remedies for social network discrimination. For example, what is the appropriate level of delineation for racial groups? Are all members of racial groups equally susceptible to social network discrimination, especially given intersectional matters?[256] Should all members of the same racial group benefit equally from policy remedies? Should the descendants of those held as slaves benefit the same as minorities who are recent immigrants? How should different racial classifications be managed in remedying social network discrimination?[257]

These important considerations reflect key tradeoffs that must be made from a policy standpoint in remedying social network discrimination—with one of the primary tradeoffs being between *simplicity* versus *specificity*. The goal of policy specificity, which this Article defines as policy that is flexible enough to fully remedy the magnitude of social network discrimination manifesting on an individual level, is laudable. Policy that is flexible enough to meticulously promote individual fairness represents the most narrowly tailored option

256. For example, should wealthy minorities be handled equivalently to lower-income minorities with regards to social network discrimination?

257. For example, are all people of color grouped together, or should Black people be put in a different category from Latinos or Asians? Also, should all Asians be interacted with the same, or should different Asian nationalities be distinguished?

possible (thereby increasing the likelihood that it survives the strict scrutiny standard of judicial review), but also comports with commonsense notions of merit and justice. However, achieving perfect policy specificity remains impossible. Even if the data, computational resources, and manpower required to perfectly measure individual disadvantage due to social network discrimination were available, continually doing so would likely be prohibitively costly. Any approach that focuses on measured differences in groups must sacrifice inherently, to some extent, a focus on measuring individual disadvantage.

There are also other constraints to specificity, which include the fact that many of the social network parameters used to estimate the magnitude of social network discrimination are performed at the level of broad(er) demographic groups, such as racial, gender, and age categories.[258] Furthermore, these social network parameters are often not measured to incorporate the intersection of identities—for example, the magnitude of homophily of wealthy Blacks versus lower-income Blacks.[259] This poses a challenge in crafting policy that remedies social network discrimination at a level more granular than broad demographic categories (e.g., race or gender). And, even if such parameters were measured at much greater granularity, implementing policy at a near individualized level could pose daunting administrative burdens on the government.[260] Importantly, sociology research has already found that among major demographic categories, people in the United States primarily group around race and ethnicity first, followed by age, religion, education, occupation, and gender, in approximately that order.[261] Thus, even if the challenges confronting perfect policy specificity prove too daunting, research supports the notion that race-conscious policies will capture the predominant element that drives social groupings in the United States context. This increases the chances that race-conscious policies, though not representing *perfect* policy specificity, may get reasonably close to sufficiently attractive policy specificity.

This Article defines the goal of policy simplicity, in contrast to specificity, as satisfying underlying policy objectives through the simplest or most straightforward policy design. The simplest design can be interpreted through a cost-minimization perspective or through the perspective of reducing the underlying policy complexity. Prioritizing policy simplicity in remedying social network discrimination would likely limit attempts at addressing the myriad nuanced intersectional elements of social groupings (e.g., race *and* class *and*

258. *See, e.g.*, Marsden, *supra* note 185, at 127.

259. *See, e.g.*, *id.*

260. For an introduction into understanding administrative burden, see PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 15–41 (2018).

261. McPherson et al., *supra* note 21, at 415.

gender *and* other cognizable elements of identity) and might instead focus on the most significant elements of social groupings, which this Article already mentions is race. As such, similar to other race-conscious programs, this approach to remedying social network discrimination may not differentiate between wealthy and poor minorities, but instead would confront racial segregation more broadly. Though more fine-grained racial classifications would be acknowledged, they would not represent the main fulcrum around which to design policies to remedy social network discrimination. There is undoubtedly a happy balance that policymakers can strike between the competing goals of policy specificity and policy simplicity, one which reasonably and largely addresses the most significant factors that contribute to social network discrimination, *without* undermining the feasibility of policy execution through an overly complex or burdensome design. The initial stage to policy design that remedies social network discrimination might simply prioritize racial differences; yet, as understanding of the implications of more fine-grained classifications and intersectional factors grows among the research and policy communities, policy approaches could be refined over time to more fully remedy social network discrimination on a more individualized level and better allow greater specificity in promoting the fair and just distribution of opportunity.

IV. RE-ENVISIONING RACE-CONSCIOUS POLICIES

The research on social network discrimination finds that in the absence of true diversity—defined not simply as majority and minority workers attending the same school or working in the same job, but more intimately as sharing the same connections, friendships, and relationships—*not* having preferential policies means that minority workers can overcome their disadvantage only if they form stronger-knit social networks.[262] In other words, in the absence of a corrective policy, overcoming social network discrimination requires the smaller group to have more social ties or to self-segregate *more* aggressively than the majority does.[263] Potentially choosing between greater self-segregation or persistent inequality obviously contrasts starkly with the lofty post-racial vision of society held by many who promote fully "colorblind" policies. No apparent previous legal scholarship or Court opinions similarly explore the continual influence of social networks on the relationship between diversity, merit, and justice. Likewise, none discuss the merit-based rationale for the sort of race-conscious policy proposed by this Article.

This new understanding of the complex—and, at times, unintuitive—relationship between race, merit, and justice allows re-envisioning the practical,

262. Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 1–2).

263. *Id.*

legal, and moral possibilities race-conscious policies offer. This part provides just a brief beginning to such a re-envisioning of race-conscious policy along a couple dimensions: as merit-enhancing and as transcending colorblindness critiques.

A. *As Merit-Enhancing*

Many who debate race-conscious policies share a persistent assumption—that in a world without historical discrimination, without misogyny or Jim Crow or implicit biases, "no policy" would be the best policy.[264] "No policy" would best promote the most meritocratic outcome, with opportunities accessed based on corresponding ability or "merit."[265] Yet the findings in this Article suggest otherwise. Although the research uncovering social network discrimination does not go so far as to identify *which* characteristic forms the majority versus minority group, social science research suggests that race and ethnicity create the strongest social divide, with "age, religion, education, occupation, and gender following in roughly that order."[266] And so, all else being equal, meritocracy remains elusive even in the absence of psychological prejudice, historical wrongs, and gaps in ability among the population. All else being equal, advantages from being within a larger social group persist, despite one's talent. All else being equal, much can remain unequal.

Meritocracy is a lofty ideal, one difficult to achieve even within the simplifying abstractions of an economic model. Yet social network discrimination enables the re-envisioning of race-conscious policies as *merit*-based, wholly independent of the purported benefits of diversity to institutions, students, employees, and society. The implications of such a rethinking of race-conscious policies are widespread. First, it surfaces a new justification for policies that promote diversity—not simply remediating for past injustice, nor contributing to future benefit, but also helping correct persisting inequality arising purely from the existence of more and less advantageous present-day social networks. Second, the findings reinforce the traditional rationales for race-conscious policies—both the one focusing on historical harm and the one promoting future benefits.[267] In other words, the model reveals that the root of

264. *See, e.g.*, ANDERSON, *supra* note 12, at 163–65; Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (statement of Chief Justice Roberts for the Court) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

265. *See, e.g.*, *id.*

266. McPherson et al., *supra* note 21, at 415.

267. *See, e.g.*, Regents of the Univ. of the Cal. v. Bakke, 438 U.S. 265, 305–06 (1978) ("The special admissions program purports to serve the purposes of: (i) 'reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical 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." (citation omitted)).

past disadvantage is more complex and cryptic than simply the confluence of discriminatory policies, practices, and mindsets. On college campuses, admissions officers can design communities in which economic and social opportunities are equitably distributed across their *entire* student body, regardless of demographic background.

"Fault" and historical guilt cannot be assigned through the economic model that uncovers social network discrimination, nor through its implications, as the economic model begins with full equality in the very first time period, and employers cannot identify which workers belong to the majority group versus the minority one.[268] Thus, the implications of the model divorce the dialogue on race-conscious policies from traditional exercises in finger pointing. No single group is to "blame" for social network discrimination, allowing for healthier conversation between those on both sides of the debate surrounding the use of race-conscious policies. Similarly, this Article may finally help elevate the public discourse above simplistic impassioned appeals to "merit" and "fairness," namely by providing more honest exposure to the inherently complex and unintuitive nature of these lofty concepts.

B. *As Transcending "Colorblindness" Critiques*

The implications of this Article challenge arguments against race-conscious policy because social network discrimination does not rely on the subjective values-based reasoning both sides sometimes use in the ongoing debate. The economic model mentioned in this Article that uncovers social network discrimination *begins* from what many would characterize as "the ideal."[269] The model does not consider the ramifications of past discrimination; instead, it explores what happens if *no* discrimination exists in the initial time period. No sins have been committed. All social groups have the same ability. And all groups have the same levels of employment and wages. The only difference between groups is their relative size. Yet still, over time, the minority group—which sociology research suggests is most stratified along racial lines[270]—suffers disadvantages and expects lower welfare.

To understand how the existence of social network discrimination allows race-conscious policy to transcend the critiques of those who champion colorblindness, let us first explore some of their perspectives. Various Supreme Court Justices and legal scholars have expressed disdain for pursuing preferential policies. According to Justice Scalia, "to pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced

268. Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 5–6).

269. *Id.* (manuscript at 5–8).

270. McPherson et al., *supra* note 21, at 415.

race slavery, race privilege and race hatred."[271] Justice Thomas remarked, "In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple."[272] This sentiment has been shared by various legal scholars. In *Affirmative Action: Past, Present and Future*, Professor Peter Shuck strongly disagrees with the justifications for diversity as a compelling interest, stating:

> The benefits [diversity] confers are too small, too arbitrarily and narrowly targeted, and too widely resented to justify the costs that it imposes—its unfairness to other individuals, its propensity to corrupt and debase public discourse, its incoherent programmatic categories, and its reinforcement of the pernicious and increasingly meaningless use of race as a central principle of distributive justice rather than the other distributive principles, particularly merit, with which most Americans, whites and minorities alike, strongly identify.[273]

Schuck refutes the justification for diversity established by the Court—namely, that it provides benefits—by arguing that diversity should no longer be held as a compelling interest. Granted, preferential policies can be poorly structured or administered in an unhelpful way in order to yield the expected benefits. Yet shortcomings in the execution of a justification do not undermine the justification itself; frustrations about how diversity efforts are implemented do not weaken the rationale for pursuing diversity at all. Schuck's position presumes that pursuing diversity *inherently* runs counter to conceptions of "fairness" and "merit." Others share this presumption, that preferential policies are inherently unfair.[274]

The main justifications advocates of colorblindness have used in arguing that race-conscious policy is inherently wrong include: (1) it is irrational; (2) it expresses illegitimate racist attitudes; (3) it violates principles of fairness and merit; (4) it expresses a racially divisive conception of relations among races; and (5) it misconceives individuals as tokens of their racial category.[275] Yet, as this section describes below, each of these arguments is undermined when conceiving of race-conscious policy as a corrective not for historical discrimination, but rather as a remedy for social network discrimination that arises from present-day social structure.

271. Adarand Constructors v. Peña, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

272. *Id.* at 241 (Thomas, J., concurring).

273. Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 3 (2002).

274. Kang & Banaji, *supra* note 218, at 1070–71 ("[M]any Americans seem unpersuaded by arguments about past wrongs or promises about future value [regarding the use of preferential policies].").

275. ANDERSON, *supra* note 12, at 160.

1. Irrationality

Some claim race-conscious policy is irrational either because (a) races do not really exist (e.g., they are merely a social construct); or (b) the use of race in policy is arbitrary.[276] Remedying social network discrimination suggests that even if race is not biologically grounded, it exists insofar as it impacts social group formation and welfare outcomes. Furthermore, as the Court in *Bakke*, *Grutter*, and *Gratz* have held, the use of race in policy need not be arbitrary, as there can be compelling justifications.[277]

2. Racism

Some claim race-conscious policy is wrong because it is racist and manifests racial prejudice.[278] In line with this perspective, affirmative action is sometimes conceived as representing a hostile retaliation against whites, who are viewed as being guilty of past discrimination.[279] Remedying social network discrimination highlights that race-conscious policy need not be retaliation against the majority; it can simply be *restoration* of meritocratic outcomes between majority and minority groups. Remedying social network discrimination need not manifest racial prejudice; instead, it can correct the inadvertent discriminatory outcomes that can naturally result from social network dynamics.

3. Violations of Principles of Fairness and Merit

Some claim that race-conscious policy is unfair because it is predicated on involuntary personal traits.[280] Remedying social network discrimination highlights that race-conscious policy can in fact preserve the distribution of social and economic opportunities based on commonsense notions of fairness. The inherently unfair disadvantages associated with belonging to a smaller social group, all else being equal, can be corrected through policy that targets the traits guiding such social group formation.

4. Racial Divisiveness

Some claim that race-conscious policy suggests that society is comprised of mutually antagonistic racial blocs, each entitled to a proportionate share of resources.[281] Remedying social network discrimination highlights that race-conscious policy can be implemented without antagonism, especially if this new form of discrimination is popularized and understood as justification for such

276. *Id.*

277. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 324 (1978); Grutter v. Bollinger, 539 U.S. 306, 339 (2003); Gratz v. Bollinger, 539 U.S. 244, 270 (2003).

278. ANDERSON, *supra* note 12, at 162.

279. *Id.*

280. *Id.* at 163.

281. *Id.* at 165.

corrective policy. Research has shown that theories of discrimination, and the words we use in communicating them, can impact stereotypes, as well as shape the attitudes and behaviors of the more influential groups within society.[282] Thus, race-conscious policy need not be antagonistically creating racial blocs; instead it can be ensuring equal opportunities to members of all racial blocs.

5. Offense to Individuality

Some claim that race-conscious policy is based on racial stereotypes, which deny people's individuality by treating them as if all members of the same race are alike.[283] Doing so represents an offense to people's dignity.[284] Remedying social network discrimination highlights that race-conscious policy need not be based on racial stereotypes, but solely on the traits that chiefly guide social group formation based on existing social science research.[285] Race-conscious policy need not violate individuals' dignity; it can protect the dignity of all individuals to flourish irrespective of distortions from social network dynamics.

CONCLUSION

Foundational to America's national identity is the concept of "equal opportunity."[286] This notion assumes that individuals may not get to the same destination but will at least enjoy the same *access* in trying. In other words, "equal opportunity" involves removing arbitrariness from selection processes and better aligns the distribution of opportunities with ability. Yet, as this Article explains, social network discrimination leads to disadvantages for minorities, even in contexts without historical prejudice, inequality, or differences in ability or "merit."[287] As such, social network discrimination exposes how equality of opportunity may conceptually be a myth in the absence of corrective policy. Equal opportunity is elusive; left alone, opportunity is rarely equal.[288]

In the United States context of race relations, "equal opportunity" becomes even more fraught—given the legacy of the historical institutions of slavery and Jim Crow. According to some who participate in the ongoing

282. Tilcsik, *supra* note 234, at 93.

283. ANDERSON, *supra* note 12, at 165.

284. *Id.*

285. McPherson et al., *supra* note 21, at 415 ("Homophily in race and ethnicity creates the strongest divides in our personal environments . . . .").

286. *See, e.g.*, Isabel V. Sawhill, *Still the Land of Opportunity?*, BROOKINGS (Mar. 1, 1999), https://www.brookings.edu/articles/still-the-land-of-opportunity/ [https://perma.cc/AK2Y-SV4H].

287. Okafor, *Seeing Through Colorblindness*, *supra* note 15 (manuscript at 1).

288. In the aftermath of *SFFA*, various organizations continue to promote diversity and equality of opportunity by supporting prospective college students in ways that could also mitigate social network discrimination. *See, e.g.*, TODAYDREAM, https://www.todaydream.com [https://perma.cc/7WQF-EZ8T]; PREP FOR PREP, https://www.prepforprep.org [https://perma.cc/3LG8-VGCT]; SEO SCHOLARS, https://www.seo-usa.org/scholars/ [https://perma.cc/5KA8-LMLC].

popular debate, several decades of race-conscious policies in university admissions should be long enough to achieve student body racial diversity, despite over 350 years of slavery and nearly 100 years of Jim Crow laws. According to others, it is not long enough. And for a third category, which may include some members of the Court, even if it is not long enough, two "wrongs" do not make a right.

Transcending this fractious popular debate requires rethinking certain conceptual priors. Chief among them: the reasoning that the use of race in admissions is inherently "wrong" is undermined by the existence of social network discrimination—especially if our collective ideal as a nation is the hallowed "equal opportunity." As this Article has explained, recent economics research suggests that without intervention minority workers are disadvantaged in settings in which opportunities are at least partially distributed based on social or information networks, all else being equal.[289] These settings span not only traditional employment referral contexts, but also—most immediately relevant—college campuses. Key social ties are formed in postsecondary schooling and in professional schools (e.g., business schools, law schools, and medical schools). Importantly, university admissions officers are largely responsible for manufacturing these instrumental social communities. The social ties formed in these schooling contexts may guide future personal and professional opportunities. Yet the opportunity for some minority groups to form social ties as advantageous as those of the majority group may be constrained due to the smaller size of their demographic group in certain settings, due to social network discrimination.

Remedying social network discrimination represents a new *merit*-based justification for race-conscious policies. Remedying social network discrimination is not about enshrining special advantages for racial minorities; it is about correcting inherent disadvantages tied to present-day social structure. These disadvantages manifest inherently from the fact that racial minorities represent a smaller social group—in other words, the disadvantage to minorities is directly linked to their minority status. As such, increasing diversity directly confronts the root cause of social network discrimination. Fostering greater student body diversity can in fact better align opportunities with ability—a finding totally opposite to the characterization that the use of race is unfair. Race-conscious policies could not only combat social network discrimination, but also foster heterogeneous communities, thereby prompting dialogue to break the homophily that causes social network discrimination in the first place. In other words, through the true cultivation of relationships between racial groups, the specter of inequality dissolves—while creating an environment that

289. *See, e.g.*, Okafor, *Seeing Through Colorblindness*, *supra* note 15, at 36–37.

more closely aligns with the meritocratic vision held by many on both sides of the ongoing dialogues on race-conscious policies.

Given the conservative composition of the current Supreme Court, it appears likely that the law will increasingly be interpreted to promote greater colorblindness. Yet as the research on social network discrimination shows, colorblind policies do not inherently promote individual merit. Ultimately, the impact of social network discrimination leads to uncomfortable truths for both the political left and the political right to consider. For those on the political right, social network discrimination shows that colorblindness as an approach or a judicial philosophy does not create a true meritocracy. Yet for those on the political left, social network discrimination also complicates underlying approaches—highlighting that even if a more utopian vision were obtained by eradicating historical injustices, left alone "unjust" disparities would still naturally occur over time. Thus, race-conscious policies—if properly designed—may in fact represent an important strategy to promote fairness and move us all closer to true equality of opportunity.