ARTICLE

"WE ALL WEAR GREEN, WE ALL BLEED RED, THERE IS NO DIFFERENCE": RACE-CONSCIOUS ADMISSIONS POLICIES HAVE NO PLACE AT OUR MILITARY ACADEMIES

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I. INTRODUCTION[1]

While the thousands upon thousands of dedicated military officers do not share the same skin color, what they do—and must—share is something vastly more important; it is a dedication to our Nation, its Constitution, and a willingness to put their lives on the line to protect and defend the Constitutionally guaranteed freedoms of every American. This includes the safety and well-being of every sailor, soldier, airman, and Marine without considering anyone's race or ethnicity. That should be the only test for every officer entrusted with protecting our national security.

If we have learned nothing else from our history surrounding race, we should have learned this: dividing any collection of individuals by race—whether it be a platoon, a battalion, an airwing, a Corps of Cadets, or a Brigade of Midshipmen—and assigning benefits or assessing penalties to the resulting groups is fundamentally destructive. Perpetuating racial favoritism and its opposite, racial discrimination, does not heal a society; it poisons it. Policies that focus on race do not lead to a cohesive and effective military; they undermine it. Such policies have no place in our military.

A. Promises Made

The Armed Forces of the United States "became a deliberately inclusive organization in 1948, when President Harry S. Truman issued his historic Executive Order 9981 that called for 'equality of treatment and opportunity for all persons in the armed services.'"[2] It was President Truman's effort to guarantee equal opportunity to the thousands of minority war veterans who,

1. Portions of this Article originally appeared in an essay published in 2003 and later in an amicus curiae brief filed by the author as Counsel of Record on behalf of former Member of Congress and retired Army Lieutenant Colonel Allen B. West. R. Lawrence Purdy, *Operation Racial Preferences: What the U. S. Military Doesn't Need*, NAT'L REV. (May 28, 2003), https://www.nationalreview.com/2003/05/operation-racial-preferences-r-lawrence-purdy/ [https://perma.cc/6RY4-SZ5U]; Brief of Allen B. West as Amicus Curiae Supporting Petitioner, Fisher v. Univ. of Tex., 570 U.S. 297 (2013) [hereinafter West Brief] (No. 11-345). In addition, many of the author's positions herein have appeared in essays published in 2023. R. Lawrence Purdy, *Racial Discrimination Has No Place in Our Military*, MINDING THE CAMPUS (Feb. 14, 2023), https://www.mindingthecampus.org/2023/02/14/racial-discrimination-has-no-place-in-our-military/ [https://perma.cc/M67X-P9QL]; R. Lawrence Purdy, *Our Service Academies Must Discard Race-Based Admissions*, 36 ACADEMIC QUESTIONS, Winter 2023, at 33, 33–40.

2. MIL. LEADERSHIP DIVERSITY COMM'N, FROM REPRESENTATION TO INCLUSION: DIVERSITY LEADERSHIP FOR THE 21ST-CENTURY MILITARY vii (2011). The Military Leadership Diversity Commission was established as part of the National Defense Authorization Act for Fiscal Year 2009. The final report was delivered to President Barack Obama on March 15, 2011. *Id.*

notwithstanding being denied basic civil rights in many parts of our country, served bravely in its defense during World War II. In his Executive Order, President Truman captured the essence of the principle he deemed necessary to protect and defend our country's security.[3] He described it as:

> [E]ssential that there be maintained in the armed services of the United States the highest standards of democracy, with equality of treatment and opportunity for all those who serve in our country's defense . . . [it is] declared to be the policy of the President that *there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color . . . or national origin*.[4]

What was extraordinary about his action in 1948 was that in addressing the members of our military, President Truman's color-blind directive preceded by almost two decades the general passage of our landmark civil rights legislation.[5] Change, however, was slow in coming. In 1969, amid our nation's civil rights revolution, the Department of Defense (DoD) issued its first Human Goals Charter (DoD Charter), explicitly mentioning diversity.[6] From the outset, it was understood that the meaning of diversity was associated with the principle of *"equal opportunity*."[7] For some, the word "conjures up the fight against racial segregation and inequality. For these Americans, diversity policies and programs are another name for equal opportunity (EO) programs."[8]

Building on the importance of equal opportunity without regard to race or ethnicity, the DoD Charter, which was renewed in 2014, set forth the

3. *See generally* Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948) (discussing Truman's order to desegregate the United States armed forces).

4. *Id.* (emphasis added).

5. *See* 42 U.S.C. § 2000d (establishing that no person shall be discriminated against "on the basis of race, sex, color, national origin, [or] disability. . .); *id.* § 2000e-17.

6. MIL. LEADERSHIP DIVERSITY COMM'N, *supra* note 3, at 27–9.

7. *Id.* at 29 (emphasis added).

8. *Id.* at 11. A proper melding of diversity with equal opportunity was best described by a highly distinguished public servant, decorated Marine Corps combat veteran, and member of the United States Naval Academy's class of 1968. In July 2010, then United States Senator Jim Webb (D–VA) wrote: "Nondiscrimination laws should be applied equally among all citizens[] . . . . Our government should be in the business of enabling opportunity for all, not in picking winners. *It can do so by ensuring that artificial distinctions such as race do not determine outcomes*." R. Lawrence Purdy, *Racial Discrimination Has No Place in Our Military*, MINDING THE CAMPUS (Feb. 14, 2023), https://www.mindingthecampus.org/2023/02/14/racial-discrimination-has-no-place-in-our-military/ [https://perma.cc/576U-CC9Q] (alteration in original) (footnote omitted).

essential steps necessary to maintain peace and security: "O[ur] Nation was founded on the principle that each individual has infinite dignity and worth. The Department of Defense, which exists to keep the Nation secure and at peace, must always be guided by this principle."[9] The DoD asserts that the attainment of this goal is through "a model of equal opportunity for all regardless of race, color . . . or national origin."[10]

Another example of DoD's guarantee of a color-blind meritocratic system can be found in a 2015 Navy Regulation: "Equal Opportunity shall be afforded to all on the basis of individual effort, performance, conduct, diligence, potential, capabilities and talents without discrimination of race, color . . . or national origin."[11]

Finally, one of the most recent examples of DoD's promise of equal opportunity and treatment without regard to race is found in DoD Instruction 1350.02. Revision 1, issued on December 20, 2022, defined Military Equal Opportunity (MEO) as "[t]he right of all Service members to serve, advance, and be evaluated based on only individual merit, fitness, capability, and performance in an environment free of prohibited discrimination on the basis of race, color . . . [or] national origin."[12]

These are just a few of the numerous promises made to our military personnel over many decades from 1948 to the present, which describe DoD policies that claim to neither permit nor condone racial discrimination against any individual wearing a uniform.[13] The reasoning underlying this promise is straightforward: "Service members shall be evaluated only on individual merit, fitness, and capability."[14]

9. U.S. DEP'T OF DEF., HUMAN GOALS CHARTER (2014) [hereinafter DoD Charter]; *see* Steve Hoarn, *Revised Department of Defense Human Goals Charter Disseminated Far and Wide*, DEF. MEDIA NETWORK (Jun. 8, 2014), https://www.defensemedianetwork.com/stories/revised-department-of-defense-human-goals-charter-disseminated-far-and-wide/ [https://perma.cc/CRM9-ACCE].

10. DoD Charter, *supra* note 10.

11. Dep't of Navy, Gen. Regul. 1164, Equal Opportunity and Treatment (Dec. 16, 2015).

12. U.S. DEP'T OF DEF., DOD INSTRUCTION 1350.02, MILITARY EQUAL OPPORTUNITY PROGRAM 37 (2022) [hereinafter DoD Instruction] (emphasis added). Identical language is found in this instruction in Section 2.7. *See id.* at 9 ("Service members are evaluated only on individual merit, fitness, capability, and performance.").

13. *See also* 10 U.S.C. § 932(b)(4) ("The term 'unlawful discrimination' means discrimination on the basis of race, color, religion, sex, or national origin."); DEP'T OF THE NAVY, OFF. OF THE CHIEF OF NAVAL OPERATIONS, OPNAV INSTRUCTION 5354.1F (2007).

14. U.S. DEP'T OF DEF., DIRECTIVE 1350.2 2 (1995) [hereinafter DoD Directive]. This directive was cited by the government in its amicus breif in *SFFA*, but the language expressly acknowledging the adverse impact of resorting to the use of race-based policies is not contained in the

B. Promises Broken

Notwithstanding the promises outlined above, beginning in 2003, a small group of senior retired military officers publicly acknowledged that service academies used race as a factor in admissions.[15] In an amicus brief filed in support of the University of Michigan in two cases challenging the University's use of race in admissions, these retired officers claimed that a racially diverse officer corps could not be achieved "unless the service academies and ROTC used limited race-conscious recruiting and admissions policies."[16]

The undergraduate case, *Gratz v. Bollinger*,[17] did not mention the military amici's argument.[18] But in *Grutter v. Bolinger*,[19] the case involving the University of Michigan's Law School, Justice O'Connor, writing for a 5–4 majority, held that "the Equal Protection Clause does not prohibit 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."[20] Thereafter, relying upon Justice O'Connor's

brief. *See* Brief of the United States as Amicus Curiae Supporting Respondents, at 13, Students for Fair Admissions, Inc. v. U.N.C., 600 U.S. 181(2023) [hereinafter United States Brief] (No. 21-707).

15. Consol. Brief of Lt. Gen. Julius W. Becton, Jr., et al., as Amici Curiae Supporting Respondents, at 18–27, Grutter v. Bollinger, 539 U.S. 306 (2003) and Gratz v. Bollinger, 539 U.S. 244 (2003) [hereinafter Becton Brief] (No. 02-241, 02-516); *see generally* R. Lawrence Purdy, *Operation Racial Preferences: What the U. S. Military Doesn't Need*, NAT'L REV. (May 28, 2003), https://www.nationalreview.com/2003/05/operation-racial-preferences-r-lawrence-purdy/ [https://perma.cc/6RY4-SZ5U] (making moral, ethical, and practical arguments against race-preference policies, particularly in a military context).

16. Becton Brief, *supra* note 16, at 5; *see also* Grutter v. Bollinger (*Grutter III*), 539 U.S. 306, 331 (2003) (citing Becton Brief). *But see* Grutter v. Bollinger (*Grutter I*), 137 F. Supp. 2d 821 (E.D.Mich. 2001) (detailing the trial court's extensive record ignored by Justice O'Connor and her 5–4 majority, upon which the trial court struck down the Law School's race-preference admissions policies as violating plaintiff's constitutional rights).

17. Gratz v. Bollinger, 539 U.S. 244 (2003).

18. *See id.* at 275–76 (discussing why the Supreme Court struck down the race-based undergraduate admissions policy as a violation of plaintiffs' civil rights but acknowledged that race-based admissions could continue under the guidelines set forth in *Grutter III*).

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

20. *Id.* at 343. But see LARRY PURDY, GETTING UNDER THE SKIN OF "DIVERSITY": SEARCHING FOR THE COLOR-BLIND IDEAL 125–159 (2008), for a detailed discussion of the University of Michigan's claim that there are "educational benefits that flow from a diverse student body," particularly as asserted by the Law School in *Grutter*. *See also* R. Lawrence Purdy, *Prelude: Bakke Revisited*, 7 TEX. REV. L. & POL. 313, 318 (2003) (outlining the facts of *Grutter*).

rationale, the service academies continued using race-conscious admissions.[21]

Following *Grutter*, race became fully embedded as a factor in the treatment of, and the opportunities offered to, members of our armed services.[22] This return to the old segregationists' claim that "race matters" is ironically captured in the Military Leadership Diversity Committee's (MLDC) Final Report in language that would have been unimaginable before *Grutter*:

> [A]lthough good diversity management rests on a foundation of fair treatment, *it is not about treating everyone the same*. This can be difficult to grasp, especially for leaders who grew up with the [Equal Opportunity]-inspired mandate to be . . . color . . . blind. Blindness to differences, however, can lead to a culture of assimilation in which differences are suppressed rather than leveraged.[23]

Today, with a heavy emphasis on race and ethnicity via the bureaucratic adoption of now ubiquitous diversity, equity, and inclusion (DEI) programs, military leaders are encouraged to abjure assimilation and, instead, leverage these irrelevant and immutable differences.[24] The MLDC's 2011 race-

21. United States Brief, *supra* note 15, at 5, 24; Brief of Adm. Charles S. Abbot, et al., as Amici Curiae Supporting Respondents, at 31, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) [hereinafter Abbot Brief] (Nos. 20-1199, 21-707).

22. *See* West Brief, *supra* note 2, at 7 n.14 (detailing MLDC's numerous recommendations seeking to achieve racial balance within the military officer corps).

23. MIL. LEADERSHIP DIVERSITY COMM'N, *supra* note 3, at 18 (emphasis added) (citations omitted).

24. *See* Brent Ramsey, *What Diversity, Equity, and Inclusion is Doing to the Navy*, ARMED FORCES PRESS (Dec. 8, 2023), https://armedforces.press/what-diversity-equity-and-inclusion-is-doing-to-the-navy/ [https://perma.cc/4KF9-USGG] ("[The Navy's] focus on superficial attributes such as the color of your skin or ethnicity [is] a recipe for creating division, not uniformity[.] . . . [T]he attention to DEI has become an obsession . . . . It is a system based on a belief with no actual evidence that diversity improves performance or readiness."); *see also* Phillip Keuhlen, *Task Force One Navy Final Report: "The Emperor's New Clothes" Redux,* REAL CLEAR DEF. (Dec. 6, 2021), https://www.realcleardefense.com/articles/2021/12/06/task_force_one_navy_final_report_the_emperors_new_clothes_redux_806507.html [https://perma.cc/RXG8-VPS4] (highlighting a detailed analysis by a retired Navy nuclear submarine commanding officer); Erec Smith, *DEI Should Be M.I.A. in the U.S. Military*, NEWSWEEK (Jan. 31, 2024), https://www.newsweek.com/dei-should-mi-us-military-opinion-1864428 [https://perma.cc/8VJX-3L5Z] (describing the threat DEI poses to our military); Kendall Qualls, *The More Diversity Officers and DEI Training,Race Relations Get Worse*, STARRS (Feb. 28, 2024), https://starrs.us/the-more-diversity-officers-and-dei-training-race-relations-get-worse/ [https://perma.cc/Y93V-XWPE] ("DEI is not civil rights 2.0. . . . [I]t is eroding our military from the inside-out."); *see generally* Bill Ackman, *How to Fix Harvard*, FREE PRESS (Jan. 3, 2024),

focused recommendations were a tragic detour from the protection against racial discrimination as recognized in the Fifth and Fourteenth Amendments to the United States Constitution and far removed from the principle announced in President Truman's 1948 Executive Order.[25] This brings us to *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*).[26]

II. DO RACE-CONSCIOUS ADMISSIONS AT OUR NATION'S MILITARY ACADEMIES REMAIN LAWFUL FOLLOWING THE SUPREME COURT'S DECISION IN *SFFA*?

In the wake of the Supreme Court's decision in *SFFA* striking down the race-conscious admissions policies at both Harvard College and the University of North Carolina (UNC), new parties approach the courts challenging similar race-conscious admissions policies at our nation's service academies.[27] The coming battles were presaged in the majority opinion:

> The United States as amicus curiae contends that race-based admissions programs further compelling interests at our Nation's military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.[28]

For the many reasons set forth herein, it is submitted that the service academy's admissions policies: (1) are not based on "distinct interests" that would justify the use of race as a factor in admissions; (2) constitute direct violations of the Due Process Clause of the Fifth Amendment to the United States Constitution; (3) are contrary to a plethora of long-established DoD regulations and instructions guaranteeing equal treatment and opportunity

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https://www.thefp.com/p/bill-ackman-how-to-fix-harvard [https://perma.cc/M943-523D] (analyzing the damage DEI is doing in academia).

25. Exec. Order No. 9981, 13 Fed. Reg. 4313 (Jul. 26, 1948).

26. Students for Fair Admissions v. President & Fellows of Harvard Coll. (*SFFA*), 600 U.S. 181 (2023).

27. *See generally* Students for Fair Admissions, Inc., v. U.S. Mil. Acad. at W. Point (*West Point*), No. 23-CV-08262 (PMH), 2024 WL 36026 (S.D.N.Y. Jan. 3, 2024) (denying plaintiff's motion for injunctive relief); Verified Complaint, Students for Fair Admissions Inc., v. U.S. Naval Acad., No. RDB-23-2699, 2023 WL 8806668 (Md. Oct. 5, 2023) (denying permanent injunction prohibiting the Academy from basing admission decisions on race).

28. *SFFA*, 600 U.S. at 213 n.4.

for military personnel without regard to race; and, finally, (4) directly violate the Supreme Court's holding in *SFFA*.[29]

There can be little dispute that the Court's criticisms of the Harvard and UNC admissions policies fully apply to the policies presently used at the service academies. Thus, when it comes to the Department of Defense, one reasonably would have expected it to promptly revoke all uses of race in service academy admissions to bring the academies into full compliance with the principle announced in *SFFA*.[30] However, as of this writing, there is no indication any such changes will voluntarily be made. Both West Point and Annapolis have objected to the *SFFA* plaintiffs' pretrial motions to temporarily enjoin the use of their respective race-based policies.[31]

A post-*SFFA* legal analysis frames the question as to "whether, in light of [SFFA], the service academies may continue to use . . . race-based admissions polic[ies]."[32] This Article is devoted to supplementing the conclusion that they may not.

III. A BRIEF BUT NECESSARY DETOUR

Before directly addressing the issue raised in *SFFA*'s footnote four,[33] it is crucial to dispel the errant observation in the principal dissent authored by Justice Sotomayor.[34] Therein, she wrote that "the Court [has] exempt[ed]

29. U.S. CONST. amend. V; *see SFFA*, 600 U.S. at 230 ("[T]he Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and ack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today."). Shortly after the Supreme Court struck down Harvard and the UNC's race-based admissions policies in *SFFA*, UNC announced it was voluntarily dismantling the formerly race-conscious aspects of its policy. Harvard has made no similar commitment. However, battles in various contexts beyond those involving the service academies seem destined to continue. *See* Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 23-170, 2024 WL 674659 (Feb. 20, 2024) (Alito, J., dissenting) (Thomas, J., dissenting) (dissenting from the denial of certiorari in a case involving an admissions policy is currently being used by a public high school in Virginia).

30. *See* discussion *infra* Section IV(A).

31. *But cf.* Students for Fair Admissions, Inc. v. United States Mil. Acad. at W. Point, 144 S.Ct. 716 (2024) (Mem.) (denying the plaintiff's application for writ of injunction).

32. Paul J. Larkin, Charles D. Stimson & Thomas W. Spoehr, *Should We Play Politics with the Nation's Defense? The Supreme Court's Ruling in Students for Fair Admissions v. Harvard College and the U.S. Service Academies*, GEO. J.L & PUB. POL'Y (2023), SSRN-id4577628.pdf.

33. *SFFA*, 600 U.S. at 213 n.4.

34. For lengthy views that focus—even if accurately—on the very worst aspects of our Nation's racial history, see the dissenting opinions authored by Justices Sotomayor and Jackson. *Id.* (Jackson, J., dissenting) (Sotomayor, J., dissenting). Both offer harshly ideological arguments that ignore the

military academies from its ruling" prohibiting the use of race in admissions, or, as she further asserted, the Court created a "carveout" for the academies.[35] These misstatements are based on her misreading of the language in footnote four. Compounding her error, she presumes to answer the unanswered question when she claims that "[t]he majority recognize[d] the compelling need for diversity in the military and the national security implications at stake."[36]

However, the majority opinion in *SFFA* recognized no such thing. Indeed, no fair reading of footnote four, much less the entirety of the Court's majority opinion, supports Justice Sotomayor's comments. While the Court acknowledged the government's argument, it did not recognize, much less affirm, a "compelling need for diversity in the military and the national security implications at stake."[37] The only fair reading of the footnote is that absent some future hypothetical evidentiary showing of sufficiently compelling "potentially distinct interests" (i.e., more compelling than the interests unsuccessfully asserted by the defendants in *SFFA*), the race-conscious policies at West Point, Annapolis, and the Air Force Academy must end.[38]

IV. DISCUSSION

A. The Principle Announced in SFFA

The basis for the assertion that race should no longer be a factor in service academy admissions is premised on the following principle announced in *SFFA*:

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words of our Constitution and distort our country's and the courts' historical quest to realize for every citizen the ideal expressed in our Declaration of Independence. As the Chief Justice noted:

> [Justice Sotomayor's] dissent wrenches our case law from its context, going to lengths to ignore the parts of that law [she] does not like. The serious reservations that *Bakke, Grutter*, and *Fisher* had about racial preferences go unrecognized. The unambiguous requirements of the Equal Protection Clause—"the most rigid," "searching" scrutiny it entails—go without note. And the repeated demands that race-based admissions programs must end go overlooked—contorted, worse still, into a demand that such programs never stop.

Id. at 229 (majority opinion) (citations omitted).

35. *Id.* at 355–56 (Sotomayor, J., dissenting).
36. *Id.* at 380 (citations omitted).
37. *Id.*
38. *Id.* at 355–56.

> *Eliminating racial discrimination means eliminating all of it.* . . . [T]he Equal Protection Clause . . . applies "without regard to any differences of race, of color, or of nationality"—*it is* "*universal in [its] application.*" . . . [T]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.[39]

It is also supported by the language in the Fifth Amendment to the Constitution and the landmark holding announced in *Brown v. Board of Education*.[40] Consider the following:

(1) The Due Process Clause of the Fifth Amendment: "No person shall be . . . deprived of life, liberty, or property, without due process of law."[41]

(2) *Brown*: In perhaps the greatest unanimous decision ever issued in the history of the United States Supreme Court, the Court held that "racial discrimination in public education is unconstitutional. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle."[42] For all intents and purposes, the Supreme Court readopted *Brown*'s fundamental principle in *SFFA*.[43]

This conclusion is also supported by the DoD Human Goals Charter[44] and in the language contained in DoD regulations, including one of the most recent:

(3) DoD Instruction 1350.2: "Ensure that Service members are treated with dignity and respect and are afforded equal opportunity in an

39. *Id.* at 206 (majority opinion) (emphasis added) (citations omitted) (first quoting Yick Wo v. Hopkins, 18 U.S. 356, 369 (1886); and then quoting Regents of Univ. of Cal. v. Bakke, 428 U.S. 265, 289–90 (1978)).

40. Brown v. Bd. of Educ., 349 U.S. 294 (1955) (*Brown II*).

41. U.S. CONST. amend. V; *see also* Bolling v. Sharpe, 347 U.S. 497, 499 ("The Fifth Amendment . . does not contain an equal protection clause, as does the Fourteenth Amendment, which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive.").

42. *Brown II*, 349 U.S. at 298. *Brown* involved five public school desegregation cases that led to the decision in *Bolling v. Sharpe*. Bolling v. Sharpe, 347 U.S. 497 (1954). Four of the cases involved public schools in different states and thus implicated the Equal Protection Clause of the Fourteenth Amendment. *Bolling* explained the similar application of the Due Process Clause of the Fifth Amendment to cases involving the federal government's use of suspect racial classifications in DC's public school system. *Id.* at 499.

43. *SFFA*, 600 U.S., at 204, 206.

44. DoD Charter, *supra* note 11.

environment free from prohibited discrimination on the basis of race, color, [or] national origin."[45] Military Equal Opportunity (MEO) is defined in this instruction as "[t]he right of all Service members to serve, advance, and be evaluated based on only individual merit, fitness, capability, and performance in an environment free of prohibited discrimination on the basis of race, color, [or] national origin."[46]

And finally,

(4) There is no sufficiently compelling interest that justifies the narrowly tailored use of racial classifications by the military academies. Indeed, the interest that DoD claims to be compelling is heavily weighted *against* the use of racial classifications for all the reasons set forth throughout this Article.[47] In short, compelling national security interests do not rely upon suspect racial classifications to achieve a hypothetical level of racial diversity not linked to increased military effectiveness or lethality.[48]

B. *DoD's Poorly Camouflaged Opposition to a Colorblind Meritocratic System*

In what began quietly,[49] only later to be openly admitted in 2003 in the retired officers' amicus brief in *Gratz* and *Grutter*,[50] the use of race in military decision-making became officially embraced following the release of the MLDC's final report in 2011.[51] That said, neither the U.S. government, through its commander-in-chief, nor the government's senior military leaders can point to any prevailing legal authority that today permits them

45. DoD Instruction, *supra* note 13, at ¶1.2(a)(1).

46. *Id.* at 37.

47. *See* DoD Directive, *supra* note 15 at ¶4.2 (emphasis added) ("Unlawful discrimination against persons or groups based on race, color, . . . or national origin is *contrary to good order and discipline and is counterproductive to combat readiness and mission accomplishment*."). DoD Directive 1350.2 was superseded by DoD Instruction 1350.02. DoD Instruction, *supra* note 13.

48. Harvard and UNC used terms such as "opaque," "imprecise," and "incoherent" to define race, which are categories indistinguishable from those employed by the service academies. *SFFA*, 600 U.S. at 216–17, 291–94. These terms are also discussed in Justice Gorsuch's concurring opinion and further discussed *infra* Section V.

49. *See* Declaration of Stephen Bruce Latta at ¶71, Students for Fair Admissions, Inc. v. U.S. Naval Academy, 2023 WL 8806668 (D. Md. Dec. 20, 2023) ("USNA has considered race and ethnicity as a factor in admissions since at least the 1980s."); *see also* United States Brief, *supra* note 15, at 12 (discussing the military's claimed need to use racial preferences to achieve a diverse officer corps).

50. Becton Brief, *supra* note 16, at 10.

51. MIL. LEADERSHIP DIVERSITY COMM'N, *supra* note 3, at 6.

to *racially* discriminate against American military personnel, much less against service academy applicants.[52]

The Court should protect service academy applicants against racial discrimination in the admissions process.[53] Today, this view is nowhere contradicted—indeed, it is bolstered—by the principle announced in *SFFA*. As circumscribed in *SFFA*'s footnote 4, the question becomes whether the service academies present "potentially distinct interests" that are sufficiently compelling to meet the heavy burden placed on governmental institutions that use suspect racial classifications in any program.[54] It is respectfully submitted they do not.

C. Analysis of the Military Amici's Claim of a Compelling Interest

To begin, it is worth reviewing the history of the so-called "compelling interest" that the government and its military amici in *Gratz* and *Grutter* initially claimed would justify its use of race in admissions to the service academies and universities hosting ROTC units.[55] In *Grutter* (but nowhere mentioned by the Court in *Gratz*), the interests cited by the military amici were commingled with, and indistinct from, the interests claimed by the defendant, the University of Michigan.[56] These interests were echoed by

52. The authority to use race-based admissions at the service academies, which have been in place for well over two decades, was arguably based on the 2003 ruling in *Grutter* and less firmly on Part IV-D in the 1978 decision in *Bakke*. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–12 (1978). Based on Justice Powell's lone dicta, Justice O'Connor held that the University of Michigan Law School had demonstrated "a compelling interest in attaining a diverse student body" for the singular purpose of "obtaining the educational benefits that flow" therefrom. Grutter v. Bollinger (*Grutter III*), 539 U.S. 306, 308, 317 (2003). Colleges and universities across the country, including the service academies, felt free to continue using race as a factor in admissions so long as they complied with the "narrow[ly] tailored," time-limited requirements set forth in *Grutter III*. *Id.* at 333–42. To reiterate, "[Harvard's and UNC's]' policies [were] carefully crafted to comply with *Grutter*." Abbot Brief, *supra* note 22, at 31.

53. *See* discussion *infra* Section IV(A)(1)–(3).

54. The "daunting two-step examination known in our cases as 'strict scrutiny'" is the standard that would apply to any effort by the military to continue race-based admissions policies at the service academies. *See* Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181, 206 (2023).

55. Beginning with the consolidated amicus brief filed in *Gratz* and *Grutter* by retired officers and civilian leaders of the United States military, these military amici have consisted of a small number of senior military officials who expressed support for race-based admissions. *See generally* Becton Brief, *supra* note 16 (supporting race-based admissions). For similar amici briefs led by General Becton and joined by many of the same officers, see West Brief, *supra* note 2. These earlier amici briefs are collectively referred to by the military proponents for race preferences in *SFFA* as the "Prior Military Briefs." Abbot Brief, *supra* note 22, at 21.

56. *Grutter III*, at 330.

large civilian corporate amici, such as 3M and General Motors.[57] The goal of all those who supported the use of the University's race-based policies was the same—to achieve "educational benefits that flow from student body diversity," arguing that student body diversity "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."[58] These benefits—both civilian and military—were addressed by Justice O'Connor:

> [M]ajor American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. [H]igh-ranking retired officers and civilian leaders of the United States military assert that . . . a "highly qualified, racially diverse officer corps is essential to national security."[59]

Justice O'Connor argued that because the service academies and the ROTC are the "primary sources for the Nation's officer corps," the military "cannot achieve an officer corps that is *both* highly qualified *and* racially diverse" without using "limited race-conscious recruiting and admissions policies."[60] This rationale was "for all intents and purposes

57. *Id.* at 330–31. The retired officers in *SFFA* demonstrate there is nothing distinct about their interests when they cite Justice O'Connor's language. *Id.* at 332. Therein, she describes the number of leaders, i.e., politicians and judges, produced by law schools like the University of Michigan. Had she mentioned military leaders—none of whom were law school graduates—it would have been worth noting that the highly distinguished senior officer whose name appeared as the lead on the *Gratz/Grutter* military amicus brief (the late Lt. Gen. Julius W. Becton, Jr.) was a graduate, not of West Point, but of the historically black Prairie View A&M University, and was commissioned through its ROTC program. Following his retirement from the Army, Gen. Becton returned to his alma mater to serve as its president. It is hard to imagine Gen. Becton would have agreed with any contention that men and women educated at civilian institutions—many being relatively racially homogeneous—institutions were somehow less qualified and capable of rising to positions of leadership in the military or less motivated to defend the Nation's security.

58. *Grutter III,* 539 U.S. at 330.

59. *Id.* at 330–31 (citations omitted).

60. *Id.* at 331. *Contra* United States Brief, *supra* note 15, at 17 (acknowledging fewer than one in five military officers—about 19%—receive commissions through the service academies). Well over 55% of military officers are commissioned through ROTC and OCS programs, with an additional percentage receiving commissions through sources other than the service academies. *Id.* at 18–19. Both Harvard and UNC host ROTC programs. Yet, that fact did not alter the outcome of *SFFA* striking down the defendants' use of race in admissions. There is no plausible justification for treating service academy applicants differently (based on race) from applicants to civilian institutions from where ROTC and OCS candidates come.

overruled" in *SFFA*.[61] The 6–3 decision authored by Chief Justice Roberts held:

> [Every] student must be treated based on his or her experiences as an individual—not on the basis of race. Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice.[62]

For the reasons expressed by the majority, any effort by the service academies to find a safe haven in the now-defunct ruling in *Grutter* or solace in *SFFA* must fail. Interestingly, in its amicus brief and oral arguments before the Court in *SFFA*, the Biden administration's Solicitor General described the importance of retaining racially discriminatory admissions at our service academies, colleges, and universities that host ROTC programs.[63] She claimed, "[T]he United States has a vital interest in ensuring that our Nation's institutions of higher education—including the military's service academies—produce graduates who come from all segments of society and who are prepared to succeed and lead in an increasingly diverse Nation."[64]

One important caveat regarding the Solicitor General's statement is that no one disagrees that the military academies, like ROTC programs throughout the Nation, are tasked with producing graduates who are prepared to lead a unified, effective, and highly lethal military. Yet this is a far cry from the claim expressed by the Air Force Academy Superintendent, among others.[65] In private emails obtained through a Freedom of

61. Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181, 287 (2023) (Thomas, J., concurring). *See also id.* at 307 (Gorsuch, J., concurring) ("If the Court's post-*Bakke* higher education precedents ever made sense, they are by now incoherent."); *id.* at 341–42 (Sotomayor, J., dissenting) ("The majority opinion . . . overrul[es] decades of precedent . . . [and] [a]s Justice Thomas puts it, '*Grutter* is for all intents and purposes, overruled.'").

62. *Id.* at 231 (majority opinion). Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined in full, with Justice Thomas and Justice Gorsuch adding powerful concurring opinions.

63. *See generally* United States Brief, *supra* note 15 (arguing for race-based admissions policies for diversity in higher education).

64. *Id.* at 1. In the interest of accuracy, the phrase "who come from all segments of society" should be removed because, as presently written, it is untrue. For example, many segments of society are ineligible for military service. *See* discussion *infra* Section IV(G) (listing examples of why many do not qualify to serve in the military).

65. The emails were obtained by DCNF via a Freedom of Information Act request. Micaela Burrow, *Air Force Academy Privately Fretted the End of Race-Based Admissions Would Hamstring 'Diversity'*

Information Act request, the Superintendent expressed his concern that eliminating race-based admissions at service academies would set back the service's "warfighting imperative," which he characterized as a need to build a racially diverse military.[66] Given the United States military is arguably the most racially diverse organization in the world, the Superintendent's concerns are unserious.[67] Indeed, based on that fact alone, it is patently clear that no warfighting imperative requires the use of racial classifications at any American educational institution, much less at the Nation's service academies.[68]

As highlighted throughout this Article, protecting the Nation's security is not in tension with the prohibition against racial discrimination when it comes to our military personnel.[69] The opposite is true; strict adherence to color-blind, meritocratic policies is essential if our Nation is to field and maintain a unified, cohesive, and effective fighting force. In other words, protecting our Nation's peace and security is untethered to the racial demographics of an officer corps selected via a color-blind, meritocratic process—a system open to all candidates irrespective of their race.[70]

Moreover, eliminating race-based admissions at self-anointed elite institutions—i.e., Harvard, UNC, West Point, Annapolis, and the Air Force Academy—in no way diminishes the government's ability to achieve the vital interest it describes.[71] Additionally, eliminating race-based systems

Goals, DAILY CALLER NEWS FOUND. (Dec. 27, 2023), https://dailycaller.com/2023/12/27/air-force-academy-race-admissions-diversity/ [https://perma.cc/ZGG9-GA99].

66. *Id*; *see also Demographics of the U. S. Military*, COUNCIL ON FOREIGN REL., https://www.cfr.org/backgrounder/demographics-us-military [https://perma.cc/25TW-L383] (documenting the racial demographics in both the officer and enlisted ranks).

67. COUNCIL ON FOREIGN REL., *supra* note 67 (outlining the racial demographics of the military).

68. Burrow, *supra* note 66.

69. *See generally* U.S. DEPT. OF DEF., *supra* note 13 (discussing the DoD's Military Equal Opportunity Program).

70. *Id.* at 2; U.S. DEPT. OF DEF., *supra* note 13, at 9. The recent drastic decline in the public's confidence in the military is attributed partly—if not largely—to the erosion in purely merit-based standards. This deviation from such a system further decreases military readiness, results in declining retention, and, as has been widely reported, the services' recent failures to meet their minimum recruiting goals. *See, e.g.*, Brent Ramsey, *Politics Ruins Readiness*, PATRIOT POST (Feb. 5, 2024), https://patriotpost.us/articles/104122-politics-ruins-readiness-2024-02-05?mailingid=8113 [https://perma.cc/5MEY-U5WQ] (noting every military branch other than the Marines has experienced recruiting shortfalls).

71. The government, Harvard, and UNC's military amici ignored the extraordinary contribution made to the professional officer corps by graduates from "[t]hree out of every five American universities that do *not* consider race in their admissions decisions." *SFFA*, 600 U.S. 181, 229 n.9, 285

does not hinder our Nation's commitment to achieving an inclusive society. Indeed, eliminating race-based policies from the military would be entirely consistent with the promise of equal treatment for every citizen in a way that virtually all military veterans, as well as the majority of Americans, agree with.[72]

D. Diversity is neither a Core Value nor a Compelling Interest

In recent years, DoD leadership has attempted to mold "diversity" into a core value of the military. In fact, the MLDC recommended the service-wide definition of diversity as, "all the different characteristics and attributes of individuals that are consistent with Department of Defense core values, integral to overall readiness and mission accomplishment, and reflective of the Nation we serve."[73]

Setting aside whether any sense can be made of this proposed definition, an individual's race has nothing to do with being consistent with DoD's core values. These core values are duty, integrity, ethics, honor, courage, loyalty, leadership, professionalism, and technical know-how.[74] Everyone wearing a uniform must live by these values. It is a singular devotion to these core values, irrespective of one's race, that matters, together with "the fact that equal opportunity is absolutely indispensable to unit cohesion, and therefore critical to military effectiveness and our national security."[75]

A bona fide boots-on-the-ground example was provided by retired Army Lieutenant General Ernie Audino. In response to the United States Solicitor General's argument in *SFFA*, West Point graduate and combat veteran General Audino assessed why race does not matter on the battlefield:

(2023). Importantly, these contributions include the nation's historically black colleges and universities whose outsized contributions to the United States military's officer corps to this day.*E.g.* LARRY PURDY, GETTING UNDER THE SKIN OF "DIVERSITY": SEARCHING FOR THE COLOR-BLIND IDEAL (2008); PURDY, *supra* note 21, at 105–6.

72. If rewritten as follows, "The United States has a vital interest in ensuring that our Nation's institutions of higher education—including the military's service academies—produce graduates who are prepared to succeed and lead our Nation's military," few would disagree. Moreover, it would be consistent with the colorblind meritocratic views held by a majority of the American public. *See generally More Americans Disapprove than Approve of Colleges Considering Race, Ethnicity in Admissions Decisions*, PEW RSCH. CTR. (June 8, 2023) (providing data on American's views of race and ethnicity as an admissions factor).

73. MIL. LEADERSHIP DIVERSITY COMM'N, *supra* note 3, at xiv.

74. *Id.* at 132; MIL. LEADERSHIP DIVERSITY COMM'N, DEPARTMENT OF DEFENSE CORE VALUES 1 (Dec. 2009).

75. Becton Brief, *supra* note 16, at 17.

> Bullets snapping across a battlefield are equal opportunity employers. That's because bullets don't discriminate based on skin color, and soldiers don't shoot more or less accurately because of their skin color. [Y]et, . . . Solicitor General Elizabeth Prelogar argued that "it is a critical national security imperative to attain diversity with the officer corps. And, at present, it's not possible to achieve that diversity without race-conscious admissions, including in our nation's service academies." Of course, she's never worn a military uniform, let alone set foot on a battlefield, so you would think she would have referred to some real evidence to support her assertion. She didn't. Instead, she relied upon the opinion of a collection of retired general officers who, also *without evidence*, asserted the same imperative in an amicus brief they filed for the case. They're all blowing smoke.[76]

In bureaucratic terms that even the Army should be able to understand, General Audino explains why they are "blowing smoke":

76. Ernie Audino, *The Big Lie to SCOTUS: Racial Preferencing in Military Academy Admissions is a National Security Imperative*, GOLD INST. FOR INT'L STRATEGY (Nov. 18, 2022), https://www.goldiis.org/the-big-lie-to-scotusracial-preferencing-in-military-academy-admissions-is-a-national-security-imperative [https://perma.cc/MX8E-JYT4]. For example, in August 2023, West Point's chief data officer reportedly stated that USMA has no data with which "to measure the effectiveness of [Diversity, Equity, and Inclusion]." Colonel William F. Prince: *When a Diversity Conference Could Benefit from an Increase in Diversity*, STARRS (Sept. 19, 2023), https://starrs.us/when-a-diversity-conference-could-benefit-from-an-increase-in-diversity/ [https://perma.cc/A6RJ-99LT]. It, therefore, is unclear what proof—beyond ideological rhetoric—the *West Point* and *Annapolis* courts should expect to see from DoD in support of its claims of alleged improved performance due to manipulated changes in the racial demographics within the officer corps, particularly if the demographic changes are achieved through divisive racially discriminatory policies. In fact, no credible evidence supports the government's claims. *See generally* Keuhlen, *supra* note 25 (analyzing the statistical values of a diverse military); Ramsey, *supra* note 25 (outlining ways the Navy prioritizes diversity); Bing West, *The Military's Perilous Experiment*, HOOVER INST. (June 23, 2021), https://www.hoover.org/research/militarys-perilous-experiment [https://perma.cc/42GQ-T9VY] (explaining the military's efforts for increasing diversity); Brent Ramsey, *The Navy and Diversity*, REAL CLEAR DEF. (Oct. 7, 2023), https://www.realcleardefense.com/articles/2023/10/07/the_navy_and_diversity_984557.html [https://perma.cc/2M7C-8QPU] (discussing the Navy's commitment to diversity, equity, and inclusion). The United States Brief argued for "the importance of '[d]evelop[ing] future leaders who represent the face of America and are able to effectively lead a diverse workforce." United States Brief, *supra* note 15, at 15. "Each of those institutions has concluded that this limited consideration of race in a holistic admissions system is necessary to achieve the educational and military benefits of diversity." *Id.* at 17–18. The government asserted that current race-neutral alternatives would not achieve the military's compelling interest in fostering a diverse officer corps. *Id.* at 18. The reason given is illuminating. According to the government, it relates to the factors required for the military to be successful, i.e., "a combination of academic excellence, leadership skills, physical ability, and personal character." *Id.* What the government's argument ignores is that none of these factors have anything to do with an individual's skin color.

> [If the Solicitor General] and those generals are right, i.e., that racial diversity in our officer corps is a "national security imperative," then the services would at least track racial percentages in their mandatory assessments of unit combat readiness, but they don't. Racial diversity is not included, and never has been.[77]

Ultimately, it is puzzling and deeply disappointing for our government to suggest that relying on a color-blind meritocratic system will somehow compromise its ability to protect our Nation's peace and security. Equally false is the claim that this vital interest is unachievable if the government strictly adheres to the color-blind principles enshrined in the Equal Protection and Due Process Clauses of the Constitution, the unanimous Supreme Court decision in *Brown v. Board of Education*,[78] and our landmark Civil Rights legislation.[79]

E. A Military that "Looks Like America"?

With all due respect to the military's oft-repeated goal of creating a military that "looks like America,"[80] this Article contends that the paramount goal should be the creation and maintenance of the most effective, most lethal military, i.e., a military that is best able to defend the national security interests of America for all Americans of every race and ethnicity. This is best achieved via reliance on a color-blind, meritocratic system.

The opposite approach to a color-blind system based on equal opportunity is based on "equity" instead of individual merit.[81] Whatever such an equitable approach (e.g., seeking racial demographic parity) might create, it would not be focused on guaranteeing the best, most effective, most cohesive, and most lethal military achievable.

77. Audino, *supra* note 74.

78. Brown v. Bd. of Educ., 349 U.S. 294, 298 (1955).

79. U.S. CONST. amend XIV. Some who favor the use of race-based systems can point to the language of Title VI and case law holding that its protections against racial discrimination do not apply to federal agencies or entities that are fully funded by the federal government. However, this would come as a surprise to many, if not the vast majority, of the Nation's elected leaders as well as to the millions of men and women who have faithfully served and continue to serve in our military.

80. *See infra* text accompanying notes 98–99.

81. *See generally* Peter C. Myers, *The Case for Color-Blindness*, 75 HERITAGE FOUND., (2019), https://www.heritage.org/civil-society/report/the-case-color-blindness [https://perma.cc/XD5W-G85R] (discussing the equal opportunity in a color-blind system).

In *SFFA*, the retired military officials' amicus brief supporting Harvard's and UNC's race-based admissions policies took a different approach where their interest in diversity seemed to eclipse their interest in lethality.[82] For example:

> This Court has rightly deferred "to the professional judgment of military authorities" on matters concerning the optimal composition and operations of our Armed Forces. To that end . . . the Court deferred to the military's judgment regarding the importance of a diverse officer corps and validated its interest in that diversity: [t]o cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.[83]

The statement that "the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity" is misleading. It suggests that preferences must be awarded to certain underrepresented minority applicants without which they would be unable to compete—and thus be "visible"—when it comes to holding leadership positions in the military. This observation is condescending and false, as with so much of the government's argument. Moreover, even if arguendo it once had any validity, it no longer does today.[84]

82. In the cases that preceded *SFFA*, the arguments in each of the retired officers' amicus briefs simply echoed the vital interest generally described in *supra* Section IV(C). The Court did not mention the retired officers' amicus briefs in *Gratz* nor did the Courts mention their amicus briefs in *Fisher I* or *Fisher II*.

83. Abbot Brief, *supra* note 22, at 3 (citations omitted). Instituting divisive (and often camouflaged) race-based policies would seem antithetical to the goal of instilling "confidence in the openness and integrity of the educational institutions that provide this training." Grutter v. Bollinger*,* 539 U.S. 306, 332 (2003).

84. While the claimed need for visibility hardly rises to the required strict scrutiny standard, it is now thoroughly belied by the fact that for eight years between 2009 and 2017, the Nation was led by President Barack Obama, a multi-racial but self-identified and highly visible, African American, who served as the Nation's commander-in-chief. Several years before that, General Colin Powell (a man of Jamaican heritage who was commissioned via Army ROTC at CCNY) served as our Nation's most senior military leader under President George H.W. Bush. *Colin Luther Powell,* U.S. DEP'T STATE, https://history.state.gov/departmenthistory/people/powell-colin-luther [https://perma.cc/789J-NYFC]. Powell later served as Secretary of State during the administration of President George W. Bush. *Id.* In addition, recent Superintendents at both West Point and the Air Force Academy were from under-represented minority backgrounds. *General Darryl A. Williams*, GEN. OFFICER MGMT. OFF., https://www.gomo.army.mil/public/Biography/usa-7530/darryla-williams

Moreover, none of the cases cited in the retired officers' brief in *SFFA*, from *Goldman v. Weinberger*,[85] to *Grutter* and *Fisher*, had anything to do with a Court "defer[ring] to the optimal composition . . . of our Armed Forces" insofar as it relates to its racial and ethnic demographic composition.[86] The retired officers' claim otherwise is simply untrue.

As in *SFFA*, no service academy or ROTC program was a party to any previous race preference admissions cases (i.e., *Bakke*, *Gratz*, *Grutter*, or *Fisher*).[87] Apart from acknowledging (rather than deferring to) the retired officers' argument in their amicus brief jointly filed in *Gratz* and *Grutter*, no Court in any of the undergraduate cases, including *Gratz*, deferred to or even mentioned the alleged importance of creating a "diverse officer corps."[88] Neither the *Grutter* Court nor any court has validated the military's claim of an interest in diversity apart from the standard position expressed by all the amici—civilian and military alike—who supported the retention of race-

[https://perma.cc/CU6C-S2TL]; *Lieutenant General Richard M. Clark*, U.S.A.F., https://www.af.mil/About-Us/Biographies/Display/Article/108502/richard-m-clark/ [https://perma.cc/ABU8-QQU2]. For years, as General Powell and other highly qualified minority officers were ascending in the military, minority officers throughout the armed services were visible. As of this writing, the Department of Defense is led by a Black Secretary of Defense (retired former four-star Army General Lloyd Austin); *Lloyd J. Austin III*, U.S. DEP'T OF DEF., https://www.defense.gov/About/Biographies/Biography/article/2522687/lloyd-j-austin-iii/ [https://perma.cc/5LXY-ECZR. The current Chairman of the Joint Chiefs of Staff, United States Air Force General C. Q. Brown, is Black. *Charles Q. Brown Jr.*, U.S. DEP'T OF DEF., https://www.defense.gov/About/Biographies/Biography/Article/2318211/general-charles-q-brown-jr/ [https://perma.cc/7Q5N-B2H3]. Finally, for decades, there have been large numbers of extraordinarily skilled, highly ranked, and highly respected Black and Latino officers and senior enlisted personnel across all the armed services. *See generally* Keuhlen, *supra* note 25 (reporting the percentages of race demographics throughout the years); COUNCIL ON FOREIGN REL., *supra* note 67 (noting "the officer corps has similar levels of racial diversity as the general population").

85. Goldman v. Weinberger, 475 U.S. 503 (1986).

86. *Id.*

87. Regents of the Univ. of Cal. v. Bakke, 438 U. S. 265 (1978); Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); *Fisher II*, 579 U.S. 365 (2016). The University of Michigan maintained active ROTC units on its undergraduate campus. Notwithstanding the retired officers' support for the undergraduate university's race-conscious policies precisely because of their alleged impact on their ROTC units, the 6–3 majority in *Gratz* made no mention of the military amici's brief in deciding that the University of Michigan's undergraduate race-based system violated the *Gratz* plaintiffs' rights as guaranteed by both the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. *Gratz*, 539 U.S., at 275–76.

88. *See generally* Gratz v. Bollinger, 539 U.S. 244 (2003) (making no mention of the alleged importance of a diverse officer corps); *Fisher II*, 579 U. S. 365 (2016) (discussing other issues rather than the importance of a diverse officer corps).

based admissions policies for the singular purpose of "obtaining the educational benefits that flow from a diverse student body."[89]

The retired officers' decision to cite *Goldman* was interesting.[90] *Goldman* is inapt for two reasons. It addressed whether the military could prohibit an Orthodox Jewish officer from wearing a yarmulke.[91] While a deeply divided Court decided in 1986 that the Air Force could prohibit this officer's request (in a decision which since has been modified with a change in service regulations),[92] what should not be overlooked when it comes to addressing the issue of racial discrimination is the reasoned dissent of two of the Court's then-most prominent liberal justices (Justice William Brennan and Justice Thurgood Marshall):

> Our cases have acknowledged that, in order to protect our treasured liberties, the military must be able to command service members to sacrifice a great many of the individual freedoms they enjoyed in the civilian community, and to endure certain limitations on the freedoms they retain. Notwithstanding this acknowledgment, we have steadfastly maintained that *our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.*[93]

The right to wear the headgear of one's choice is one thing. The right to be free from racial discrimination is quite another. Beyond any question,

89. *Grutter III,* 539 U.S. at 317. For a different view of the "educational benefits that flow from a diverse student body," see Mitchell J. Chang, *Racial Diversity in Higher Education: Does a Racially Mixed Student Population Affect Educational Outcomes?* (1996) (Ph. D. dissertation, UCLA) (on file with author). In *Grutter*, Justice O'Connor cited Dr. Chang's collaborative work with other researchers. *Grutter*, 539 U.S. at 330. However, Justice O'Connor ignored Dr. Chang's most relevant research, which ran counter to her conclusion about the alleged educational benefits of a diverse campus. *See* Mitchell J. Chang, *Racial Diversity in Higher Education: Does a Racially Mixed Student Population Affect Educational Outcomes?* (1996) (Ph. D. dissertation, UCLA) (on file with author) (showing racial diversity may negatively impact students of color based on surveys conducted among college students). For a detailed discussion of Chang's findings, see PURDY, *supra* note 21, at 143.

90. Abbot Brief, *supra* note 22, at iii.

91. *Goldman*, 475 U.S., at 506–9.

92. In recent years, this regulation has been altered to permit observant Sikhs and Muslim women, in some situations, to wear certain non-regulation head coverings when in uniform. Meghann Myers, New Army Policy Oks Soldiers to Wear Hijabs, Turbans and Religious Beards, Army Times (Jan. 5, 2017) https://www.armytimes.com/news/your-army/2017/01/05/new-army-policy-oks-soldiers-to-wear-hijabs-turbans-and-religious-beards/ [https://perma.cc/P5W3-YATQ].

93. *Goldman*, 475 U.S. at 515 (1986) (Brennan, J., dissenting) (emphasis added) (citations omitted).

the latter is among the most basic fundamental rights retained by all citizens, including our citizens in uniform.[94]

F. *DoD's Use of Race to Achieve Unconstitutional Quotas*

In the government's amicus brief tying its national security claims to the need for race-preference admissions policies, numerous references are made—inter alia—to achieving "minority demographic representation," "the importance of developing future leaders who represent the face of America," and "building an officer corps that adequately reflects the racial and ethnic composition of the Service members . . . and the American public they serve."[95] Each of the above phrases is a euphemism for the term "quota," which all the amici who support the use of race preference admissions work overtime to avoid. The reason is apparent: DoD's claimed interest would run afoul of longstanding Supreme Court precedents because it would, by definition, be a goal based on using race to achieve impermissible racial and ethnic quotas.[96] Even before addressing the question of quotas, consider the even murkier question of how race and ethnicity are defined.[97]

In short, the current administration and some DoD leadership argue that our nation's security depends upon having an officer corps that racially mirrors America based on "imprecise," "arbitrary or undefined," and "opaque" racial categories when, in fact, neither our military at large nor its officer or enlisted corps will ever perfectly mirror America.[98]

94. *See Freedom from Racial Discrimination is a Right, Not a Privilege,* U.N. NETWORK ON MIGRATION, https://migrationnetwork.un.org/statements/freedom-racial-discrimination-right-not-privilege [https://perma.cc/R9TJ-5U5A] (explaining racial discrimination as a threat to society).

95. United States Brief, *supra* note 15, at 13, 15.

96. Grutter v. Bollinger, 539 U.S. 306, 334 (2003) (citing Regents of the University of California v. Bakke, 438 U.S. 265, 315 (1978)).

97. *See* discussion *infra* Section V; Students for Fair Admissions, Inc. v. Harvard Coll., 600 U.S. 181, 216–17 (2023) (detailing "incoherent" and "irrational stereotypes" that racial categories further). Racial categories are variously described as "plainly overbroad," "still others underinclusive," "imprecise," "arbitrary or undefined," and "opaque." *Id.* The identical criticisms contained in *SFFA* apply to the racial categories currently contained in DoD Instruction 1350.02. DoD Instruction, *supra* note 13, at 38 ("Classifications of race include: White, Black or African American, American Indian or Alaska Native, Asian, and Native Hawaiian, or other Pacific Islander.").

98. *SFFA*, 600 U.S. at 216–17. Another reason our military will likely never "mirror America" has nothing to do with race. While over half of our country is comprised of females, only approximately 20% of our military is made up of women, and no responsible military leader is suggesting that number be increased to "mirror" America's gender demographics. Keuhlen, *supra* note 25, at n.24.

G. The Military's Permissible Discrimination

As mentioned in *Orloff v. Willoughby*,[99] the military explicitly discriminates against some individuals.[100] This discrimination occurs for many reasons, including reasons arguably as mundane as maintaining consistent, uniform headwear regulations.[101] In addition, the military discriminates against individuals based on height, obesity (as defined by military standards), physical fitness, numerous medical reasons, physical handicaps, and a lack of minimal intellectual skills required to hold a position in the military.[102] Additionally, criminal records, drug use, or other disciplinary records can preclude admission of a candidate seeking an appointment to a service academy or seeking a commission through ROTC or OCS.[103] All of these factors—many of which might be actionable were they challenged in a purely civilian setting—can be justifiable reasons for refusing admission into our military.[104] But, a candidate's race should never form the basis for such a refusal.

H. Reliance on a Color-blind Meritocratic System Avoids the Dangers and

99. Orloff v. Willoughby, 345 U.S. 83 (1953).

100. *Id.* at 94 ("Discrimination is unavoidable in the Army."). Nowhere does the permitted discrimination referenced in *Orloff* relate to, much less condone, discrimination based on one's skin color.

101. Goldman v. Weinberger, 475 U.S. 503 (1986).

102. For example, the requirements posted on the UNC-Chapel Hill Army ROTC website:

> (1) be a U.S. citizen; (2) be at least 17 and under 31 in year of commissioning; (3) have a high school diploma or equivalent; (4) have a high school GPA of at least 2.50, unweighted, if you're in high school while applying; (5) have taken the SAT or ACT; (6) take the Army Combat Fitness Test (ACFT); (7) meet the physical height and weight requirements; and (8) agree to accept a commission and serve in the Army, Army Reserve, or Army National Guard.

Active Duty, UNIV. N.C. CHAPEL HILL, https://armyrotc.unc.edu/applicants/activeduty/ [https://perma.cc/5STR-TSQ4]. Under UNC's Tarheel Battalion FAQs section, the following language appears: "ROTC scholarships are awarded on merit . . . . Merit is exhibited in high school or college academic achievement and extracurricular activities, such as sports, student government or part-time work." *FAQ*, UNIV. N.C. CHAPEL HILL, https://armyrotc.unc.edu/applicants/activeduty/ [https://perma.cc/5STR-TSQ4]. Notably, race has no bearing on any of the qualifications, and no individual is prevented from applying—or shown preference, much less discriminated against—based on his race.

103. *Active Duty*, UNIV. N.C. CHAPEL HILL, https://armyrotc.unc.edu/applicants/activeduty/ [https://perma.cc/5STR-TSQ4].

104. *Id.*

Divisiveness Created by Race-Based Policies

The only process our nation and our courts should condone is selecting individuals from a pool where persons of every race and ethnicity are encouraged to apply and commission only those who meet stringent color-blind meritocratic standards. Thus, the fundamental question, again, for those like Harvard's and UNC's military amici, becomes whether there is any evidence—much less compelling evidence—that our nation's peace and security are compromised by relying on such a system.

That question is answered because no credible evidence exists that relying on a color-blind meritocratic system threatens our national security.[105] In fact, the opposite is true, as has been fully recognized by our military in explicit directives issued over the past several decades, directives which—as previously noted—have been entirely ignored by Harvard's and UNC's retired military amici. Consider, for example, the language contained in this previously cited 1995 Department of Defense Directive: "Unlawful discrimination against persons or groups based on race, color, . . . or national origin is contrary to good order and discipline and is counterproductive to combat readiness and mission accomplishment."[106] Or consider the 2001 Department of the Navy Instruction: "[Racial discrimination] adversely affect[s] good order and discipline, mission readiness, and prevents our Navy from attaining the highest level of operational readiness."[107]

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105. [S]ome definitions [of diversity] imply that increasing the representation of racial and ethnic minorities among the organization's employees and leaders will serve the goal of improving organizational performance. However, research finds no direct link between demographic representation and organizational capability, absent racial, ethnic, or gender diversity within the broader occupation or industry. Indeed, several researchers have found that the type of diversity is not a significant moderator of the positive versus negative effects of diversity per se.

MIL. LEADERSHIP DIVERSITY COMM'N, DECISION PAPER #5, DEFINING DIVERSITY 6 (Feb. 2011) (footnote omitted). A recent study has refuted the claim—often relied upon by DoD entities—that racial diversity improves performance metrics. *See generally* Jeremiah Green & John R. M. Hand, *McKinsey's Diversity Matters/Delivers/Wins Results Revisited*, 21 ECON J. WATCH, Mar. 2024, at 5–34 (evaluating the study about improved performance metrics). Finally, easily understood examples that closely mirror the military in many ways illustrate that racial and ethnic diversity play no role in improving organizational performance. These examples are readily found in high-profile elite collegiate and professional sports programs.

106. U.S. DEP'T OF DEF., *supra* note 13, at 2.

107. DEP'T OF THE NAVY, OFF. OF THE CHIEF OF NAVAL OPERATIONS, OPNAV INSTRUCTION 5354.1F (2007)., Navy Equal Opportunity (EO) Policy § 4(a) (July 25, 2007). This is another example of the pro-race preferences military amici selectively citing certain DoD directives and regulations but excluding their actual language. Becton Brief, *supra* note 16, at 12, n.3.

In addition to the untold millions of United States military veterans who would attest to this fact are the observations from, among others, senior jurists like Justice Clarence Thomas, the late Justice Sandra Day O'Connor, and retired Justice Anthony Kennedy.[108] Each of these three Justices wrote extensively in major cases involving race preference admissions and, whether approving or rejecting the particular use of race, each pointed out the dangers, divisiveness, and disunity that result when race is used to separate individuals—and award benefits to some while penalizing others, based on skin color.[109]

1. Associate Justice Clarence Thomas

We begin with Justice Thomas' words in *Grutter*:

> The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. "Purchased at the price of immeasurable human suffering, the equal protection principle reflects our nation's understanding that such classifications ultimately have a destructive impact on the individual and our society."[110]

After joining the majority opinion in *SFFA*, Justice Thomas wrote a lengthy and powerful "originalist defense of the colorblind Constitution . . .

108. *See* Grutter v. Bollinger, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part) (emphasis added) (citations omitted) (explaining his position regarding the negative impacts of race classifications); *id.* at 341 (Kennedy, J., dissenting) (outlining inherent issues with race-based preference); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (showing Justice O'Connor's disdain for classifications based on race); Rice v. Cayetano, 528 U.S. 495, 517 (2000) (emphasis added) (citations omitted) (explaining the reasoning behind prohibiting race as a classification).

109. *See* David Sacks & Peter Thiel, *The Case Against Affirmative Action*, Stanford Magazine (Oct. 1996), https://stanfordmag.org/contents/the-case-against-affirmative-action [https://perma.cc/R5KQ-DP6J] ("Originally conceived as a means to redress discrimination, racial preferences have instead promoted it. And rather than fostering harmony and integration, preferences have divided the campus. In no other area of public life is there a greater disparity between the rhetoric of preferences and the reality."). Dr. King reflected this sentiment in his Letter from Birmingham Jail: "[i]njustice anywhere is a threat to justice everywhere." MARTIN LUTHER KING, JR., LETTER FROM BIRMINGHAM JAIL (Apr. 1963), *reprinted in* 212 ATL. MONTHLY 78 (Aug. 1963).

110. *Grutter,* 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part) (citations omitted) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995)).

to emphasize the pernicious effects of all such discrimination."[111] In his fifty-eight-page concurring opinion, Justice Thomas reiterates that "no social science has disproved the notion that this discrimination . . . provokes resentment among those who believe that they have been wronged by the government's use of race."[112]

It is precisely this sort of "resentment," felt by members of every race who have suffered from racial discrimination, that corrodes unity and can destroy cohesiveness within our military, as the military readily concedes in various publications.[113]

2. The Late Associate Justice Sandra Day O'Connor

Next, we examine Justice O'Connor's prior warnings, expressed before her ideological conversion. "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may, in fact, promote notions of racial inferiority and lead to a politics of racial hostility."[114] In *Grutter*, Justice O'Connor acknowledged the "serious problems of justice connected with the idea of preference itself."[115] She also noted that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."[116] Justice O'Connor acknowledged that although the goals for racial classifications are compelling, they "are potentially so dangerous that they may be employed no more broadly than the interest demands."[117]

This point is critical because national security is a perpetual interest that will always be compelling.[118] Thus, were any court to accede to DoD's strained rationale for using race in service academy admissions, it would arguably "enshrin[e] a permanent justification" for using such

111. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 232 (2023) (Thomas, J., concurring).

112. *SFFA*, 600 U.S. at 275 (Thomas, J., concurring) (citing *Adarand* 515 U.S. at 241).

113. *See, e.g.*, discussion, *supra* note 87; and *infra* note 150.

114. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

115. *Grutter*, 539 U.S. at 341 (quoting Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978)) (emphasis added). *See also SFFA*, 600 U.S. at 212 (majority opinion) (quoting Justice O'Connor's language in *Grutter* and adding that the Court "expressed marked discomfort with the use of race in college admissions").

116. *Grutter*, 539 U.S. at 341 (citing Palmore v. Sidoti, 466 U.S. 429, 432 (1984)).

117. *Id.* at 342 ("Enshrining a permanent justification for racial preferences would offend [the] fundamental equal protection principle.").

118. *See id.* at 351 (Thomas, J., concurring part and dissenting in part) (agreeing national security is a "pressing public necessity").

preferences.[119] Such a decision would be an anathema to maintaining a cohesive and unified military.

3. Retired Associate Justice Anthony Kennedy

We also consider the words of Justice Kennedy:

> One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.[120]

Three years after penning those words in *Rice v. Cayetano*,[121] Justice Kennedy dissented in *Grutter III*, arguing "[p]referment by race . . . can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and the idea of equality."[122] Justice Kennedy was correct in his observation, and hundreds of thousands of American military veterans from many armed conflicts over the past century would agree.[123] Our veterans fully understand the fundamental truth expressed by Justice Kennedy in both *Rice* and *Grutter III*, even if a

119. *Id.* at 342 (majority opinion).

120. Rice v. Cayetano, 528 U.S. 495, 517 (2000) (citations omitted) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

121. Rice v. Cayetano, 528 U.S. 495 (2000).

122. *Id*; *Grutter III*, 539 U.S. at 388 (Kennedy, J., dissenting). Justice Kennedy inexplicably altered his view of race-conscious admissions when, shortly before he retired from the Court, he authored the Court's 4–3 opinion in *Fisher II*. *See generally* Fisher v. Univ. of Tex. (*Fisher II*), 579 U.S. 365 (2016) (describing an opinion penned by Justice Kennedy upholding the University of Texas's use of race-conscious admissions). For a critique of Justice Kennedy's position in *Fisher II*, see R. Lawrence Purdy, *Awaiting the Rebirth of an Icon:* Brown v. Board of Education, 44 MITCHELL HAMLINE L. REV. 510, 543-48 (2018).

123. The government and the retired officer amici point to racial incidents that occurred during the Vietnam War, a war that ended over a half-century ago. They cite Vietnam-era racial tension and racial conflicts as evidence for the need for race-preference admissions at our service academies. United States Brief, *supra* note 15, at 12, 15. Their arguments grossly misrepresent the cause of these incidents—alleging without proof that they were largely due to an imbalance in the racial makeup of the officer corps. In fact, many of the cited "racially charged conflicts" had nothing to do with an "absence of diversity in the officer corps." *Id.* at 15. As many Vietnam veterans can attest, these conflicts reflected the ongoing racial turmoil throughout our society during the late 1960s and early 1970s civil rights revolution.

small cadre of self-anointed government bureaucrats and retired military elites do not.[124]

4. The Late Army General Colin Powell (USA, Ret.)

The words of the late Army four-star General, former Chairman of the Joint Chiefs of Staff, and former Secretary of State Colin Powell cannot be ignored. The retired officers in their SFFA brief have completely distorted his views on affirmative action.[125] While the origin and meaning of the phrase "affirmative action" seems entirely unknown to the military amici, a brief history lesson may prove helpful.

Affirmative action was first established in an executive order signed by President John F. Kennedy on March 6, 1961.[126] It required all government contracting agencies to "take affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, creed, color, or national origin."[127] President Kennedy's Executive Order makes clear that his use of the phrase affirmative action was explicitly intended to *remove*—not add—race as a factor in government employment and contracting.[128]

There can be little doubt General Powell ascribed to President Kennedy's view by refusing to allow the phrase "affirmative action" to metastasize into preferential treatment.[129] In his autobiography, General Powell expressed a decidedly negative view of preferential treatment in the military and

124. *See, e.g.*, Samuel Boehlke, *160-Plus Retired Military Brass Urge Congress to Root Out DoD's Poisonous 'Diversity' and 'Equity' Programs*, FEDERALIST (May 24, 2023), https://thefederalist.com/2023/05/24/160-plus-retired-military-brass-urge-congress-to-root-out-dods-poisonous-diversity-and-equity-programs/ [https://perma.cc/DM5R-LEH8] (referencing "Flag Officers 4 America" letter to United States congressional leaders).

125. In their amici brief in support of Harvard and UNC, the retired officers claim that "Secretary Powell's rise through the ranks was made possible in part by the race-conscious policies" they support. Abbot Brief, *supra* note 22, at 20. This last claim is a particularly odd and offensive one to make. And if his own words are to be believed, General Powell himself did not believe it. *See* COLIN POWELL & JOSEPH E. PERSICO, MY AMERICAN JOURNEY 591–92 (1995) (detailing Powell's view on affirmative action as equal consideration, not reverse discrimination).

126. Exec. Order No. 10925, 3 C.F.R. § 301 (1961) ("[D]iscrimination because of race, creed, color, or national origin is contrary to the Constitutional principles and policies of the United States . . . .").

127. *Id.*

128. *See generally id.* (indicating the U.S. Constitution calls for "equal opportunity" without regard to race).

129. POWELL & PERSICO, *supra* note 126.

emphasized that his support for affirmative action depended entirely upon how the phrase was defined.[130]

> The present debate over affirmative action has a lot to do with definitions. If affirmative action means programs that provide equal opportunity, then I am all for it. If it leads to preferential treatment . . . I am opposed. I benefited from equal opportunity and affirmative action in the Army, but I was not shown preference. . . . Affirmative action in the best sense promotes equal consideration, not reverse discrimination. Discrimination "for" one group means, inevitably, discrimination "against" another; and all discrimination is offensive.[131]

General Powell was right. Racial discrimination is offensive in our military, where combatting discrimination and ensuring equal opportunity are absolutely indispensable to unit cohesion, military effectiveness, and, therefore, critical to military effectiveness and national security.[132]

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130. *Id.*

131. *Id.* at 591–92 ("[Equal rights and equal opportunity] do[es] not mean preferential treatment. Preferences, no matter how well intended, ultimately breed resentment among the nonpreferred. . . . [a]nd . . . demeans the achievements that minority Americans win by their own efforts."). Additionally, Northwestern University Professor Charles Moskos observed that:

> [A]n emphasis on standards [for college admissions, employment, or military promotion] can work only if it goes hand in hand with a *true commitment to equal opportunity* and vice versa. . . . In preferential treatment, those standards are suspended; that is, quotas are adopted to favor individuals on the basis of their membership in groups rather than on the basis of merit. . . . [M]ajorities of both blacks and whites consistently oppose the latter.

Charles Moskos, *Affirmative Action in the Army: Why it Works*, *in* THE AFFIRMATIVE ACTION DEBATE 231 (George Curry, eds., 1996) (emphasis added).

132. Becton Brief, *supra* note 16, at 12, 17. Thereafter, these observations by the retired military amici were quietly ignored and forgotten, lost in their support for the University of Michigan's racially discriminatory policies. These observations are notably absent from the 2023 version of the retired officers' *SFFA* brief. Instead, these earlier views have been reduced to an anecdote by the late Lt. General Becton where he "wager[s]" that his colleagues on the *Grutter* brief "would recognize [that minorities within the leadership] is a combat multiplier. It brings about unit cohesiveness." Abbot Brief, *supra* note 22, at 30. No data is offered to support Lt. General Becton's view that the race of the military leadership is a "combat multiplier," much less that "[i]t brings about unit cohesiveness." *Id.* Moreover, the language in DoD Directive 1350.2, cited—but not quoted—by the government in its amicus brief in *SFFA,* expresses a decidedly different viewpoint. United States Brief, *supra* note 15; U.S. DEP'T OF DEF., *supra* note 13. Regrettably, but unsurprisingly, neither Harvard nor UNC's military amici nor the government mentions this language in their respective amicus briefs in *SFFA*.

5. Major General Alfred A. Valenzuela (USA, Ret.)

Fifteen years after General Powell expressed his negative view of preferential treatment, it was again given a human face by retired Army Major General Alfred A. Valenzuela.[133] In testimony given to the MLDC, vice-chaired by the same Lt. Gen. Becton who served as the lead amicus in the retired officers' briefs filed in *Gratz*, *Grutter*, and *Fisher*, General Valenzuela said this: "[My dad] told me one thing when he came back from World War II . . . we all wear green . . . we all bleed red, . . . there is no difference and don't let ethnicity play a role."[134]

Put simply, General Valenzuela's words and the setting in which he delivered them capture the essence of this Article. Yet, the Chairman and Vice-Chairman of the MLDC, both aware of the plain words spoken by one of the Commission's most distinguished invited witnesses, regrettably ignored his message. Instead, they chose to lend their names to amicus briefs supporting the racially and ethnically discriminatory policies that General Valenzuela's World War II veteran father had wisely counseled against.[135]

In the end, it is impossible to square the MLDC's multiple concessions to "equal opportunity for all" with the Commission's race-focused recommendations and its incongruous statement that "it is not about treating everyone the same."[136]

6. Lieutenant General Gregory Newbold (USMC, Ret.)

Gregory Newbold is a retired Marine Corps Lieutenant General who commanded Marines at every level, from platoon to division.[137] His last

133. Major General Valenzuela is a 1970 graduate of St. Mary's University in San Antonio, Texas. This highly distinguished officer was commissioned into the Army through St. Mary's ROTC program. When he attained the rank of Major General, he became the highest-ranking Hispanic officer in the United States Army from 1998 to 2004. *See* Ruben Canales Jr., *Major General Alfred A. Valenzuela,* BULLOCK MUSEUM (Mar. 27, 2018), https://www.thestoryoftexas.com/discover/texas-story-project/major-general-alfred-a-valenzuela [https://perma.cc/8H5Y-7L68] (discussing Major General Valenzuela's background and extraordinary accomplishments in the Army).

134. West Brief, *supra* note 2, at 25 (alteration in original) (quoting testimony of Major Gen. Valenzuela before the MLDC on January 14, 2010).

135. *See generally* Abbot Brief, *supra* note 22 (vying for the idea of preference based on race); Becton Brief, *supra* note 16 (explaining problems that arise from lack of military leadership diversity).

136. MIL. LEADERSHIP DIVERSITY COMM'N, *supra* note 3, at xix, 18.

137. *Col. G.S. Newbold*, U.S. MARINE CORPS, https://www.15thmeu.marines.mil/Leaders/Leaders/Leaders-View/Article/545582/col-gs-newbold/ [https://perma.cc/R6A8-23WY].

assignment was as Director of Operations for the Joint Staff in the Pentagon.[138] General Newbold warned about the military's embrace of the ideological tenets of Critical Race Theory and DEI programs, which have been infused into curricula at the service academies.[139] He writes:

> A military force's greatest strengths are cohesion and discipline. Individuality or group identity is corrosive and a centrifugal force. Indeed, the military wears uniforms because uniformity is essential. The tenets of Critical Race Theory—a cross-disciplinary intellectual and social movement that seeks to examine the intersection of race and law in the United States, but which has the unfortunate effect of dividing people along racial lines—undermine our military's unity and diminish our warfighting capabilities. Recruit training teaches close order drill and the manual of arms (drill with weapons) not because they still have relevance to maneuvers on the field of battle, but because they instill a sense of how conformity creates efficiency and superior group results. Upon a firm foundation of cohesion, imaginative leaders can spark initiative and innovation. But when we highlight differences or group identity, we undermine cohesion and morale. Failure results.[140]

General Newbold speaks for millions of American veterans of every race and ethnicity.

7. Voices of Hundreds of Decorated Military Combat Veterans Opposing Race-Based Decision-Making

Finally, it must not go unmentioned that the pro-race preferences position advocated by the government and its limited number of senior retired military amici was vigorously opposed in *SFFA* in an amicus brief filed by a far more significant and equally, if not more distinguished, group of military veterans, Veterans for Fairness and Merit (VFM).[141] In contrast to the thirty-five individuals named in the *SFFA* brief, VFM's membership consists of hundreds of former members of all branches of the United States

138. *Id.*

139. *See* Gregory Newbold, *A Retired Marine 3-Star General Explains 'Critical Military Theory'*, TASK & PURPOSE (Feb. 10, 2022), https://taskandpurpose.com/news/critical-military-theory/ [https://perma.cc/M2M6-55WH] (reinforcing certain inconvenient truths must be maintained for the continued success of the United States military).

140. *Id.*

141. Brief of Veterans for Fairness and Merit as Amicus Curiae Supporting Petitioner at 1, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (Nos. 20-1199 & 21-707).

military, a wide range of enlisted men and women, and members of all officer ranks, including 119 general/flag officers.[142] Among VFM's members are twenty-one recipients of the Medal of Honor and hundreds of recipients of other decorations for combat valor, including Distinguished Service, Navy and Air Force Crosses, 142 Silver Stars, 212 Bronze Star Medals with combat "V" devices, and 215 Purple Hearts for wounds received during combat.[143]

Thus, in addition to the individual voices cited above, the collective voices of VFM's members deserve to be heard above the small number of retired military amici who, regrettably, continue to promote the retention of racially discriminatory admissions policies at our nation's service academies.

8. The Long-Term Adverse Consequences to the Purported Beneficiaries of Race-Preference Policies

Racial divisiveness is far from the only adverse impact that results from the use of race-based policies. The impact on the supposed beneficiaries of such policies is one of the most devastating and frequently overlooked. Ignored by the MLDC and DoD's current advocates is the subtle but very real damage done to the supposed beneficiaries of these policies. As law Professor Viet Dinh pointed out three decades ago, "the new race-as-merit rhetoric . . . permanently embraces racial divisions, balkanizing American society into warring ethnic fiefdoms."[144] Even worse, it lends credence to the false suggestion by some that the color of one's skin *does* dictate one's ability. Moreover, it devalues the hard-earned achievements of individual members of the groups to whom preferences are given. Respected scholars and national leaders of all races understand this.

Former Harvard University President Derek Bok, one of the University of Michigan's designated expert witnesses in *Grutter*, long ago recognized that "any policy offering special dispensations to minority students stamps them as second rate and thereby lowers their self-confidence and diminishes the respect accorded them by their white peers."[145] Bok has expressed concern that "contemporary America has placed educated blacks in a confusing shadow world where it is hard for them to know whether . . .

142. *Id.*

143. *Id.* at 1–2.

144. VIET D. DINH, *The Choice, in* DEBATING AFFIRMATIVE ACTION 289 (Nicolaus Mills, ed., 1994).

145. DEREK BOK, BEYOND THE IVORY TOWER 102 (1982) (citing the work of distinguished economist Thomas Sowell).

when they advance, they have truly excelled or only been moved ahead as a grudging concession to comply with some legal requirement.[146] General Powell has explicitly mirrored this concern: "[P]referential treatment demeans the achievements that minority Americans win by their own efforts."[147]

Notable scholars have expressed similar concerns. Dr. Shelby Steele has opined that replacing merit with race suggests "a loss of faith in a racial equality grounded in merit—in comparable levels of competence and skills between races."[148] Even when done for noble reasons, Dr. Steele reminds us that the lowering of standards in the name of one's race is "the most dehumanizing and defeating thing that can be done to black Americans."[149] Former Princeton University president William G. Bowen, along with Derek Bok, authored one of the principal defenses of race-preference admissions, which was often cited during the pendency of the University of Michigan litigation.[150] In their lengthy treatise, they expanded on the concerns expressed by Dr. Steele by adding that "the lowering of normal standards to increase black representation [] puts blacks at war with an expanding realm of debilitating doubt, so that [it] becomes an unrecognized preoccupation that undermines their ability to perform . . . in integrated situations."[151]

Ironically included among the innumerable examples is a distinguished retired Navy Admiral, Cecil D. Haney, who joined the *SFFA* retired officers' amici brief supporting Harvard's and UNC's race-conscious admissions systems.[152] Haney described his lingering discomfort over the fact that some

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146. DEREK BOK, THE STATE OF THE NATION 188–9 (1996).

147. POWELL & PERSICO, *supra* note 126, at 591

148. Shelby Steele, *We Shall Overcome—But Only Through Merit*, THE WALL STREET JOURNAL (Sep. 16, 1999), https://www.wsj.com/articles/SB937435080968825994. [https://perma.cc/U337-VN7D].

149. SHELBY STEELE, A DREAM DEFERRED: THE SECOND BETRAYAL OF BLACK FREEDOM IN AMERICA 113 (1998).

150. *See generally* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (20th ed. 1998) (arguing for the merits of race-preferential admissions). Bowen, like Bok, served as an expert witness for the University—Bowen in the undergraduate *Gratz* case and Bok in the Law School *Grutter* case.

151. *Id.* at 261. Justice O'Connor cited Bowen and Bok in *Grutter* but ignored their concerns about the damage done to the purported beneficiaries by these policies. Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

152. Abbot Brief, *supra* note 22, at 2.

of his classmates and colleagues attributed his admission to the Naval Academy and his extraordinary advancement thereafter to the use of race preferences.[153] In an open letter to Naval Academy alumni, he wrote:

> I know that while most . . . in the room have dignity and respect for all human beings, I suspect that there may be a small number that is in the same frame of mind that one of my midshipman classmates was in when in front of others (who did not challenge his beliefs), stated that I was only there because I was a part of some quota system. That comment continues to reverberate in my mind every time I enter a room of people I have not worked closely with and especially when I am the only person of color in that room.[154]

This is a patently undeserved burden for this thoroughly accomplished man to bear. Still, it is fully recognized as one of the adverse consequences every time the use of race is suspected or known to be part of any admissions or military advancement decision.

Finally, Dr. Glenn Loury, the Merton P. Stoltz Professor of the Social Sciences and Professor of Economics at Brown University, made the following observations, further capturing this burden:

> [A highly respected colleague and I have] both achieved at the highest levels in our fields, and we've done so not because of affirmative action but almost *in spite of it*. . . . [W]hile our experiences are outside the norm, [we] shared something as young men that is not—or should not be—exceptional. We both knew that . . . to excel, we had to prove ourselves the same way everybody else did. Maybe we were both brilliant, but brilliance is not enough. It's what you do with your talent that counts. . . . The problem, then, is two-fold. On the one hand, African Americans in any field who meet and exceed the standards of that field will have to deal with condescension and undeserved suspicion regarding "how they got here." That is insulting, and it casts a pall of illegitimacy over their achievements. It compromises how their integrity is perceived, and through no fault of their own. Indeed, *affirmative action actually penalizes high-achieving African American[s]*, since everyone knows that all black people at the elite level in the US benefit from affirmative action, whether they want it or not. On the other hand, African Americans who might not be up to snuff but who are nevertheless elevated within their fields

153. *See generally* Cecil D. Haney, *A Call to Action For USNA Alumni*, U.S. NAVAL ACAD. ALUMNI ASS'N & FOUND. (June 2020), https://www.usna.com/news20-call-to-action [https://perma.cc/8ZXX-3FR5] (explaining his experiences).

154. *Id.*

> may never actually know they're being condescended to. It's not as though a hiring committee will tell them, "Well, you're not the best candidate, but we like your skin color." These beneficiaries walk around believing their peers regard them as equals, when, in reality, everyone else can see they're below par. . . . [H]e won't be regarded as a true equal. It's obvious why those . . . who don't need special preferences usually don't want them. It should be equally obvious that the "benefits" less-qualified affirmative action recipients accrue turn out to have downsides. Maybe they'll have a decent job and a good-looking resumé. Maybe they'll be associated with a prestigious company or institution. But they'll pay for it. Not with money, but with their dignity and, perhaps eventually, their self-respect. Is that something any of us can afford?[155]

Unfairness and unconstitutionality aside, for all the reasons outlined by Professor Loury, these demeaning, condescending, and thoroughly unnecessary race-based policies must end.[156]

(5) THE UNAVOIDABLE DILEMMA: HOW "RACE" AND "ETHNICITY" ARE DEFINED WHEN ADMINISTERING RACE-PREFERENCE ADMISSIONS POLICIES

Aside from the immorality of using race to benefit or penalize any individual, the final, inescapable dilemma presented each time the policies are employed is practical, i.e., how race-based systems operate. The analysis begins, as it must in every race-based system, with how race is defined.[157]

On that subject, no better explanation can be found than that provided by Justice Gorsuch in his concurring opinion in *SFFA*:

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155. Glenn Loury, *The Indignities of Affirmative Action* (Jan. 30, 2024), https://glennloury.substack.com/p/the-indignities-of-affirmative-action [https://perma.cc/FW3J-9RRH] (emphasis added).

156. See Alexandr Wang, *Meritocracy at Scale*, SCALE (June 13, 2024), https://scale.com/blog/meritocracy-at-scale [https://perma.cc/VY99-W2ZL], for an example of how companies implement meritocratic hiring policies today. Mr. Wang announced his commitment to this once uncontroversial, now edgy proposition, that DEI should be replaced by MEI (Merit, Excellence & Intelligence) as his company's guiding principle. Echoing Mr. Wang, and with MEI as the predicate, every member of our military should have confidence that their leaders are chosen for their outstanding talent and for no other reason.

157. *See* Students for Fair Admissions, Inc. v. Harvard Coll., 600 U.S. 181, 216, 291 (2023) (providing categories of race used by universities such as Harvard and UNC); *see also* U.S. DEP'T OF DEF., *supra* note 13, at 38 (using the same classifications)

> [M]any colleges and universities . . . invite interested students to complete the Common Application. . . . [A]pplicants are prompted to tick one or more boxes to explain "how you identify yourself." The available choices are American Indian or Alaska Native; Asian, Black or African American; Native Hawaiian or Other Pacific Islander; Hispanic or Latino; or White. Applicants can write in further details if they choose. Where do these boxes come from? Bureaucrats. A federal interagency commission devised this scheme of classifications in the 1970s . . . "without any input from anthropologists, sociologists, ethnologists, or other experts." Recognizing the limitations of their work, federal regulators cautioned that their classifications "should not be interpreted as being scientific or anthropological in nature, *nor should they be viewed as determinants of eligibility for participation in any federal program*." Despite that warning . . . this classification system [is used] for that very purpose—to "sor[t] out winners and losers in a process that, by the end of the century, would grant preference[s] in jobs . . . and university admissions."[158]

Aside from utilizing these "opaque racial categories"[159] to select the "winners" and racially discriminate against those who, solely because of their skin color, become the "losers," where do the increasing multitudes of multi-racial individuals fit in?[160] To pose a classic rhetorical question: As our nation's racial and ethnic demographics (however they may be measured) continue to evolve and expand with each passing year, how is the military to keep up with these changes in an inevitably imprecise and lagging effort to make the troops "look like America"?

Thus, it becomes even more crucial that our Nation's military leaders adhere to the principle that considerations of race have no place in our military. Indeed, the only concern Americans should have is that their military leaders ensure that those chosen to protect our country and lead our

158. *SFFA*, 600 U.S. at 291 (Gorsuch, J., concurring) (citations omitted) (last alteration in original) (citing David E. Bernstein, *The Modern American Law of Race*, 94 S. CAL. L. REV. 171, 196–202 (2021)); *seee also* Brief of David E. Bernstein as Amicus Curiae Supporting Petitioner, at 3, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (Nos. 201-1199 and 21-707).

159. *Id.* at 217 (majority opinion).

160. In 2010, the multi-racial population in the U.S. was measured at 9 million. Ten years later in 2020, that figure had almost quadrupled, to 33.8 million. It predictably will continue to increase at an almost exponential rate. Nicholas Jones et al., *2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. CENSUS BUREAU (Aug. 12, 2021), https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html [https://perma.cc/8KSR-8KTN].

soldiers, sailors, airmen, and Marines are the most competent, capable individuals a colorblind meritocratic system can produce.

VI. CONCLUSION

The door wrongly cracked open in *Grutter*—permitting colleges and universities to use race preference admissions policies—has now seemingly been shut by the readoption of the principle announced seven decades ago in *Brown*.[161] *Brown*'s fundamental principle has thankfully been resurrected in *SFFA*.[162] It is a simple one, which in its 21st Century iteration bears constant repeating: "*Eliminating racial discrimination means eliminating all of it*. . . . [T]he Equal Protection Clause . . . applies without regard to any differences of race, of color, or of nationality—it *is* '*universal in [its] application*.'"[163]

Therefore, our Constitution and our Supreme Court jurisprudence, guided by the intent and purpose of our landmark civil rights legislation, make clear that race has no legitimate role to play in 21st Century America. This is especially true when it comes to selecting the individuals who, in the future, will be appointed to our Nation's service academies and who, upon commissioning, will voluntarily take an oath to support and defend the Constitution of the United States. When deciding who shall qualify to take that oath, the color of a person's skin should make no difference.

161. Brown v. Bd. of Educ., 349 U.S. 294, 298 (1955) ("[R]acial discrimination in public education is unconstitutional. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle.").

162. *See, e.g., SFFA*, 600 U.S. at 202 (citations omitted) ("The Constitution . . . 'should not permit any distinctions of law based on race or color,' because any 'law which operates upon one man [should] operate *equally* upon all.'")

163. *Id.* (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (emphasis added).