

The Intertwined Fates of Affirmative Action and the Military

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This Article explores the deep connections between the crises facing the military and affirmative action. The military struggles with a sexual assault epidemic and a related failure to achieve gender and racial equality, both of which undermine its ability to effectively carry out its mission. Affirmative action faces growing skepticism from the American public and from the courts, which have been gradually eliminating the ground on which gender- and race-conscious measures can be constitutionally justified.

In this time of crisis for both, the military and affirmative action need each other like never before. Affirmative action needs the military to tell the American public and the courts, once again, the story of how race- and gender-conscious measures permitted it to endure earlier crises and emerge as a stronger, highly respected institution. And the military needs affirmative action because it cannot hope to eliminate the damaging gender hostility within its ranks unless it uses gender-conscious measures to rapidly integrate its leadership—especially by assigning women to the combat positions from which they were unfairly excluded.

If the military can once more lead by example, it may persuade a conservative Court to accept that there is still a place for affirmative action in American life. But the military must be willing to act and to use all of the available constitutional arguments in defense of its own policies, as well as those in civilian institutions. If affirmative action cannot survive in the military, it probably cannot survive anywhere in public life. Its fate and that of the military are inextricably intertwined.

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INTRODUCTION

In 2013, the United States Department of Defense (“Defense Department” or “DoD”) abolished rules formally excluding women from hundreds of thousands of combat roles in the U.S. military.¹ Although these positions will be opened gradually over several years, the prospect of a truly gender-integrated combat armed forces—seen only in science fiction²—is moving closer to reality.

1. See Memorandum from Martin E. Dempsey, Chairman, Joint Chiefs of Staff, and Leon Panetta, U.S. Def. Sec’y, to Sec’ys of the Military Dep’ts, Acting Under Sec’y of Def. for Pers., and Readiness Chiefs of the Military Servs. on Elimination of the 1994 Direct Ground Combat Definition and Assignment Rule (Jan. 24, 2013), available at <http://www.defense.gov/news/WI SRJointMemo.pdf>.

2. See, e.g., JOE HALDEMAN, THE FOREVER WAR (1974); STARSHIP TROOPERS (TriStar

These combat exclusions were one of the few remaining areas of formal occupational gender discrimination in American life.³ They also ran counter to the military's own self-professed goals, including the "representation principle"—that the U.S. military should, from top to bottom, represent "the country it defends."⁴ By 2013, women were formally excluded from only some 230,000 positions in the armed forces, out of millions. But these roles are key stepping stones for the top command positions, and female officers' career prospects have long been constrained by their exclusion from them.⁵

Students of American history know, of course, that it is a long road from formal equality to tangible equality. Military culture, traditions, and practices remain, in many ways, uniquely and stubbornly inhospitable to gender equality.⁶ Even without formal exclusions from combat roles, women in the military face "not only restricted career options but also a higher chance of harassment, discrimination, and sexual violence than in almost any other profession."⁷ A long-festering epidemic of sexual assault in the ranks has captured public attention and driven efforts at reform from Congress and the Pentagon.⁸

The hostility women in the military face is an outrage—not only because it prevents women from accessing the full benefits of military

Pictures 1997).

3. For a thorough discussion of the ways in which American society is still gender segregated, both formally and informally, see generally David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 COLUM. J. GENDER & L. 51 (2011).

4. U.S. DEP'T OF DEF., DIVERSITY AND INCLUSION STRATEGIC PLAN 2012–2017, at 4 (2012) [hereinafter DOD DIVERSITY PLAN] (emphasis omitted), available at http://diversity.defense.gov/Portals/51/Documents/DoD_Diversity_Strategic_Plan_%20final_as%20of%2019%20Apr%2012%5B1%5D.pdf.

5. See Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 139–40 (2008); see also Heather S. Ingrum Gipson, Comment, "*The Fight for the Right to Fight*": *Equal Protection & the United States Military*, 74 UMKC L. REV. 383, 403–04 (2005).

6. See *infra* Part III.

7. Megan H. MacKenzie, *Let Women Fight: Ending the U.S. Military's Female Combat Ban*, FOREIGN AFF., <http://www.foreignaffairs.com/articles/138200/megan-h-mackenzie/let-women-fight> (last updated Jan. 23, 2013); see *infra* Part II.B.

8. The number of reported sexual assaults in the military rose sharply from 2010 to 2012, although the Pentagon attributed at least some of the increase to greater willingness by victims to report. See, e.g., Jennifer Steinhauer, *Reports of Sexual Assault Rise Sharply*, N.Y. TIMES, Nov. 7, 2013, <http://www.nytimes.com/2013/11/07/us/reports-of-military-sexual-assault-rise-sharply.html>; Jennifer Steinhauer, *Sexual Assaults in Military Raise Alarm in Washington*, N.Y. TIMES, May 7, 2013, <http://www.nytimes.com/2013/05/08/us/politics/pentagon-study-sees-sharp-rise-in-sexual-assaults.html?pagewanted=all>; see also 1 U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2012 (2013) [hereinafter DOD FY 2012 ANNUAL REPORT ON SEXUAL ASSAULT], available at http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf.

service, but also because it threatens the military's mission and reputation. Sexual harassment and assault—particularly when they go unpunished—sap morale and productivity while undermining unit cohesion.⁹ Persistent gender inequality makes it harder for the military to recruit talented personnel, marks the military as increasingly out of step with the nation it serves, and limits its ability to relate to those it must interact with abroad.¹⁰ In 2013, the Army Chief of Staff called gender inequality a “cancer” on the armed forces that would “destroy its fabric.”¹¹

Moreover, as civilians' views of gender equality evolve, the military's striking failures in that area damage its reputation as a model of successful integration—which it achieved largely through the use of affirmative action.¹² The military had, like civilian institutions, long resisted integration. But once it began to integrate, the military proceeded with urgency and breadth that outstripped most efforts elsewhere.¹³

Indeed, because of the military's integration history and its institutional prestige, it still offers the most broadly appealing argument for affirmative action in civilian life.¹⁴ It was the military that did the

9. See *infra* Part I.

10. See *infra* Part I.

11. *Pending Legislation Regarding Sexual Assaults in the Military: Hearing Before The S. Armed Servs. Comm.*, 113th Cong. 2 (2013) (statement of General Raymond T. Odierno, Chief of Staff, U.S. Army), available at http://www.armed-services.senate.gov/imo/media/doc/Odierno_06-04-13.pdf (“Sexual assault and harassment are like a cancer within the force—a cancer that left untreated will destroy the fabric of our force.”).

12. See *infra* Part II. In its broadest sense, “affirmative action” can mean any measures that promote integration and equality but are not constitutionally required. See Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1063–64 n.3 (2006) (“[Affirmative action] includes a broad range of policies and practices that are designed to respond to past discrimination, prevent current discrimination, and promote certain societal goals such as social stability or improved pedagogy.”). However, I use the term more narrowly here to refer to policies that are race- or gender-conscious rather than race- or gender-neutral.

13. See *infra* Part II.

14. The history of racial integration in the military has been told in e.g., MARTIN BINKIN, MARK J. EITELBERG, ALVIN J. SCHEXNIDER & MARUM M. SMITH, *BLACKS AND THE MILITARY* (1982); JACK D. FONER, *BLACKS AND THE MILITARY IN AMERICA* 186 (1974); MICHAEL LEE LANNING, *THE AFRICAN-AMERICAN SOLDIER: FROM CRISPUS ATTUCKS TO COLIN POWELL* 292 (1997); BERNARD C. NALTY, *STRENGTH FOR THE FIGHT: A HISTORY OF BLACK AMERICANS IN THE MILITARY* (1986); Stephen E. Ambrose, *Blacks in the Army in Two World Wars*, in *THE MILITARY AND AMERICAN SOCIETY* 177, 186 (Stephen E. Ambrose & James A. Barber Jr. eds., 1972); John Sibley Butler, *Affirmative Action in the Military*, 523 ANNALS AM. ACAD. POL. & SOC. SCI. 196, 196–97 (1992); Joseph James DeFranco, *Blacks and Affirmative Action in the U.S. Military* 16 (1987) (unpublished Ph.D. dissertation, University of Illinois at Urbana-Champaign) (on file with author).

most to rescue affirmative action in public universities from constitutional oblivion. In *Grutter v. Bollinger*,¹⁵ the Supreme Court relied heavily on an amicus brief by officers, senators, and former secretaries of defense in concluding that diversity was a compelling rationale for the use of some race-conscious law school admission policies.¹⁶ The amici had recounted the military's successful use of race-conscious policies to integrate the armed forces.¹⁷

Yet the mortal danger to affirmative action is not over. The Court has since expressed ever-greater skepticism about race-conscious measures, even in higher education.¹⁸ Lower courts, to a lesser extent, have cast doubt on the legality of gender-conscious measures as well.¹⁹ The survival of affirmative action in public universities—and all public institutions—may very well hinge on whether the Court's now-altered membership still finds the military's arguments persuasive.

And just as the future of affirmative action depends on the military, the future of the military depends on its willingness to use affirmative action aggressively. In short, as this Article explains, the fates of affirmative action and the military are intertwined.

In Part I of this Article, I discuss the different crises now facing the military and affirmative action. In Part II, I discuss the lessons from the military's past efforts at integration. In particular, I examine the divergent paths of racial and gender integration. Although the military used race-conscious policies to achieve greater integration in the services, an enduring cult of masculinity has made leadership much less willing to use gender-conscious policies to the same extent. Formally excluding women from important roles was just the most obvious example of this divergence. Yet even with respect to race, the military has fallen short of full integration.²⁰

The current sexual assault crisis has forced the military to confront its deep discomfort with gender equality.²¹ As I explain in Part III, the military must expand its use of gender-conscious measures to shake off the mistaken belief that its effectiveness depends on preserving the cult

15. *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003).

16. See Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents at 5, *Grutter*, 539 U.S. 306 (No. 02–241), 2003 WL 1787554 [hereinafter Becton Brief].

17. See *id.*; see also *supra* notes 77–80 and accompanying text.

18. See *infra* Part I.B.

19. See Rosalie Berger Levinson, *Gender-Based Affirmative Action and Reverse Gender Bias: Beyond Gratz, Parents Involved, and Ricci*, 34 HARV. J.L. & GENDER 1, 14–15 (2011).

20. See *infra* notes 222–23 and accompanying text.

21. See *infra* Part II.E.

of masculinity. It is the military's own history that points to a solution. Just as aggressive race-conscious affirmative action enabled the military to reform itself amid the Vietnam War Era "time of troubles," today's military must expand its affirmative action programs—with a special emphasis on moving women swiftly into combat and command positions—so that diversity is reflected in the faces of its personnel, not just in its policies.²²

Moreover, the military must take these measures despite the fact that it would be swimming against the current of public opinion. The type of strong affirmative action measures required for full integration of the military are, to the say the least, controversial.²³ Many states have enacted measures, which the Supreme Court upheld, outlawing race and gender preferences in public education and employment.²⁴ And even where affirmative action has survived political efforts to eliminate it, it still faces increasing hostility from the courts.²⁵

Nonetheless, as I discuss in Part IV, the military's affirmative action policies stand on a uniquely solid constitutional footing. Doctrines that require especially strong deference to military policies could enable affirmative action to continue in the armed forces even if the courts were effectively to banish it from every other public institution. More importantly, as history shows, the same cohesive and hierarchical military culture that currently stands in the way of full integration can, once a decision is made to reverse course, make that integration happen much more quickly than in civilian institutions. But the military must commit itself to bold and comprehensive steps toward integration and stand behind its policies when they face legal challenges. The future of both the military and affirmative action depends upon it.

22. David Maraniss, *U.S. Military Struggles to Make Equality Work*, WASH. POST, Mar. 6, 1990, at A1.

23. *See infra* Part III.

24. *See, e.g.*, CAL. CONST. art. I, § 31 (California Proposition 209, which prohibits the state from "discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting"); MICH. CONST. art. I, § 26 (providing that the state "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."), *upheld as constitutional by* Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary v. Regents of Univ. of Mich., No. 12-682, 2014 WL 1577512 (U.S. Apr. 22, 2014).

25. For a discussion of this hostility and possible causes, see generally Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CALIF. L. REV. 1565, 1570 (2013).

I. A NEW TIME OF TROUBLES FOR AFFIRMATIVE ACTION AND THE MILITARY

One of the darkest chapters in the recent history of the U.S. military was the so-called “time of troubles”—the late 1960s and early 1970s, when the armed services were facing defeat in Vietnam; riven with racial strife, poor morale, and fragging incidents; and generally unpopular with the American public.²⁶ A number of factors—widespread disillusionment about the purpose and success of the Vietnam War among the armed services in general, increasing racial consciousness in American society, and frustration over lack of opportunity to be promoted—led to a crippling series of racial incidents in the services.²⁷ In just two years, 1969 and 1971, the Defense Department recorded over 300 racial incidents, including “race riots” on military bases, resulting in the deaths of seventy-one American troops.²⁸ In the fall of 1972, operations on two navy aircraft carriers were brought to a halt by racial unrest.²⁹

The Assistant Secretary of Defense for Equal Opportunity, James Render, reported to President Nixon that year that “acute frustration” and “volatile anger” among black servicemembers were driven in large part by lack of equal opportunity and local commanders’ failure to address the problem.³⁰ Others recalling the incidents identified a complete breakdown in understanding between minority enlisted servicemembers and the white officers who led them.³¹ The shortage of

26. Mario L. Barnes, *But Some of (Them) Are Brave: Identity Performance, the Military, and the Dangers of an Integration Success Story*, 14 DUKE J. GENDER L. & POL’Y 693, 701 (2007).

27. See *id.* at 748; see also BINKIN ET AL., *supra* note 14, at 35–38; Kenneth Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 521 (1991) (“Racial tensions ran high during the Vietnam War, especially in the Army, which had few black officers and was suffering a general decline in discipline and morale.”); Steven Schlossman et al., *Potential Insights from Analogous Situations: Integrating Blacks into the U.S. Military*, in RAND NAT’L DEF. RESEARCH INST., OFF. OF THE SEC’Y OF DEF., SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: POLICY OPTIONS AND ASSESSMENT 180, 180 (1993) [hereinafter RAND Sexual Orientation Study], available at http://www.rand.org/content/dam/rand/pubs/monograph_reports/2009/RAND_MR323.pdf (“Between 1968 and 1972, all the Armed Forces experienced numerous outbreaks of racial hostility and violence in a worldwide pattern that nearly matched the strife that had existed during World War II.”).

28. NALTY, *supra* note 14, at 309; see Bryan W. Leach, *Race As Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond*, 113 YALE L.J. 1093, 1111 (2004).

29. DeFranco, *supra* note 14, at 22 (citing Frederick J. Harrod, *Integration of the Navy*, 15 NAVAL INST. PROCEEDINGS 46 (1979)).

30. *Id.* (citing RICHARD O. HOPE, RACIAL STRIFE IN THE MILITARY: TOWARD THE ELIMINATION OF DISCRIMINATION 39 (1979)).

31. NALTY, *supra* note 14, at 317 (“Violence and even death proved necessary to drive home the realization that . . . even commanding officers had only the faintest idea what the black man

black officers deprived many enlisted servicemembers of role models, undermining morale.³² The frustration and anger were justified. Studies during the 1970s concluded that, even controlling for test score differences, black servicemembers were more likely to be assigned to combat than technical occupations and were promoted more slowly.³³

This crisis, which military and civilian leadership anticipated could become worse in the impending transition to an all-volunteer force, provoked a substantial response. The Defense Department took steps to address the communication failures by establishing “equal opportunity councils” within each major unit to strengthen communication between officers and enlisted servicemembers.³⁴ It ramped up training in race relations and established a Defense Race Relations Institute to oversee the training programs.³⁵

But officials knew these measures would not be enough unless swift progress could also be made toward fuller racial integration, especially in the officer corps. So began the military’s use of affirmative action in earnest, which consisted largely of three components—(1) setting integration goals and carefully tracking progress toward them; (2) race-conscious admissions policies at service academies and Reserve Officers’ Training Corps (“ROTC”) programs; and (3) minority representation on promotion boards. In December 1970, the Defense Department commanded each service to establish goals and timetables for increasing utilization of racial minorities in occupations from which they had been excluded.³⁶ The order warned that officers who failed to act against discrimination would be relieved of command. For their part, service academies increased their enrollment of racial minorities

and woman in the service were thinking.”). Lieutenant General Frank Petersen, Jr. described the “time of troubles” this way:

In Vietnam, racial tensions reached a point where there was an inability to fight
We were pulling aircraft carriers off line because there was so much internal
fighting Platoons that were 80 percent minority were being led by lieutenants
from Yale who had never dealt with ghetto blacks.

Maraniss, *supra* note 22, at A1.

32. See Leach, *supra* note 28, at 1111 (“The military further surmised that the dearth of black officers had weakened morale by depriving young black servicemen of role models”); see also U.S. DEP’T OF DEF., REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES 57–59 (1972) [hereinafter ADMINISTRATION OF MILITARY JUSTICE], reprinted in 13 BLACKS IN THE UNITED STATES ARMED FORCES: BASIC DOCUMENTS 455, 529–31 (Morris J. MacGregor & Bernard C. Nalty eds., 1977).

33. Butler, *supra* note 14, at 203 (citing John Sibley Butler, *Inequality in the Military*, 41 AM. SOC. REV. 807, 818 (1976)); see also ADMINISTRATION OF MILITARY JUSTICE, *supra* note 32.

34. DeFranco, *supra* note 14, at 22; see HOPE, *supra* note 30, at 39.

35. Butler, *supra* note 14, at 202.

36. HOPE, *supra* note 30, at 39; DeFranco, *supra* note 14, at 22.

by making race a factor in admissions,³⁷ and ROTC programs and scholarships were established at historically black colleges.³⁸ The services began to require “minority representation on all officer selection boards.”³⁹

These policies established the basic framework for race-conscious affirmative action in the military that continues today.⁴⁰ Such measures helped the military rebuild its morale and reputation during the 1980s and, by the time of Gulf War I in 1991, the military was led by a black general, Joint Chiefs Chairman General Colin Powell, and racial incidents were unheard of.⁴¹

By 2013, however, it became clear that the military was living through a new and different “time of troubles.” Pervasive gender discrimination and sexual assault and harassment were not leading to riots or shutting down aircraft carriers, but they were causing great damage nonetheless. Army Chief of Staff General Ray Odierno testified to Congress that sexual assault and harassment were “like a cancer within the force—a cancer that left untreated will destroy the fabric of our force.”⁴² Indeed, sexual assault undermines effectiveness: victims’ trust in the military and productivity are damaged, and talented female recruits are hesitant to join for fear of becoming victims.⁴³

Sexual assault and harassment were publicly recognized as serious problems for the military beginning with the Tailhook Scandal in 1991, when ninety service members alleged they were sexually harassed or

37. Becton Brief, *supra* note 16, at 18–24 (discussing the identity-conscious policies—including targets and goals—used to ensure opportunities for women and minorities at the service academies); *see id.* at 25–27 (discussing the same policies for ROTC programs); *see also* OFFICE OF DEPUTY ASSISTANT SEC’Y OF DEF. FOR EQUAL OPPORTUNITY & SAFETY POLICY, U.S. DEP’T OF DEF., BLACK AMERICANS IN DEFENSE OF OUR NATION 44 (1985) (“The Department of Defense Equal Opportunity Program . . . gave commanders authority to deny on-base access to any organizations . . . that did not practice equal opportunity . . . authorized commanders to impose sanctions when discriminatory treatment toward military members . . . was proven because of race, color, ethnic group or national origin.”).

38. FONER, *supra* note 14, at 240.

39. *Id.* at 237.

40. *See* Robert Knowles & Rachel E. VanLandingham, *Affirmative Sir! (And Ma’am): The U.S. Military Needs Affirmative Action Now More Than Ever*, NEW REPUBLIC, June 24, 2013, <http://www.newrepublic.com/article/113603/affirmative-action-us-military-still-essential>.

41. *See infra* notes 206–08 and accompanying text.

42. Odierno, *supra* note 11; *see* U.S. COMM’N ON CIVIL RIGHTS, SEXUAL ASSAULT IN THE MILITARY 161 (Sept. 2013) [hereinafter CIVIL RIGHTS COMM’N REPORT], *available at* http://www.usccr.gov/pubs/09242013_Statutory_Enforcement_Report_Sexual_Assault_in_the_Military.pdf.

43. *See* CIVIL RIGHTS COMM’N REPORT, *supra* note 42, at 3; Michael Martinez, *Daughters and Moms Now Consider Rape Before Applying to Military*, CNN (June 17, 2013, 6:47 AM), <http://www.cnn.com/2013/06/16/us/military-recruitment/>.

assaulted during a Las Vegas convention.⁴⁴ In the years since, recurring sexual assault scandals—at Aberdeen Proving Ground in 1996;⁴⁵ at the Air Force Academy in 2003;⁴⁶ and at Lackland Air Force Base in 2013⁴⁷—made clear that the military had failed to respond adequately.

Indeed, in 2013, the level of sexual assault and harassment experienced by both men and women remained high.⁴⁸ The number of reported sexual assaults increased from 1700 in calendar year 2004 to 3374 in fiscal year (“FY”) 2012, although this change may have been due in part to increased reporting.⁴⁹ In an anonymous survey, 6.1% of female and 1.2% of male service members indicated that they experienced some form of sexual assault—as defined by DoD policy—while on active duty during FY 2012.⁵⁰ In the same survey, 23% of women and 4% of men reported experiencing unwanted sexual contact since enlistment.⁵¹ The plight of victims in the military is made worse by an insular military culture that frowns on disruption: victims who reported sexual assaults were frequently retaliated against by their assailants and commanding officers.⁵²

Since the Tailhook Scandal first brought the problem to public attention, the military—often with prodding from Congress—gradually

44. See OFFICE OF THE INSPECTOR GEN., THE TAILHOOK REPORT: THE OFFICIAL INQUIRY INTO THE EVENTS OF TAILHOOK ‘91 (1993).

45. See Art Pine, *Army Reacts Quickly to Sex Harassment Charges*, L.A. TIMES, Nov. 8, 1996, http://articles.latimes.com/1996-11-08/news/mn-62470_1_sexual-harassment.

46. Cathy Booth Thomas/Tucson, *Conduct Unbecoming*, TIME, Mar. 6, 2003, <http://content.time.com/time/magazine/article/0,9171,428045,00.html>.

47. Molly Hennessy-Fiske, *Air Force Defends Handling of Sex Scandal*, L.A. TIMES, Jan. 23, 2013, <http://articles.latimes.com/2013/jan/23/nation/la-na-lackland-hearing-20130124>.

48. Because men far outnumber women in the military, more men than women are sexual assault victims. But the causes of sexual assault against both men and women are rooted in the same toxic military culture that too often associates sexual aggressiveness with combat effectiveness. See *infra* Part III.

49. See 1 DOD FY 2012 ANNUAL REPORT ON SEXUAL ASSAULT, *supra* note 8, at 58–59. The number of reports has increased each year, except for a small decrease in 2007 and 2010. *Id.*

50. DEF. MANPOWER DATA CTR., 2012 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS 21–22, 67 (2013) [hereinafter 2012 DOD GENDER RELATIONS SURVEY], available at http://www.sapr.mil/public/docs/research/2012_Workplace_and_Gender_Relations_Survey_of_Active_Duty_Members-Survey_Note_and_Briefing.pdf. The DoD defines “sexual assault” as “intentional sexual contact characterized by use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent.” U.S. DEP’T OF DEF., DIRECTIVE 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM 18 (Jan. 23, 2012, Incorporating Change 1, Apr. 30, 2013) [hereinafter DOD DIRECTIVE 6495.01], available at <http://www.dtic.mil/whs/directives/corres/pdf/649501p.pdf>.

51. 2012 DOD GENDER RELATIONS SURVEY, *supra* note 50, at 137–38.

52. *Id.* at 149 (noting that 26% of the 33% of women who reported unwanted sexual contact to a military authority experienced a combination of professional retaliation, social retaliation, administrative action, and/or punishments).

implemented a series of reforms aimed at better tracking, preventing, and punishing sexual harassment and assault and assisting victims. In 1994, the DoD established a Victim and Witness Assistance Program to address victims of all crimes.⁵³ In October 2005, the DoD established the Sexual Assault Prevention and Response Office (“SAPRO”), which, although it lacked authority to intervene in sexual assault cases or provide services to victims, “serve[s] as the single point of authority, accountability, and oversight for the sexual assault prevention and response [(“SAPR”)] program.”⁵⁴ Responding to a statutory mandate, the Pentagon required all new and prospective commanders to attend SAPR training.⁵⁵ The bulk of military personnel—including nearly every member of the Air Force—received “bystander intervention training,” which encourages those who observe sexual harassment to intervene safely.⁵⁶

The Pentagon also created new resources and procedures to protect victims, especially from retaliation for reporting sexual assaults. Each military installation by 2013 had a Sexual Assault Response Coordinator (“SARC”) who, along with a coordinator on the installation’s Victim Advocates, connects victims with resources and assists them in the reporting process.⁵⁷ Beginning in 2005, victims were granted the right to file “restricted” reports and receive medical care and other support services without naming the perpetrator or triggering an investigation.⁵⁸ In 2011, the Pentagon implemented an expedited transfer policy permitting victims to request an immediate transfer from a unit or base and appeal a denial to the first general or flag officer in the chain of command.⁵⁹ After initial complaints that expedited transfer

53. CIVIL RIGHTS COMM’N REPORT, *supra* note 42, at 17.

54. *Id.*

55. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 574, 126 Stat. 1632, 1756–57 (codified at 10 U.S.C. § 1781(a)(2012)). DoD policy provides that Commanders should meet with the unit’s Sexual Assault Response Coordinator (“SARC”) for one-on-one training within thirty days of taking command. U.S. DEP’T OF DEF., INSTRUCTION 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES 32 (Mar. 28, 2013), *available at* <http://www.afpc.af.mil/shared/media/document/AFD-130416-049.pdf>.

56. *See* CIVIL RIGHTS COMM’N REPORT, *supra* note 42, at 12.

57. U.S. DEP’T OF DEF., *supra* note 8, at 72.

58. DOD DIRECTIVE 6495.01, *supra* note 50, at 4.

59. CIVIL RIGHTS COMM’N REPORT, *supra* note 42, at 19–20; U.S. DEP’T OF DEF., DIRECTIVE TYPE MEMORANDUM 11-063, EXPEDITED TRANSFER OF MILITARY SERVICE MEMBERS WHO FILE UNRESTRICTED REPORTS OF SEXUAL ASSAULT (Dec. 16, 2011, Incorporating Change 2, Dec. 7, 2012), *available at* <http://www.afpc.af.mil/shared/media/document/AFD-130416-051.pdf> (note: Directive-Type Memorandum 11-063 was incorporated into reissued DoDI 6495.02 published on March 28, 2013).

requests were frequently refused, Congress required the Pentagon to track and publish data on such requests.⁶⁰

Like the Defense Department's 1970s measures aimed at improving race relations in the military through better education and communication, these reforms were badly needed. However, also like the 1970s measures before them, these reforms could not be enough because they could not in themselves change the military culture that fostered an environment hostile to equality.⁶¹ Only real progress toward integration could change that culture. And meaningful integration, the military had discovered by the 1970s, was only possible through affirmative action.

By 2013, however, affirmative action was living through its own "time of troubles." The most rigorous forms of affirmative action—those centered on hard quotas, for example—had never been especially popular to begin with, and by 1994, a conservative Congress and Supreme Court were looking on affirmative action in general with strong suspicion.⁶² The Court sharply limited the permissible scope of such programs in *City of Richmond v. Croson* in 1989⁶³ and *Adarand Constructors v. Peña* in 1995.⁶⁴ In *Croson*, the Court held that programs providing for numerical racial preferences in the form of set-asides for minority businesses violated the Equal Protection Clause of the Fourteenth Amendment when they were not rooted in efforts to address specific, present discrimination, and narrowly tailored to address that discrimination.⁶⁵ *Adarand* held that this same strict scrutiny would be applied to federal employment programs.⁶⁶ The doctrinal change brought by these decisions prompted President Clinton

60. See National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 582, 125 Stat. 1298, 1432 (codified at 10 U.S.C. § 673); CIVIL RIGHTS COMM'N REPORT, *supra* note 42, at 20.

61. See *supra* notes 33–40 and accompanying text.

62. See *infra* Part IV.B; see also Kathleen M. Sullivan, *City of Richmond v. J.A. Croson Co.: The Backlash Against Affirmative Action*, 64 TUL. L. REV. 1609 (1990) (“[A] societal backlash has set in against affirmative action. And the *Croson* decision suggests that the backlash has touched the Supreme Court.”). For recent critiques of affirmative action's effectiveness, see, e.g., TANNER COLBY, *SOME OF MY BEST FRIENDS ARE BLACK: THE STRANGE CASE OF INTEGRATION IN AMERICA* (2012); RICHARD D. KAHLENBERG & HALLEY POTTER, *A BETTER AFFIRMATIVE ACTION* (Oct. 3, 2012), available at <http://tcf.org/assets/downloads/tcf-abaa.pdf>. For an argument that “affirmative action” should be defined to include the vast array of benefits that have flowed to white males through government programs, see generally IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE* (2006).

63. 488 U.S. 469 (1989).

64. 515 U.S. 200 (1995).

65. 488 U.S. at 509–11.

66. 515 U.S. at 237–38.

to evaluate the federal government's affirmative action programs and to respond with his "mend it, don't end it," approach.⁶⁷

By the time the Supreme Court again addressed affirmative action in 2003—this time in public education—with *Grutter v. Bollinger*⁶⁸ and *Gratz v. Bollinger*,⁶⁹ many observers predicted the end of affirmative action. As it turned out, they were wrong—thanks largely to the influence of the military.

In these cases, plaintiffs were denied admission to the University of Michigan—in *Grutter* to the law school, and in *Gratz* to the undergraduate school.⁷⁰ In both cases, the Court concluded that the university, through its affirmative action policies in admissions programs, had established racial classifications requiring strict scrutiny.⁷¹ However, the Court reached different conclusions in each case about whether the programs were narrowly tailored to achieve a compelling state interest. In *Gratz*, the Court declared unconstitutional the undergraduate school's allocation of additional points to racial minorities in the admissions process.⁷² In contrast, the *Grutter* Court upheld the law school's admissions policy, which differed from the undergraduate policy because it did not assign points based on race, but instead used race as one "individualized" factor among many.⁷³

In upholding the law school policy, the Court recognized that the state had a "compelling interest in obtaining the educational benefits that flow from a diverse student body," which the policy was narrowly tailored to achieve through the admission of a "critical mass" of minority students.⁷⁴ The Court deferred to a significant degree to the educational expertise of the law school. The level of diversity sought through the admissions policy, the Court agreed, was important for developing "cross-racial understanding," breaking down stereotypes,

67. Barnes, *supra* note 26, at 748; *see infra* notes 117–18 and accompanying text. For a thorough discussion of affirmative action and an explication of the "mend it, don't end it" approach, see generally CHRISTOPHER EDLEY, NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES (1999).

68. 539 U.S. 306 (2003).

69. 539 U.S. 244 (2003).

70. *See Grutter*, 539 U.S. at 306; *Gratz*, 539 U.S. at 244.

71. *See Grutter*, 539 U.S. at 326 ("We have held that all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny."); *see also Gratz*, 539 U.S. at 270 ("To withstand our strict scrutiny analysis, respondents must demonstrate that the University's use of race in its current admissions program employs 'narrowly tailored measures that further compelling governmental interests.'" (citation omitted)).

72. *Gratz*, 539 U.S. at 275.

73. *Grutter*, 539 U.S. at 334.

74. *Id.* at 328, 334.

and for making classroom discussion livelier, more entertaining, and more enlightening.⁷⁵ Diversity also played a crucial role in preparing students to be professionals in “an increasingly diverse workforce and society.”⁷⁶

The military’s use of affirmative action played a starring role in the Court’s decision to recognize diversity as a compelling state interest in *Grutter*. A consolidated amicus brief filed by officers, senators, and former defense secretaries offered historical analysis and data to tell the story of the military’s successful integration through the careful use of affirmative action.⁷⁷ The amici warned that these accomplishments would not have been possible, and could be threatened, if the military were not able to rely on some limited race-conscious policies.⁷⁸ Legal scholars called the brief a “showstopper”⁷⁹ that was “delivered, like a precision-guided munition” in a post 9/11, wartime environment “certain to maximize its effect.”⁸⁰

Justice O’Connor, writing for the majority, drew heavily from the consolidated brief: “[H]igh-ranking retired officers and civilian leaders of the United States military assert that, ‘[b]ased on [their] decades of experience,’ a ‘highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.’”⁸¹ The majority agreed that, because the service academies and ROTC programs were important sources for filling the officer corps, “limited race-conscious recruiting and admissions policies” were necessary in those contexts.⁸² The majority also agreed with amici that other elite professions, including the legal profession, must prioritize diversity for similar reasons. “It requires only a small step from this analysis,” Justice O’Connor wrote, “to conclude that our country’s other most selective institutions must

75. *Id.* at 330.

76. *Id.*

77. See Becton Brief, *supra* note 16, at 5.

78. *Id.* The military’s gender-conscious policies were not much discussed, in part because the university was not using race in the same way as gender in its admissions policies, but also perhaps because the military had fallen well short with respect to gender integration.

79. James M. O’Neill, *Supreme Court Experts Say Affirmative Action Looks Safe, Justices Focus on Military Briefs*, COLUM. CHRON., Apr. 14, 2003, http://digitalcommons.colum.edu/cadc_chronicle/567/ (quoting Columbia Law Professor Samuel Issacharoff who called the military brief “a showstopper” that “impressed on the court the significance not only of the legal principles at stake but the broader social impact of a poorly thought-out decision”).

80. Thomas H. Lee, *University Dons and Warrior Chieftains: Two Concepts of Diversity*, 72 FORDHAM L. REV. 2301, 2313 (2004).

81. *Grutter*, 539 U.S. at 306, 331 (quoting Becton Brief, *supra* note 16, at 27).

82. *Id.*

remain both diverse and selective.”⁸³

For evaluating the effectiveness of the military’s argument and its institutional clout with the Court, it is particularly telling that the dissenters in *Grutter*, despite their sharp disagreement with the majority about diversity as a compelling state interest and the use of race-conscious admissions policies to further it—had nothing to say, either in oral argument or in their opinions, about the military’s affirmative action programs.⁸⁴

Nonetheless, *Grutter* was an outlier in a decades-long trend by the Court in steadily narrowing the ground upon which race-conscious measures could be justified under either the Equal Protection Clauses or Title VII.⁸⁵ Concurrently with *Grutter* that Court had, after all, invalidated the University of Michigan’s policy of awarding additional points to racial minorities in calculating undergraduate admissions scores.⁸⁶ In 2007, in *Parents Involved in Community Schools v. Seattle School District No. 1*,⁸⁷ the Court struck down two school districts’ race-based enrollment targets for student assignments, holding that they failed strict scrutiny because the districts’ professed interest was not a compelling one and, in any event, their plans were not narrowly tailored to serve that interest.⁸⁸ The majority specifically limited the basis for *Grutter*’s diversity rationale to the context of higher education.⁸⁹ Two years later, in *Ricci v. DeStefano*,⁹⁰ the Court held that New Haven, Connecticut’s decision to ignore the results of firefighter promotion test constituted prohibited reverse discrimination under Title VII.⁹¹ The city’s concern that using the test would exclude almost all minority candidates and subject it to disparate impact liability was not sufficient, the Court held, to justify race-conscious measures.⁹²

These decisions, like *Adarand* and *Crosby* before them, further

83. *Id.*

84. Leach, *supra* note 28, at 1141; see Transcript of Oral Argument at 12, 19–22, *Grutter*, 539 U.S. 244 (No. 02-241), available at http://www.supremecourt.us/oral_arguments/argument_transcripts/02-241.pdf.

85. See generally Levinson, *supra* note 19.

86. 539 U.S. 244, 244, 275 (2003).

87. 551 U.S. 701 (2007).

88. *Id.* at 726, 732.

89. *Id.* at 724–25. In a concurring opinion, Justice Kennedy acknowledged that “[a] compelling interest exists in avoiding racial isolation,” and that school districts should continue “the important work of bringing together students of different racial, ethnic, and economic backgrounds.” *Id.* at 797–98 (Kennedy, J., concurring).

90. 557 U.S. 557 (2009).

91. *Id.* at 562–64.

92. *Id.*

marked the dominance of the “anticlassification” paradigm of the Equal Protection Clauses⁹³—the principle that “the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.”⁹⁴ Chief Justice Roberts most memorably expressed the strong version of this principle when he declared that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁹⁵ It is a view that is, obviously, quite hostile to race-conscious forms of affirmative action.⁹⁶

Moreover, the Court had cautioned in *Grutter* itself that a narrowly tailored use of race-conscious admissions criteria to achieve diversity must have a limited lifespan.⁹⁷ In the majority opinion, Justice O’Connor took “the Law School at its word” that it was searching for “a race-neutral admissions formula” that would achieve the same goals and would “terminate its race-conscious admissions program as soon as practicable.”⁹⁸ Given the increase in minority applicants with high grades and test scores over the previous decades, the Court expected that, by 2028, the use of racial preferences would “no longer be necessary to further the interest approved today.”⁹⁹

The dissent mocked the majority for this prediction and, just ten years after *Grutter*, the Court again agreed to address the use of race-conscious admissions policies in state higher education in *Fisher v. University of Texas at Austin*.¹⁰⁰ Sensing possible defeat, the military again rose to the defense of affirmative action through a consolidated amicus brief making virtually the same arguments it had made with so much success in *Grutter*.¹⁰¹ With Justice O’Connor by then replaced by the more-conservative Justice Samuel Alito, there was some doubt as to whether the core holding of *Grutter* would be preserved. But it was.

The Court did not revisit *Grutter*’s holding that colleges’ and

93. See Jack M. Balkin, *Plessy, Brown, and Grutter: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1711 (2005); see also *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); Levinson, *supra* note 19, at 36.

94. *Parents Involved*, 551 U.S. at 730 (plurality opinion) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)).

95. *Id.* at 748.

96. The anti-classification paradigm is also, on its face, hostile to benign gender-conscious policies as well. Because the Court has not addressed such policies recently, however, it is difficult to determine whether the majority would be as hostile to gender-conscious policies as it has been recently to race-conscious ones. See *infra* notes 207–55 and accompanying text.

97. *Grutter v. Bollinger*, 359 U.S. 306, 342 (2003).

98. *Id.* at 343.

99. *Id.*

100. 133 S. Ct. 2411 (2013).

101. Brief of LT. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents, *Fisher*, 133 S. Ct. 2411 (No. 11-345), 2012 WL 3578590 [hereinafter *Fisher Military Brief*].

universities' interest in a diverse student body was a compelling one. In a 7–1 decision, however, the Court reversed and remanded, concluding that the Fifth Circuit had not applied the correct standard in deciding whether the use of race was necessary to achieve that compelling interest.¹⁰² Justice Kennedy's majority opinion admonished universities that they "must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity. If a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense, then the university may not consider race."¹⁰³ The Court softened this requirement a bit by adding that colleges and universities were not required to exhaust "every conceivable race neutral alternative" before turning to race-conscious policies.¹⁰⁴

The most critical part of the Court's opinion, however, concerned the degree of deference owed to the colleges and universities. And on that subject, the Court made clear its deep skepticism of affirmative action. Although the Court would continue to give deference to the university's judgment that diversity was necessary to its educational mission, the university would receive "no deference" on whether its chosen means were "narrowly tailored to that goal."¹⁰⁵

After *Fisher*, affirmative action supporters "breathed a huge sigh of relief that the Court did not change the law."¹⁰⁶ But there was no mistaking the Court's "tougher, less sympathetic tone" toward those programs in Justice Kennedy's opinion.¹⁰⁷ And the Court, in its skepticism, one could argue, was merely reflecting the views of a majority of Americans. Although a wide array of public and private institutions, state governments, and prominent individuals had expressed their support for affirmative action as amici in *Fisher*, they represented elite opinion only. A 2013 *Washington Post*-ABC News poll found that 76% of Americans opposed race-conscious admissions policies in universities.¹⁰⁸ As for all affirmative action programs, 45% supported them, but "the same number said they have gone too far and

102. *Fisher*, 133 S. Ct. at 2411, 2419.

103. *Id.* at 2420.

104. *Id.*

105. *Id.*

106. Erwin Chemerinsky, *The Court Affects Each of Us: The Supreme Court Term in Review*, 16 GREEN BAG 2D 361, 362 (2013).

107. *Id.* at 364.

108. Scott Clement, *Wide Majority Opposes Race-Based College Admissions Programs, Post-ABC Poll Finds*, WASH. POST, June 11, 2013, <http://secure.isidewith.com/news/article/wide-majority-opposes-race-based-college-admissions-programs-po>.

now discriminate against whites, marking the first time in more than two decades that supporters did not outnumber opponents.”¹⁰⁹

The current troubles facing the military and affirmative action are quite different, of course. While affirmative action is relatively unpopular, the military still tops the list of the institutions Americans hold in high regard.¹¹⁰ But this difference is exactly why the two need each other. The military is best positioned to sell the American people and a skeptical Supreme Court on affirmative action by drawing on its own history, which I discuss in Part II. At the same time, affirmative action can be used by the military to better address its own crisis through transforming its culture in a way that helps it accomplish its missions more effectively. I discuss the need for this transformation in Part III.

II. LESSONS FROM THE MILITARY’S INTEGRATION SUCCESS STORY: THE STAGES OF INTEGRATION

Despite its current integration failures, the military does have an integration success story, and it is a powerful one. The military transformed itself in a short period of time from a racially segregated institution hostile to equality to a model of successful integration. This story is compelling because Americans tend to believe that merit alone should determine one’s success,¹¹¹ and it was easy to think that the military, more than anywhere else, was a place where merit was most recognized. War surely had the power to strip away prejudices and help one see the true value of an individual’s contribution.

And this merit-focused narrative is, in part, true. The irony is that the military’s past integration success, especially with respect to race, owed a great deal to the same institutional culture that currently inhibits full gender equality. Tradition and the requirements of maintaining effective armed forces created a unique military culture insulated from the rest of American society and prioritizing different values: cohesiveness and hierarchy have always been much more important in

109. *Id.*

110. See *Public Esteem for Military Still High*, PEW RES. RELIGION & PUB. LIFE PROJECT (July 11, 2013), <http://www.pewforum.org/2013/07/11/public-esteem-for-military-still-high/> (finding that “Americans continue to hold the military in high regard, with more than three-quarters of U.S. adults (78%) saying that members of the armed services contribute ‘a lot’ to society’s well-being”).

111. See FAYE J. CROSBY, *AFFIRMATIVE ACTION IS DEAD; LONG LIVE AFFIRMATIVE ACTION* 27 (2004) (asserting that Americans are heavily “invested in the concepts of merit and individual reward for merit”).

military institutions than in civilian ones.¹¹² The military still often reflected—and even amplified—the racist and sexist values of the times but, for largely pragmatic reasons, it simultaneously engaged in the regular practice of utilizing marginalized groups.¹¹³ Military service offered blacks—and later, other racial minorities and, to a much lesser extent, women—opportunities to gain skills and prestige that were available to them in few other places. These groups, in turn, leveraged, with mixed success, their military service opportunities in the effort to drive broader social change. It was more difficult to deny employment opportunities to minorities who had shed blood for the nation in battle.

The military had been touted as an integration success story as early as the post-World War II Era.¹¹⁴ But the story began to take hold in the early 1990s, after Gulf War I, where a racially harmonious armed forces, led by a charismatic black general, defeated the enemy easily and helped ease lingering humiliation from the defeat in Vietnam.¹¹⁵ The early 1990s also happened to be a particularly difficult time for affirmative action.¹¹⁶ In defending affirmative action as policy, President Clinton relied heavily on the popularity of the military's programs and chose to emphasize its use of preferences in education and training:

The model used by the military, the army in particular . . . that model has been especially successful because it emphasizes education and training, ensuring that it has a wide pool of qualified candidates for every level of promotion. That approach has given us the most racially diverse and the best qualified military in history. There are more opportunities for women and minorities there than ever before.¹¹⁷

112. See BRUCE FLEMING, BRIDGING THE MILITARY-CIVILIAN DIVIDE: WHAT EACH SIDE MUST KNOW ABOUT THE OTHER—AND ABOUT ITSELF 37–40 (2010) (observing that the military prizes self-sacrifice, control, insularity, and loyalty to commanders over self-determination and openness).

113. Butler, *supra* note 14, at 197 (“The military has a history of utilizing groups excluded by the larger society.”).

114. See Karst, *supra* note 27, at 518–19. Early research on race in the military concluded that integrated units had more positive attitudes than segregated units. See, e.g., 1 SAMUEL STOUFFER ET AL., THE AMERICAN SOLDIER: ADJUSTMENT DURING ARMY LIFE 566–80, 597–99 (1949).

115. See Barnes, *supra* note 26, at 702.

116. The Supreme Court—in *City of Richmond v. J.A. Croson*, and *Adarand Constructors v. Peña*—imposed strict scrutiny on government affirmative action programs and held that past government discrimination could not alone justify racial preferences in the employment context. See *Adarand Constructors v. Peña*, 515 U.S. 200, 218, 220 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 472, 485 (1989). During the 1990s, a Republican Congress considered, but did not enact, legislation eliminating affirmative action in the federal government.

117. William Clinton, President U.S., Address at the National Archives on Affirmative

Clinton's education-centered military "integration success story"¹¹⁸ fit well with American's desire to believe that success should be tied to merit and opportunity, rather than quotas or other racial or gender preferences. This education/merit approach prefigured the strategy relied upon by defenders of affirmative action several years later, when the Supreme Court considered whether preferences could lawfully be used by civilian educational institutions.

This education/merit narrative about the military's integration success has a great deal of truth to it, but it is not by any means the whole story. Expanding educational opportunities, to be sure, especially at the service academies and ROTC programs, ultimately contributed a great deal to the integration successes. But the military's affirmative action programs went well beyond education, and they would not have been nearly as successful if the military had not taken more comprehensive steps such as tracking minority service members throughout their careers and setting well-defined integration targets.

In addition, the education-centered narrative left out much of the painful process that led to greater integration. In American history, with respect to each excluded group—racial minorities, homosexuals and by now, only in part, women as well—the struggle for military integration unfolded in a similar way. In the beginning, the military began to soften its initial hard line against integration when forced to do so by the exigencies of war: total exclusions were relaxed or ignored during wartime but restored in peacetime. At this first phase, minorities could participate only in segregated roles. At the second phase, the excluded minorities sought formal integration, but met stiff initial resistance as the status quo's defenders made a set of arguments that would be repeated each time a new excluded group sought greater opportunity to serve: most prominently, defenders argued that integration would harm unit cohesion and therefore, combat effectiveness.¹¹⁹ At the third phase, these objections were eventually overcome when the critics fears proved baseless and the moral force of the minorities' arguments—

Actions Programs: Mend it Don't End it 7 (July 1995), *available at* <http://web.utk.edu/~mfitzge1/docs/374/MDE1995.pdf> (pointing out, as evidence of affirmative action's success, the "over fifty generals and admirals who are Hispanic, Asian-, or African-American"); *see Barnes, supra* note 26, at 703.

118. *See Barnes, supra* note 26, at 695 (describing the scholarly and elite consensus about military affirmative action as the "integration success story," and observing that it was not completely accurate).

119. *See* Richard J. Bailey, Jr., *Integration in the Ranks: Explaining the Effects of Social Pressure and Attitudinal Change on U.S. Military Policy* (Aug. 25, 2006) (unpublished Ph.D. dissertation, Georgetown University), *available at* <http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA460792>.

reinforced with blood—could no longer be ignored. Only after having proved they could fight effectively alongside non-minorities were the excluded groups able to persuade the military to make integration permanent. The fourth, final, but often-overlooked phase of integration was the effort by minorities to achieve full equality, frustrated by the entrenchment of oft-unspoken biases. At this phase, the movement toward full integration only really began when the military, compelled by crisis, made serious, top-down efforts to reconstitute its ranks.

Understanding the full history of the military's struggles with affirmative action is important for addressing its current problems regarding both race and gender inclusion. The military appears to lack awareness of the parallels between the past and present times of crisis. Until its leaders realize that it remains in this last, fourth, phase, of integration, especially with respect to gender, the military is unlikely to take the necessary steps to solve the crisis.

A. Limited, Temporary Participation

From the Revolutionary War to the twenty-first century wars in Afghanistan and Iraq, men and women of all races have served in the United States Armed Forces.¹²⁰ But the experience of African-Americans, in particular, is representative of the long and painful struggle minorities would have to wage for equality within the military. In the beginning, their goal was simply to participate in a meaningful way: blacks agitated to join the fight in service of their country in combat roles, rather than merely conducting menial tasks. This demand was accepted by leadership when the military required the manpower, but was just as often ignored, particularly in peacetime.¹²¹ Once the doors to regular participation in combat roles were finally thrust open, blacks faced a tortuous road toward rough parity with whites in rank and service roles—and indeed, equal respect for their sacrifices.

Until World War II, black servicemembers, when they were permitted to participate in combat, were almost always organized into all-black “Jim Crow units” led by white officers.¹²² As World War II

120. See generally LANNING, *supra* note 14, at 292 (noting that blacks have served in every war in American history).

121. See DeFranco, *supra* note 14, at 16 (“The history of black involvement in the U.S. military is an inconsistent pattern of exclusion during times of peace, and expedient acceptance during mobilizations for wars.” (citing FONER, *supra* note 14, at 186)); see also Leach, *supra* note 28, at 1110–41 (discussing the history of black military service). See generally NALTY, *supra* note 14 (describing the treatment of black soldiers from colonial times through the Vietnam War).

122. DeFranco, *supra* note 14, at 5; see Butler, *supra* note 14, at 200 (noting that by the end of World War I, some blacks had served in integrated units, and fifteen blacks had attained the rank of general). After that war ended and the size of the armed forces shrank considerably, however,

and large-scale conscription began, black civil rights organizations saw an opportunity to advance the struggle for equality and integration through military service.¹²³ They persuaded President Franklin D. Roosevelt (“FDR”), who counted on the African-American voting bloc for re-election in 1940, to expand combat roles for blacks.¹²⁴ The 1940 conscription bill contained anti-discriminatory language, although it did not prohibit segregated units.¹²⁵

That same year, FDR instigated what amounted to the first affirmative action program for the military, however protean and ineffectual. The 1940 Selective Training and Service Act was only a policy statement, but it required (1) that the proportion of blacks in the military reflect the proportion in the U.S. population; (2) that black units be established in each service branch; and (3) that blacks be permitted to attend officer candidate school.¹²⁶ The proportionality goal, while merely aspirational, was the first quota system established for the armed forces. FDR also issued an executive order prohibiting racial discrimination in hiring by defense contractors, although it appeared to lack an enforcement mechanism.¹²⁷

These measures were a start, but they drove only limited change. Of the roughly 900,000 blacks who served in World War II, almost all were in segregated units.¹²⁸ Only 150,000 were in combat units, while the rest were assigned to support units. A mere 5073 blacks served as commissioned officers.¹²⁹ What is worse, in a pattern that would recur in the following decades, integration was accompanied by violence against black servicemen.¹³⁰

Nonetheless, in a pattern that would also recur in the following decades, war brought pressure for progress toward integration. Near the war’s end—at the Battle of the Bulge—Eisenhower, seeking greater

blacks suffered the brunt of force reductions and were separated from the military in much greater numbers than whites.

123. See DeFranco, *supra* note 14, at 15.

124. See *id.* at 16.

125. See FONER, *supra* note 14, at 136; DeFranco, *supra* note 14, at 15. For a discussion of the role African-American soldiers played in the military during the World Wars, see Ambrose, *supra* note 14; see also BINKIN ET AL., *supra* note 14.

126. DeFranco, *supra* note 14, at 16; see BINKIN ET AL., *supra* note 14, at 18–19.

127. DeFranco, *supra* note 14, at 74; see FREDERICK C. MOSHER, DEMOCRACY AND THE PUBLIC SERVICE 78–84 (1982).

128. Butler, *supra* note 14, at 201.

129. Ambrose, *supra* note 14, at 186.

130. See RICHARD M. DALFUME, DESEGREGATION OF THE U.S. ARMED FORCES 73–74 (1969) (discussing the killing of a black soldier at Fort Bragg, North Carolina by a white military police officer); HOPE, *supra* note 30, at 24–25.

manpower, approved the use of 100,000 blacks with infantry training and had them assigned to organized, veteran divisions, integrating them with white companies in France, Belgium, and Germany.¹³¹ Commanders praised the performance of the black soldiers.¹³² A 1945 Army report concluded that black soldiers performed more effectively when integrated.¹³³ The argument that segregation was required for unit cohesion and mission success began slowly to unravel.

B. The Struggle for Formal, But Limited, Peacetime Integration

In 1948, black leaders again pressured a democratic president—this time Harry Truman, and this time to fully integrate the armed forces.¹³⁴ Like FDR before him, Truman would rely on support from African-American voters for election.¹³⁵ After frank discussions with African-American leaders such as A. Philip Randolph and Rev. Grant Reynolds, director of the Committee Against Jim Crow in the Military Service and Training, both of whom threatened to lead a massive campaign of civil disobedience, Truman took action.¹³⁶

On July 26, 1948, Truman issued an executive order requiring “equality of treatment and opportunity for all persons in the armed forces without regard to race, color, religion, or national origin” and that promotions be based entirely upon merit and fitness.¹³⁷ At the same time, he established the President’s Committee on Equality of Treatment and Opportunity (the “Fahey Committee”), headed by Charles H. Fahey, who would oversee implementation of the new policy by the service secretaries.¹³⁸

Although Truman’s order allowed for “due regard to the time required to effectuate the necessary changes without impairing efficiency or morale,”¹³⁹ resistance to integration was initially widespread among the military leadership, which sought to interpret the order as permitting “separate but equal” units.¹⁴⁰ Many high-ranking military leaders, including General Dwight Eisenhower, warned that integration would harm military effectiveness by provoking racial

131. DeFranco, *supra* note 14, at 17.

132. BINKIN ET AL., *supra* note 14, at 21.

133. FONER, *supra* note 14, at 177; Butler, *supra* note 14, at 201.

134. DeFranco, *supra* note 14, at 18.

135. *Id.*

136. Ambrose, *supra* note 14, at 190; DeFranco, *supra* note 14, at 18.

137. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

138. DeFranco, *supra* note 14, at 18; *see also* BINKIN ET. AL., *supra* note 14, at 26.

139. 13 Fed. Reg. at 4313.

140. DeFranco, *supra* note 14, at 74.

animus among white servicemembers and undermining morale.¹⁴¹ Similar arguments were made during the 1990s by some military leaders arguing against permitting gays and lesbians to serve openly.¹⁴²

However, Truman enjoyed the support of the key civilian leadership, and some military leaders as well, in his push for desegregation.¹⁴³ Newly appointed Defense Secretary Louis B. Johnson concluded that Truman's order required desegregation, and he ordered the services to submit integration plans.¹⁴⁴ Reluctant military leaders slowly relented to the principle of desegregation.

Nonetheless, progress was grudging, particularly in the Army, the service branch where resistance was highest.¹⁴⁵ The Army complained that blacks lacked proper "education required for many of the Army's occupational specialties."¹⁴⁶ Apparently sharing the concern that desegregation proceed gradually, the Fahey Committee suggested the Army restrain the integration of blacks by adjusting the minimum qualification score on the General Classification Tests used for determining admission.¹⁴⁷ Using this method, the Army set a goal of 10% black members in each unit.¹⁴⁸ The other services were also permitted to limit the admission of black servicemembers using similar methods.¹⁴⁹

141. See Barnes, *supra* note 26, at 649 n.3 (describing sources regarding resistance among military leadership to racial integration). Eisenhower feared that, "by passing a lot of laws to force someone to like someone, we will get into trouble . . . [because racism is an] incontrovertible fact." *Id.* at 694 n.3; see Peter J. Gomes, *Going Back in the Military Closet: Generals Carried the Day by Harnessing Fears of Change*, MINNEAPOLIS/ST. PAUL STAR TRIB., June 1, 1993, at 13A (discussing the belief among military leadership that integration would insult southern whites, who would not accept blacks as equals); see also Karst, *supra* note 27, at 520–21 (referring to military resistance to Truman's policy).

142. RAND Sexual Orientation Study, *supra* note 27, at 235–38.

143. BINKIN ET AL., *supra* note 14, at 27; Barnes, *supra* note 26, at 748 n.3; see also Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 17 (1998) (observing that racial and gender integration in the military depended on civilian initiatives overcoming military objections); RAND Sexual Orientation Study, *supra* note 27, at 166–70 (noting that Truman had the support of important civilian and military personnel, including Secretary of the Navy (and later Secretary of Defense) James Forrestal; Chief of Naval Operations, Admiral Ernest King; the Deputy Chief of Staff for the Air Force, Lt. Gen. Idwal Edwards; and the Secretary of the Air Force, Stuart Symington).

144. DeFranco, *supra* note 14, at 74.

145. *Id.* at 18–19.

146. *Id.* at 19. As Mario Barnes recounts, "[i]n March 1949, the Secretary of the Army testified before Congress that the equality of treatment and opportunity would fail because black troops were less capable than white troops." Barnes, *supra* note 26, at 694 n.3.

147. DeFranco, *supra* note 14, at 19 (citing MORRIS J. MACGREGOR & BERNARD C. NALTY, *BLACKS IN THE U.S. ARMED FORCES: BASIC DOCUMENTS* 254 (1981)).

148. *Id.* (citing MACGREGOR & NALTY, *supra* note 147, at 254).

149. BINKIN ET AL., *supra* note 14, at 27; Barnes, *supra* note 26, at 701.

Once again, however, military exigencies intervened to force progress as the United States remained mired in the Korean War and faced serious personnel shortages. The difficulty of maintaining segregated units in the face of such shortages had been on Truman's mind as he issued the desegregation order in 1948.¹⁵⁰ In 1950, the Fahey Committee recommended full integration as a solution.¹⁵¹ A 1951 study of the limited integration that took place in Korea concluded that it enhanced effectiveness. It advised that "integration should be carried out as soon as operational efficiency permits."¹⁵² Similar studies concluded that integration was more efficient in part because it gave commanders flexibility to assign available personnel to the units in which they were needed most without the burden of maintaining racially segregated units.¹⁵³ Having seen the practical benefits of integration, the days were over when the U.S. military would utilize racial minorities only in wartime and only in segregated units.

Although integration continued to progress slowly, it progressed nonetheless, and at an earlier time and at a faster pace than in civilian institutions.¹⁵⁴ The Department of Defense officially announced the abolition of all "Negro units" on October 30, 1954,¹⁵⁵ a few months after the United States Supreme Court declared that segregated schools violated the Fourteenth Amendment's Equal Protection Clause.¹⁵⁶ While de facto segregation persisted in many military units for many more years, the truth remained that the U.S. Armed Forces had begun to

150. See A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 70 (Gerald David Jaynes & Robin M Williams, Jr. eds, 1989) [hereinafter A COMMON DESTINY]; see also Barnes, *supra* note 26, at 748; Diane H. Mazur, *Why Progressives Lost the War When They Lost the Draft*, 32 HOFSTRA L. REV. 533, 586 (2003) ("The military's success, relative to the civilian world, in fostering healthy race relations deserves credit. However, it should also be noted that the military failed to make a moral commitment to better race relations until the need for minority volunteers after the end of the draft made racial inclusiveness a functional imperative, not just a moral imperative."); RAND Sexual Orientation Study, *supra* note 27, at 169 (explaining why Korean War personnel shortages forced the Army to progress toward integration).

151. DeFranco, *supra* note 14, at 19.

152. See *id.* at 20 (quoting H.S. MILTON, JOHNS HOPKINS UNIV., UTILIZATION OF NEGRO MANPOWER IN THE ARMY: REPORT ORO-R-11, at 562 (1958)).

153. The Air Force concluded that integration improved efficiency because "problems of procurement, training, and assignment always associated with racially designated units [were] reduced by an appreciable degree or eliminated entirely." MORRIS J. MACGREGOR, INTEGRATION OF THE ARMED FORCES 1940-1965, at 409 (1980).

154. Hill v. Berkman, 635 F. Supp. 1228, 1237 (E.D.N.Y. 1986) ("Before *Brown v. Board of Education* and in the days of Jim Crow segregation, in the early 1950's, the military instituted relatively successful integration throughout its ranks. This success helped to support national integration policies in later years.").

155. DeFranco, *supra* note 14, at 20.

156. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

lead civilian institutions in racial integration, both in law and in fact.¹⁵⁷ The benefits of integration in the military were reported to the Court during briefing on the *Brown* decision, and the existence of these benefits would continue to strengthen the argument for desegregation in civilian life.¹⁵⁸

The gains were too slow, however. In the 1950s, Black servicemembers suffered continued discrimination, not only with respect to opportunities for positions and promotions within the military, but in everyday life. They faced the same indignities that their civilian counterparts did: they were denied access to barber shops, swimming pools, and officer clubs on bases, and they endured discrimination in housing and schools.¹⁵⁹

The next serious effort to address discrimination came with the Kennedy administration, which in 1962 formed the President's Committee on Equal Opportunity in the Armed Forces ("the Gesell Committee").¹⁶⁰ "The Gesell Committee discovered an unbalanced grade distribution of [B]lacks in the services, segregation (or only token integration) and exclusionary practices in the National Guard and the reserves, and racial discrimination on military installations and in surrounding communities."¹⁶¹ The Committee "considered and rejected an early proposal to provide preferential treatment for blacks to achieve better representation in the leadership ranks."¹⁶² But the problems revealed by the Committee were taken seriously. In 1963, Defense Secretary Robert McNamara issued a directive "requiring commanders to oppose discrimination and promote equal opportunity."¹⁶³

The military's response was modest at first, but the McNamara directive prompted creation of the military's first substantial affirmative action program. Known as "Project 100,000," it sought to increase admission of disadvantaged groups into the military by relaxing test score requirements.¹⁶⁴ By 1969, the program had achieved its goal: 100,000 blacks used it to enter the military, although most were

157. See *supra* notes 111–208 and accompanying text.

158. Research from the late 1940s had concluded that integrated units had more positive attitudes than segregated units. See 1 STOUFFER ET AL., *supra* note 114, at 587–95. This research was brought to the Court's attention in the briefing in *Brown*. See Butler, *supra* note 14, at 198.

159. FONER, *supra* note 14, at 195; DeFranco, *supra* note 14, at 20.

160. BINKIN ET AL., *supra* note 14, at 31–32; DeFranco, *supra* note 14, at 20–21.

161. Barnes, *supra* note 26, at 701 n.33 (alteration in original) (citing BINKIN ET AL., *supra* note 14, at 31–32).

162. Leach, *supra* note 28, at 1111 n.89; see MACGREGOR, *supra* note 153, at 428.

163. DeFranco, *supra* note 14, at 21; see FONER, *supra* note 14, at 202.

164. DeFranco, *supra* note 14, at 21.

assigned to “soft skill” positions that demanded little or no formal training, such as infantry and gun crews.¹⁶⁵ This program was only the beginning, however. As civil rights rose to the forefront of the national political scene during the 1960s, the profound legal reforms changing civilian life would also affect military life.

On July 2, 1964, the same day Congress passed the sweeping Civil Rights Act,¹⁶⁶ the Army toughened the enforcement of equal opportunity mandates through Directive AR 600-21.¹⁶⁷ It assigned each military commander “the responsibility to oppose discriminatory practice affecting his men and their dependents and to foster equal opportunity for them, not only in areas under his immediate control, but also in nearby communities where they may live or gather in off-duty hours.”¹⁶⁸ Placing the burden on unit commanders—the officers lower in the chain of command—for integration and non-discrimination, while holding them to account for failures, would, over time, prove the most effective means of ensuring successful integration of the military.

But the biggest driver of increased representation of minorities—mainly blacks—during the 1960s was the draft system, which tended to provide exemptions for the wealthier, the privileged, and the connected. By contrast, the poorer segments of the population, where racial minorities were more heavily represented, were much more likely to be drafted, “to go into combat arms, be sent to Vietnam, and be killed or wounded.”¹⁶⁹ By the end of the decade, African-Americans would actually be *overrepresented* in the military, particularly in combat units.¹⁷⁰ This new problem only increased with the effective end of the draft and the transition to an all-volunteer military between 1973 and 1975.¹⁷¹ From 1971 to 1974, the proportion of blacks “in the enlisted ranks rose from 14.4 to 19.9% in the Army; from 11.4 to 17.7% in the Marines; from 12.3 to 13.8% in the Air Force; and from 5.4 to 8.1% in the Navy.”¹⁷² The number of enlisted African-Americans in all services increased from 11.4 to 14.9%.¹⁷³ The representation of blacks in the

165. BINKIN ET AL., *supra* note 14, at 34.

166. Civil Rights Act of 1964, Pub. L. No 88-352, 78 Stat. 1241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

167. Butler, *supra* note 14, at 202.

168. PETER G. NORDLIE & JOHN W. SHAW, STRATEGIES FOR IMPROVING RACE RELATIONS: THE ANGLO-AMERICAN EXPERIENCE 73 (1987).

169. DeFranco, *supra* note 14, at 21 (citing BINKIN ET AL., *supra* note 14, at 32).

170. *Id.*

171. *Id.* at 50.

172. Butler, *supra* note 14, at 203.

173. *Id.*

officer ranks, meanwhile, did not even begin to keep pace.¹⁷⁴

The overrepresentation of blacks in combat roles presented two key problems for the military. First, it diminished the effectiveness of the fighting force by fostering racial tensions. And relatedly, it undermined the legitimacy—both internal and external—of the military as an institution.¹⁷⁵ The problem was considered so serious that, for a time, it turned a basic assumption about affirmative action on its head. Some scholars studying the military during the 1970s and 1980s discussed ways in which racial imbalance could be addressed through affirmative action for white middle-class youths!¹⁷⁶

C. Crisis and Comprehensive Reform

These problems had become an acute crisis during the Vietnam War era “time of troubles,” when racial tensions reached a boiling point throughout the services. The military responded with a set of directives establishing the basic structure for affirmative action that is largely still in place in the military today, although these early programs would be expanded upon and augmented by others. The services did not impose quotas as such.¹⁷⁷ But the cohesive and unified nature of military culture, and the tools available for enforcing discipline in the ranks, gave the services tremendous flexibility to meet integration goals that civilian institutions could not draw upon. The military had another advantage that its civilian counterparts lacked—ready access to data. Comprehensive data collection is critical to the success of affirmative action programs. Because military life is a controlled and scrutinized life, the services had a powerful ability to monitor their own progress toward integration and equality. The Defense Equal Opportunity Management Institute today coordinates diversity training and assists the forces with tracking minorities throughout their time in the service—as they are admitted, assigned to occupations and locations, promoted, or separated.¹⁷⁸ This tracking has helped ensure that the

174. *See id.* at 204 (displaying a 1991 U.S. Department of Defense chart, which shows a significant discrepancy in the numbers of African-Americans classified as “enlistees” across the service areas compared to those designated as “officers”).

175. *Id.* at 203 (quoting Morris Janowitz & Charles C. Moskos, *Racial Composition in the All-Volunteer Force*, 1 *ARMED FORCES & SOC'Y* 109, 123 (1974)).

176. *Id.* at 204.

177. DeFranco, *supra* note 14, at 77.

178. Barnes, *supra* note 26, at 701–02 n.38; *see* U.S. DEP'T OF DEF., INSTRUCTION 1350.3, AFFIRMATIVE ACTION AND PLANNING AND ASSESSMENT PROCESS 6–14 (1988), available at <http://www.dtic.mil/whs/directives/corres/pdf/135003p.pdf> (requiring the services to track statistics to report to the Annual Military Equal Opportunity Assessment). Congress required the Secretary of Defense to “carry out an annual survey to measure the state of racial, ethnic, and

services are held accountable for addressing racial (and later, gender) imbalances as key decisions are made with respect to each servicemember.¹⁷⁹

Setting goals for increasing the number of minorities serving in particular occupations slowly began to integrate those positions. Over time, minorities were far less likely to be assigned only to combat roles. But even more important for improving race relations in the military—and therefore, improving the overall morale and effectiveness of the armed forces—were the services’ programs to increase the number of minority officers. The services pursued their own strategies independently, but gradually tended to converge on similar approaches. Service academies increased their enrollment of racial minorities by making race a factor in admissions.¹⁸⁰ The Army, and later the other services, required minority representation on all officer selection boards.¹⁸¹ The Navy began by setting up ROTC programs at two all-black colleges, and other services soon followed. The Navy also reached out to potential officer recruits through Project BOOST (“Broadened Opportunities for Officer Selection and Training”)—a program designed to prepare minorities for college and a career as officers.¹⁸² This program was the precursor for many others.

D. *The Integration Success Story*

These and other programs bore significant fruit in a relatively short period of time. Between 1973 and 1986, blacks grew from 17% to 30% of the Army’s enlisted force.¹⁸³ Black officer representation in the Army, for example, grew from 2.5% in 1973 to 10% in 1986.¹⁸⁴ A significant breakthrough was the appointment in 1977 of Clifford

gender issues and discrimination among members of the Armed Forces serving on active duty.” 10 U.S.C. § 481 (2000). Each service has created its own equal opportunity departments and programs separate from the Defense Equal Opportunity Management Institute. See Barnes, *supra* note 26, at 702 n.38 (“For instance, the Army initiated the Commission of Officer Diversity and Advancement (CODA) to study the underrepresentation of black officers. The Navy has formed the Diversity Directorate within the office of the Chief of Naval Operation, to promulgate the Navy’s policies on diversity.” (citations omitted)).

179. *Id.* at 702.

180. See Becton Brief, *supra* note 16, at 18–24 (discussing the identity-conscious policies—including targets and goals—used to ensure opportunities for women and minorities at the service academies); *id.* at 25–27 (discussing the same policies for ROTC programs); see also OFFICE OF THE SEC’Y OF DEF., BLACK AMERICANS IN DEFENSE OF OUR NATION 140 (1985).

181. FONER, *supra* note 14, at 237.

182. *Id.* at 240.

183. DeFranco, *supra* note 14, at 32.

184. *Id.*

Alexander, a black general, as Secretary of the Army.¹⁸⁵ By 1986, blacks made up 19% of total Department of Defense enlisted forces.¹⁸⁶ In 1974 there were 850 blacks at the highest enlisted grade of E-9, but 2000 at the same grade by 1986.¹⁸⁷ From 1949 to 1986, the percentage of black officers in all services grew from less than 1% to 6.4%.¹⁸⁸

The military's affirmative action programs were considered to be so successful that even the Reagan Administration, which was generally opposed to affirmative action as policy and hostile to such programs in government at large, ultimately did little to alter the trajectory of affirmative action in the military during the 1980s. The principle that the military should be broadly representative of the society it protects, which had animated the 1970s reforms, did come under fire, at least for a time, when the new administration took power. Lawrence Korb, who served as the top personnel official at the Defense Department during the first Reagan Administration, explicitly rejected the principle.¹⁸⁹ Defense Secretary Caspar Weinberger formalized a new policy, stating that equal opportunity goals could be met without preferential treatment. But even Weinberger did not take away the services' flexibility to use race as one factor in making personnel decisions, at least at the unit level.¹⁹⁰ In 1986, the services' affirmative action plans still reflected the representation principle, and indeed they still do today.¹⁹¹ In 1988, the Department of Defense reaffirmed the importance of numerical targets, issuing Directive 1350.2, which required each branch to formulate, maintain, and review affirmative

185. *Id.*

186. *Id.*

187. OFFICE OF THE SEC'Y OF DEF., *supra* note 180, at 49.

188. DeFranco, *supra* note 14, at 32.

189. *Id.* at 89 (citing MARTIN BINKIN, AMERICA'S VOLUNTEER MILITARY: PROGRESS AND PROSPECTS 55 (1984)). Korb was later a proponent of lifting the ban on women in combat roles. See SHEILA NATARAJ KIRBY & HARRY J. THIE, ENLISTED PERSONNEL MANAGEMENT: A HISTORICAL PERSPECTIVE 96 (1996) ("A number of studies of the effects of women in the services have found no conclusive evidence that a high percentage of women reduces readiness." (quoting Lawrence Korb) (internal quotation marks omitted)).

190. DeFranco, *supra* note 14, at 96-97 (observing that, even under the Reagan Administration, each service drafts their affirmative action plan according to their individual needs and the desires of the service heads, with little pressure or guidance from DoD). If the services wanted to give the race of a servicemember considerable weight, they were permitted to do so. See *id.* (citing the U.S. DEP'T OF THE NAVY, OPNAV INSTRUCTION 5354.3A, NAVY AFFIRMATIVE ACTION PLAN 5 (Nov. 4, 1985)).

191. See Rebekah Blowers, *CNO Issues Navy's Diversity Policy*, AM.'S NAVY (Mar. 3, 2008), www.navy.mil/submit/display.asp?story_id=35401 ("Most importantly, the Navy must reflect the face of the nation. When the nation looks at its Navy, it should see itself reflected back." (quoting Chief of Naval Operations Admiral Gary Roughead) (internal quotation marks omitted)).

action plans with “established objectives and milestones.”¹⁹²

Indeed, by the late 1980s and early 1990s, the military’s affirmative action programs were widely praised and held up as a model for successful integration of civilian institutions at all levels. A 1986 study concluded that the military was “probably the most progressive employer of blacks in the nation,” and that “[t]wo decades of equal opportunity initiatives have transformed this once segregated institution into an organization that employs more black executives than any other employer in the nation.”¹⁹³ Scholars praised the military as “contradict[ing] the prevailing race paradigm”;¹⁹⁴ “unmatched in its level of racial integration”;¹⁹⁵ and standing out, “even among governmental agencies, as an organization in which blacks often do better than their white counterparts.”¹⁹⁶ Professor Kenneth Karst articulated what is still the conventional wisdom this way: “No one today claims the services are free from the effects of racism, but on this score it is hard to find any other institution in American society that has done better.”¹⁹⁷

Military sociologist Charles Moskos observed that visitors to military installations will witness racial integration and racial equality that are rarely encountered elsewhere. Whites are routinely commanded by black superiors, and whites and blacks work together in the performance of their military duties, rarely displaying racial animosities.¹⁹⁸ Moskos attributed the special success of racial integration to the military’s unique power to shape behavior through sanctions.¹⁹⁹

The military was also seen as offering a signal contribution to integration in American society at large: it was “the institution offering

192. U.S. DEP’T OF DEF., DIRECTIVE 1350.2 § 4.4 (2003), available at <http://www.dtic.mil/whs/directives/corres/pdf/135002.pdf>.

193. DeFranco, *supra* note 14, at 1, 26–27.

194. CHARLES C. MOSKOS & JOHN SIBLEY BUTLER, ALL THAT WE CAN BE: BLACK LEADERSHIP AND RACIAL INTEGRATION THE ARMY WAY 1–2 (1996).

195. *Id.* at 2.

196. *Id.* at 5–6.

197. Karst, *supra* note 27, at 521; see Barnes, *supra* note 26, at 702–03 (describing the conventional scholarly wisdom). These scholars were quick to add the caveat that the armed forces were far from perfect. In fact, “in 1991, the United States Commission on Civil Rights . . . found that discrimination still existed in the Army . . . based on low promotion rates among blacks and apparent problems in the administration of justice.” LT. COL. ANTHONY D. REYES, STRATEGIC OPTIONS FOR MANAGING DIVERSITY IN THE U.S. ARMY 12 (2006), available at <http://www.deomi.org/DiversityMgmt/documents/DiversityArmy2006.pdf>.

198. Charles C. Moskos, *Success Story: Blacks in the Military*, ATLANTIC ONLINE (May 1986), www.theatlantic.com/past/docs/unbound/flashbks/black/moskos.htm [hereinafter Moskos, *Success Story*].

199. *See id.*

blacks the best vehicle for upward social mobility in our nation.”²⁰⁰ Military service could transform the lives of young African-Americans “who have been isolated from the mainstream of American life” by offering a “‘bridging environment,’ in which the individual acquires new skills and abilities to help him in his civilian career.”²⁰¹ From the 1970s through the early 1990s at least, the military was clearly ahead of society at large in offering opportunities for advancement to blacks. In 1985, 95.4% of black men admitted to the Army had high school diplomas, compared to only 87.6% of whites.²⁰² Moskos noted that “[t]he Army’s enlisted ranks are the only significant social arena in which black education levels (though not test scores) surpass those of whites.”²⁰³ A 1982 DoD Military Manpower Task Force study concluded that sharp increases in African-American participation in the military was due to a “proud heritage of black service in the military . . . which has contributed strongly to the prestige of military service in the black community” and “[t]he fact that military service offers blacks better opportunities for responsible work at fair compensation than are available to them in many segments of the private sector.”²⁰⁴

The changing face of the military and the success of racial integration were visible during the 1991 Persian Gulf War. The public saw armed forces that were much more harmonious and comprehensively diverse than the troubled and divided military that had fought the Vietnam War. Blacks made up an even greater share of the armed forces, “28.9 percent of the Army, 29.9 percent of the Army troops in war theater, and three-fifths of some army combat units.”²⁰⁵ But this time, blacks were represented at all ranks, and were led by four-star general Colin Powell, Joint Chiefs of Staff Chairman and “the highest-ranking in a long line of U.S. black generals.”²⁰⁶ Powell himself had benefitted from affirmative action in his rapid rise through the ranks.²⁰⁷ Another indication that the

200. DeFranco, *supra* note 14, at 28.

201. BINKIN ET AL., *supra* note 14, at 72; Charles C. Moskos, *How Do They Do It?: The Army’s Integration Success Story*, NEW REPUBLIC, Aug. 5, 1991, at 20 [hereinafter Moskos, *How Do They Do It?*].

202. DeFranco, *supra* note 14, at 32.

203. Moskos, *Success Story*, *supra* note 198, at 67.

204. MILITARY MANPOWER TASK FORCE: A REPORT TO THE PRESIDENT ON THE STATUS AND PROSPECTS OF THE ALL-VOLUNTEER FORCE, at II-13 (1982).

205. Butler, *supra* note 14, at 203-04.

206. *Id.* at 204.

207. See Franklin Foer, *Quotas and Colin Powell*, SLATE (Dec. 14, 1997), http://www.slate.com/articles/news_and_politics/hey_wait_a_minute/1997/12/quotas_and_colin_powell.html (noting that the Secretary of Defense, seeking to increase the number of minorities at top command levels, had relaxed minimum age requirements to promote Powell to Brigadier General).

armed forces had worked hard to address the Vietnam Era racial problems was the lack of racial incidents during the Persian Gulf War.²⁰⁸

E. *The Long Arc of Gender Integration*

While the integration of racial minorities—African-Americans in particular—was widely considered successful, gender integration required overcoming greater obstacles and proceeded much more fitfully.²⁰⁹ Although women had always served in the U.S. Armed Forces, they were historically excluded from combat roles and largely excluded from the officer corps as well.²¹⁰ Still, many of the same exigencies that drove the military toward rapid racial integration—personnel shortages, the advent of an all-volunteer force, and the increasing importance of the representation principle—also drove, to a lesser extent, gender integration as well.²¹¹ The number of women in the armed forces grew from 1% in 1960 to 10% by the mid-1980s.²¹²

208. Moskos, *How Do They Do It?*, *supra* note 201, at 16; *see* Barnes, *supra* note 26, at 702 (noting that the services' racial policies "were so effective that by the time of the first Persian War, there were no significant racial incidents reported during the conflict").

209. *See* Barnes, *supra* note 26, at 705 (observing that "[t]he story of gender integration has traveled along a similar but modified arc of inclusion when compared to the story of race").

210. *See id.* at 706 n.65. The Women's Armed Services Integration Act, Pub. L. No. 80-625, 62 Stat. 356 (1948), formally integrated women into the military, but in a very limited sense. *See* Valerie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303, 325 (2005) ("The Act capped the number of women in the military to [2%] of all enlisted troops. It barred women from serving on aircraft or ships engaged in combat missions . . . [it] also barred women from serving in a command position; women could not hold the rank of general or hold permanent rank above lieutenant colonel."). For many years after formal integration, different standards were applied to women and men in enlistment, discharge, dependency benefits, promotions, and assignment to combat units. *See* Lucinda Joy Peach, *Gender Ideology in the Ethics of Women in Combat*, in *IT'S OUR MILITARY TOO!: WOMEN IN THE U.S. MILITARY* 156, 158 (Judith Hicks Stiehm ed., 1996); Lucinda J. Peach, *Women at War: The Ethics of Women in Combat*, 15 *HAMLIN J. PUB. L. & POL'Y* 199, 201-02 (1994) [hereinafter Peach, *Women at War: The Ethics of Women in Combat*] ("Legislation permitted the secretaries of the services to discriminate between men and women, resulting in unequal enlistment and discharge procedures, dependency benefits, and promotion and combat restrictions."). The 2% cap was eliminated by An Act To Amend Titles 10, 32, and 37, United States Code, To Remove Restrictions On the Careers of Female Officers in the Army, Navy, Air Force, and Marine Corps, and For Other Purposes, Pub. L. 90-130, 81 Stat. 374 (1967). *See* Brenda L. Moore, *Reflections of Society: The Intersection of Race and Gender in the U.S. Army in World War II*, in *BEYOND ZERO* 125, 141 (Mary Fainsof Katzenstein & Judith Reppy eds., 1999).

211. *See* Vojdik, *supra* note 210, at 325 ("The history of women in the military reveals the institutional resistance to integrating women into this powerful male preserve. For women, the doors have been reluctantly 'pried open' largely as a result of the need for more troops during times of war and following the adoption of an all-volunteer force.").

212. Butler, *supra* note 14, at 203.

Yet in the early twenty-first century, despite the military's oft-stated goal of gender equality, the appropriate role for women in the military remained the subject of controversy.²¹³ The combat exclusions had made gender integration of the officer ranks far more difficult than racial integration.²¹⁴ Congress and the Defense Department had attempted to ameliorate this disadvantage by permitting women more time than men to qualify for promotion before separation from the military.²¹⁵ But such measures had only a limited effect and could not begin to compensate for exclusion from combat roles.²¹⁶

However, as they had in the past, the realities of war seemed once again poised to force change. From Gulf War I to the twenty-first century wars in Iraq and Afghanistan, despite formal limitations on their service, a rapidly increasing number of women saw combat and earned medals for their valor.²¹⁷ The Iraq and Afghanistan Wars were asymmetrical in nature: the enemy was more likely to avoid the "teeth" of U.S. defenses and strike relatively less-defended convoys, forward operating bases, and civilian targets.²¹⁸ This meant that women, despite being assigned to "non-combat" or "combat support" roles, more often found themselves in the thick of the fight.²¹⁹

In 2013, the Pentagon's assignment system had not caught up with this reality. Although in 1994, the Clinton Administration opened up about 250,000 front line positions to women, and in 2012, a Congressional Commission recommended lifting the combat exclusion

213. See Barnes, *supra* note 26, at 705–08 (noting that the role of women in the military was still controversial in 2007); see also Moskos, *How Do They Do It?*, *supra* note 201, at 17 (observing in 1991 that, while, like race, "equal opportunity for women is also a stated principle . . . the role of women continues to be a rolling source of contention").

214. Barnes, *supra* note 26, at 708 (observing that the combat exclusion "sets some formal limits" on gender integration).

215. See *Schlesinger v. Ballard*, 419 U.S. 498, 500–03 (1975) (noting that women were entitled to thirteen years of commissioned service before a mandatory discharge, while men were discharged once they were passed up for eligible promotion for the second time).

216. See Christina M. Dieckmann, *Equal Pay for Equal Work?—The Distributional Effects of the Assignment Policy for Military Women*, 22 COLUM. J. GENDER & L. 250, 251 (2001) ("[N]early two decades after the last statutory bar to women's participation in combat was removed, female service members . . . remain barred from positions that involve direct ground combat . . .").

217. See, e.g., Martha McSally, *Women in Combat: Is the Current Policy Obsolete?*, 14 DUKE J. GENDER L. & POL'Y 1011, 1017 (2007).

218. MARGARET C. HARRELL ET AL., RAND NAT'L DEF. RESEARCH INST., ASSESSING THE ASSIGNMENT POLICY FOR ARMY WOMEN 139 (2007), available at http://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND_MG590-1.pdf.

219. See Dieckmann, *supra* note 216, at 261 (noting that women engaged in transportation roles in Afghanistan and Iraq have frequently been involved in combat given the dangerous nature of such regions).

as a means of increasing diversity in the officer corps,²²⁰ the Pentagon only slowly and reluctantly removed the last formal gender barriers, opening 14,000 positions in 2012 and the remaining 238,000 positions by, it is estimated, 2016.²²¹

At the start of the second decade of the twenty-first century, the U.S. Military looked much more like the whole of America than it ever had before. But there was much more still to be done. According to the statistics from FY 2011, African-Americans were overrepresented in the active duty ranks, especially the enlisted ranks, while Asian and Hispanic-Americans were underrepresented.²²² Women were still seriously underrepresented, and the Pentagon noted that the number of women in enlisted ranks had remained fairly static since 2003.²²³

In 2014, the ability of the military to continue to fully integrate the armed forces hinged on two factors. The first was its willingness to take steps necessary to further change military culture, which I discuss in Part III. The second was whether the unstable legal landscape would continue to permit affirmative action measures in the military, which I discuss in Part IV.

III. CHANGING MILITARY CULTURE: THE AFFIRMATIVE ACTION SOLUTION

So long as women were denied the ability to fully participate in combat, full gender equality would remain far out of reach. Yet even as the last formal segregation disappeared, there was evidence that formal integration would not lead to de facto integration.²²⁴ Women were just

220. See Craig Whitlock, *Pentagon to Ease Restrictions on Women in Some Combat Roles*, WASH. POST, Feb. 9, 2012, http://www.washingtonpost.com/world/national-security/pentagon-to-ease-restrictions-on-women-in-some-combat-roles/2012/02/09/gIQAwnL41Q_story.html.

221. Memorandum from Martin E. Dempsey, *supra* note 1.

222. OFFICE OF THE UNDERSEC'Y OF DEF., PERS., & READINESS, POPULATION REPRESENTATION IN THE MILITARY SERVICES, FISCAL YEAR 2010, at 18–21 (2011), *available at* <http://prhome.defense.gov/rfm/MPP/ACCESSION%20POLICY/PopRep2011/summary/Summary.pdf>. In FY 2011, African-Americans made up 18.4% of enlisted personnel, but only 13% of the civilian labor force aged eighteen to forty-four. African-Americans were 8.7% of the officer corps and 8.5% of civilian college graduates aged twenty-one to forty-nine years old. Hispanic-Americans and Asian-Americans were 12.3% and 3.8%, respectively, of enlisted personnel—but 18.6% and 5.1%, respectively, of the civilian labor force. In the officer corps, Hispanics and Asians were 5.5% and 4.1%, respectively, of officers, but 7.3% and 9.2%, respectively, of civilian college graduates. Those listed as “other race” or “more than one race” were overrepresented in the enlisted ranks and underrepresented in the officer ranks.

223. *Id.* at 22.

224. After the combat exclusions were finally lifted, Marine Commandant James Amos seemed to set the bar so high that it would make full gender inclusion of his service impossible: the Marines would not assign qualified women to certain infantry roles, he said, until a critical mass were qualified; and even those women could not serve in those roles unless led by female

16% of officers.²²⁵ The military still had some distance to go in achieving full racial integration as well.²²⁶ And whether gender integration would even match the level of racial integration depended on the ability of the military to change its culture, transforming what it means to be a “warrior” in the twenty-first century.²²⁷ This Part explains why this necessary cultural change can only be fully achieved through a reconstitution of the ranks—through more deliberate and aggressive affirmative action.

The military’s integration failures are unjust because they prevent minorities from taking full advantage of opportunities provided by military service. Women and racial minorities unfairly denied promotions or access to combat positions suffer financially.²²⁸ And because the military has traditionally been both a ladder into the middle class and a gateway to leadership roles in civilian life, the military’s integration failures lead to a dearth of opportunities for minorities elsewhere as well.

The military’s core purpose is not to provide these opportunities, of course. Still, as the military itself has begun to realize, integration has become important for achieving its overarching mission—to serve America’s national security interests and protect the nation from its enemies.²²⁹ The Defense Department’s 2011 National Military Strategy made clear that diversity is crucial for achieving this mission: “An all-volunteer force must represent the country it defends. We will strengthen our commitment to the values of diversity and inclusivity, and continue to treat each other with dignity and respect. We benefit

officers. See *Some Marine Combat Jobs May Remain Closed to Women*, U.S.A. TODAY, Jan. 29, 2013, <http://www.usatoday.com/story/news/nation/2013/01/29/marine-corps-women-combat/1873753/>.

225. OFFICE OF THE DEPUTY ASSISTANT SEC’Y OF DEF., 2012 DEMOGRAPHICS PROFILE OF THE MILITARY COMMUNITY 19 (2012), available at http://www.militaryonesource.mil/12038/MOS/Reports/2012_Demographics_Report.pdf.

226. See *supra* notes 77–80 and accompanying text.

227. See Part III; see also MARY F. KATZENSTEIN & JUDITH REPPY, *Introduction: Rethinking Military Culture*, in BEYOND ZERO TOLERANCE: DISCRIMINATION IN MILITARY CULTURE 1, 16 (1999) (surveying literature discussing the divergence in the race and gender integration narratives—but concluding that whether these narratives converge will depend on whether the “constructed identity of the masculine warrior is open to amendment in response to changes in the broader society”).

228. See Dieckmann, *supra* note 216, at 280.

229. See Becton Brief, *supra* note 16, at 5 (asserting that a “racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle [sic] mission to provide national security”); see also U.S. DEP’T OF DEF., DIRECTIVE NO. 1440.1, THE DoD CIVILIAN EQUAL EMPLOYMENT OPPORTUNITY PROGRAM § 5.2.3 (1987) (describing affirmative action programs as “essential elements of readiness that are vital to [the] accomplishment of the national security mission”).

immensely from the different perspectives, and linguistic and cultural skills of all Americans.”²³⁰

Although this broad statement did not explicitly endorse affirmative action, it expressed key reasons why affirmative action in the military could still be necessary, even if it were no longer necessary elsewhere.

First, the long-held imperative that the armed forces look like the nation as a whole, the representation principle, is crucial for maintaining the military’s legitimacy, both within its own ranks and in society at large. The importance of internal legitimacy had been repeatedly reinforced by events in the military’s history: the Vietnam War Era “time of troubles” revealed that the military’s mission could be literally threatened by a large difference between minorities’ representation in the enlisted ranks and in the officer ranks.²³¹ In a broader sense, the lack of a critical mass of minority officers sends the signal to minority enlisted men and women, and the population of potential recruits, that the military is not a place in which they will be encouraged or permitted to succeed.²³² Lack of sufficient representation also sends the message to an increasingly diverse American society that the military is an alien institution out of touch with the nation it serves.²³³ Such a growing military-civilian divide would jeopardize the military’s credibility with, and support from, the public that is crucial for carrying out its mission.²³⁴

Race- and gender-conscious policies may also be especially necessary for the military because of the strongly hierarchical nature of military organizations and the critical importance of unit cohesion. Men and women in the enlisted ranks have much less freedom to exit the professional relationship than their civilian counterparts, and they therefore depend on higher-ranking officers to work especially hard at diffusing tension between enlisted servicemembers and their superiors.²³⁵ Moreover, under the severe duress imposed by combat, servicemembers “adhere to the group mission with greater intensity insofar as they feel themselves to be equal and respected members of

230. DOD DIVERSITY PLAN, *supra* note 4, at 4.

231. *See supra* Part II.C.

232. Leach, *supra* note 28, at 1118–19.

233. *See* DOD DIVERSITY PLAN, *supra* note 4, at 3 (“[The United States] is a nation whose demographic makeup parallels the environment in which we live—continually changing—and DoD must change to maintain and sustain its future forces. To the degree we truly represent our democracy, we are a stronger, and more relevant force. The Department views diversity as a strategic imperative.”).

234. *See generally* FLEMING, *supra* note 112.

235. Leach, *supra* note 28, at 1122, 1128.

the immediate community.”²³⁶ While studies show that diverse units are more effective than homogenous units, officers who share experiences and backgrounds with enlisted men and women are more likely to anticipate and resolve potential conflicts and lack of trust before they undermine unit cohesion.²³⁷

The second major way in which diversity furthers the military’s mission is by strengthening its capacity to relate to the citizens of other nations with whom the military must work. In 2009, the Defense Department operated at least 662 foreign sites in thirty-eight foreign countries.²³⁸ Moreover, the U.S. Military is so large that in many places around the world, U.S. servicemembers become, by default, the principal representatives of the United States. The importance of servicemembers’ capacity to relate to foreign citizens continues to grow as the military’s mission evolves. In an era of asymmetrical warfare and the battle for “hearts and minds,” relevant knowledge and language and cultural skills—which a more diverse military can draw upon—are becoming increasingly critical for its success.²³⁹

These are by no means the only reasons why diversity in the military is important. Diversity furthers values other than military success, some of which have been recognized as compelling government interests in other contexts. For the reasons discussed by the Supreme Court in *Grutter*, diversity is a compelling government interest for service academy and ROTC students, no less than for other students, because it increases the intellectual vibrancy and breadth of one’s education.²⁴⁰

236. *Id.* at 1122.

237. The importance for the military of having sufficient numbers of minority officers to help maintain unit cohesion is different from the argument, rejected by the Supreme Court, that race-conscious hiring decisions in education can be justified by the compelling government interest of providing role models for minority students. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274–76 (1986) (plurality opinion) (denying that there is a compelling state interest in hiring minority teachers to serve as role models for minority students); *see also* Kathleen M. Sullivan, *Sins of Discrimination: Last Term’s Affirmative Action Cases*, 100 HARV. L. REV. 78, 86–91 (1986) (situating the Court’s response to the role model argument in *Wygant* within the context of its 1980s jurisprudence, which emphasized remedial justifications for affirmative action).

238. U.S. DEP’T OF DEF., BASE STRUCTURE REPORT FISCAL YEAR 2010 BASELINE 9 fig.1 (2010), available at <http://www.acq.osd.mil/ie/download/bsr/BSR2010Baseline.pdf>.

239. DOD DIVERSITY PLAN, *supra* note 4, at 3. During the Iraq and Afghanistan Wars, female soldiers and marines were deployed in culturally sensitive situations, where their presence alone could prevent conflict with civilians. *See* ERIN SOLARO, WOMEN IN THE LINE OF FIRE: WHAT YOU SHOULD KNOW ABOUT WOMEN IN THE MILITARY 82–83, 119 (2006); *see also* Dieckmann, *supra* note 216, at 261–62 (“[I]t has been observed that the mere presence of female soldiers [in situations involving cultural sensitivities to women civilians being searched by male soldiers] often tends to deescalate potential conflicts by reducing tensions and allowing cooler heads to prevail.”).

240. *See Grutter v. Bollinger*, 539 U.S. 306, 328, 334 (2003); *see also supra* note 16 and

And to the extent that the military, as an elite institution, helps define values for the nation, the achievement of positive race relations and gender and racial equality in the military can influence civilian institutions for the better.²⁴¹

In the end, however, the threat gender discrimination poses to military effectiveness will be the primary motivation for the comprehensive changes necessary to eliminate it.

A. Barriers to Gender Diversity

The military's leadership has made clear that it understands the importance of diversity—and gender equality—in the abstract. And even before the combat ban was lifted, opinion among military and civilian leadership, not to mention the public at large, had been moving toward a consensus that women will continue to play a larger and larger role in military service more generally—but in combat roles in particular. Indeed, women had already been serving in combat for years and receiving medals for their service.²⁴²

But military culture, which drives much of day-to-day decision-making at the unit level, still remains largely hostile to gender diversity. Although the end to the formal combat exclusions and reforms to prevent sexual harassment and assault are themselves forms of “affirmative action,” the military has not used other forms of affirmative action aggressively enough to address its failings in that realm.

The biggest stumbling block to realizing the diversity ideal within the ranks is the lingering importance of masculinity in military culture. In the terminology of organization theorists, the military has always been, and still remains, a highly “gendered” institution.²⁴³ As Kenneth Karst

accompanying text.

241. For a claim that the military is an institution that defines values for the country, including values pertaining to race relations, see Mazur, *supra* note 150, at 563–64.

242. See Dieckmann, *supra* note 216, at 267 (“As of August 2006, 1,788 women have been awarded the Combat Action Badge (CAB) for service in Iraq or Afghanistan.”); Hasday, *supra* note 5, at 146.

243. See, e.g., Bailey, *supra* note 119; Karin Dunivin, *Gender and Perceptions of the Job Environment in the U.S. Air Force*, 15 ARMED FORCES & SOC'Y 71, 76 (1988); Rebecca K. Lee, *The Organization as a Gendered Entity: A Response to Professor Schultz's The Sanitized Workplace*, 15 COLUM. J. GENDER & L. 609 (2006); Brenda L. Moore, *African-American Women in the Military*, 17 ARMED FORCES & SOC'Y 363, 366 (1991); Peach, *Women at War: The Ethics of Women in Combat*, *supra* note 210, at 201 (citing Patricia Shields, *Sex Roles in the Military*, in THE MILITARY: MORE THAN JUST A JOB? 99, 106 (Charles C. Moskos & Frank R. Wood eds., 1988)); Carrie Peterson, *Separation Anxiety and Boot Camp: Why Basic Training Should Remain Gender-Integrated*, 17 LAW & INEQUALITY 139, 141 (1999) (noting that a “general consensus exists among legal scholars that the military is a “male-oriented institution built on masculine traditions and practices”); Patricia Shields et al., *Women Pilots in Combat: Attitudes of Male and*

has persuasively argued, the deeply held belief that “manhood” and military effectiveness are interdependent lies at the heart of the military’s history of excluding minorities—from blacks to homosexuals to women.²⁴⁴ A racially tinged understanding of manhood originally motivated the military to exclude racial minorities—who were thought to possess inferior abilities—from combat roles. Under pressure from the civil rights movement, civilian leadership, and its own ranks, military culture shifted, expanding the understanding of manhood to include straight males of all races.²⁴⁵ Similarly, arguments that permitting homosexuals to serve openly would undermine unit cohesion ultimately gave way to acceptance as Congress ended the “Don’t Ask, Don’t Tell” policy in 2010.²⁴⁶

However, a much more difficult challenge was presented to military culture by similar efforts to fully integrate women—particularly in combat roles. A culture that uses masculinity as a benchmark for prowess and power, and that sees expressing male sexuality as a way of promoting comradeship, was bound to find gender equality deeply problematic.²⁴⁷ Sexually explicit conversation has traditionally permeated military life, from service academy rituals to cadence calls during training to combat slang and jargon.²⁴⁸ For most of its history, the U.S. Military explicitly used sexuality to promote esprit de corps by, among other things, distributing “pin up girls” and organizing visits

Female Pilots, 8 MINERVA: Q. REP. ON WOMEN & MIL. 21, 22 (1990); see also Madeline Morris, *By Force of Arms: Rape, War and Military Culture*, 45 DUKE L.J. 651, 708–10 (1996).

244. Karst, *supra* note 27, at 500–01 (discussing forms of masculinity which cause discrimination on the basis of race, gender, and sexual orientation).

245. *Id.* at 499.

246. “Don’t Ask, Don’t Tell” was a statutorily mandated policy that permitted homosexuals to serve in the military if they did not reveal their sexual orientation, which the military was, in theory, not permitted to inquire about. See generally Fred L. Borch III, *The History of “Don’t Ask, Don’t Tell” in the Army: How We Got to It and Why It Is What It Is*, 203 MIL. L. REV. 189 (2010). It was repealed by Congress in 2010. See Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (codified at 10 U.S.C. § 654 (2012)).

247. See Lee, *supra* note 243, at 617 (observing that “male sexuality is widely infused into the combat culture in military units, as soldiers have long participated in sexual joking and explicit conversation as a way to forge personal closeness”). The military’s institutional culture operates, in the manner identified by antistatist theorists, to subordinate and naturalize an inferior role for women. See generally CATHERINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

248. Lee, *supra* note 243, at 617; see also LINDA BIRD FRANCKE, *GROUND ZERO: THE GENDER WARS IN THE MILITARY* 156–57 (1997); Fred L. Borch III, *Military Law and the Treatment of Women Soldiers: Sexual Harassment and Fraternalization in the US Army*, in *A SOLDIER AND A WOMAN: SEXUAL INTEGRATION IN THE MILITARY* 337, 337 (Gerard J. DeGroot & Corinna Peniston-Bird eds., 2000); Susanna Trnka, *Living a Life of Sex and Danger: Women, Warfare, and Sex in Military Folk Rhymes*, 54 W. FOLKLORE 232 (1995).

to red light districts near military bases.²⁴⁹ In general, military customs are “driven by a group dynamic centered around male perceptions and sensibilities, male psychology and power, male anxieties and the affirmation of masculinity.”²⁵⁰

Given the military’s history of promoting gender supremacy, it is not surprising that sexual harassment and assault are still rampant. Sexual harassment—against both women and men who are not perceived to conform to dominant gender stereotypes²⁵¹—has been used in many different work contexts outside the military to preserve established “spheres of male labor by undermining women’s confidence and equal footing on the job and sabotaging their work performance.”²⁵² The military sexual assault epidemic—also with both women and men as victims—is in one sense simply a more extreme manifestation of the same hostility toward gender equality that tolerates systematic sexual harassment in the ranks.²⁵³ A study by the Department of Veterans Affairs found that “officers who permitted sexual harassment saw four times the level of rapes in their units.”²⁵⁴ Another study determined that 99.7% of female sexual assault victims in the military had encountered sexual harassment within twelve months of being assaulted.²⁵⁵

249. See Lee, *supra* note 243, at 617.

250. Francke, *supra* note 248, at 152.

251. Sexual harassment and assault by men directed at other men are, like the same actions directed at women, attempts to subordinate and marginalize the victim by casting him or her in an inferior role in a gender-driven hierarchy. See Hilary S. Axam & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual “Horseplay”: Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After Oncale*, 11 YALE J.L. & FEMINISM 155, 192 (1999).

252. Lee, *supra* note 243, at 619; Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998) (arguing for a broader understanding of sex harassment to include harassing behavior that is nonsexual but nonetheless occurs due to gender hostility in the workplace).

253. Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 YALE L. & POL’Y REV. 1, 82 (2010) (observing that “sexual harassment and sexual assault fall along a continuum and tend to occur together.”); see also Katherine M. Franke, *What’s Wrong with Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 169, 174 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (citing John B. Pryor, Janet L. Giedd & Karen B. Williams, *A Social Psychological Model for Predicting Sexual Harassment*, 51 J. SOC. ISSUES 69 (1995); John B. Pryor, *Sexual Harassment Proclivities in Men*, 17 SEX ROLES 269 (1987)).

254. Anne G. Sadler et al., *Factors Associated with Women’s Risk of Rape in the Military Environment*, 43 AM. J. INDUS. MED., 262 (2003) (finding that increased rates of reported rape were associated with environmental factors such as officers allowing others to make demeaning remarks or gestures about women).

255. Melanie S. Harned et al., *Sexual Assault and Other Types of Sexual Harassment by Workplace Personnel: A Comparison of Antecedents and Consequences*, 7 J. OCCUPATIONAL HEALTH PSYCHOL. 174, 180 (2002) (finding that, of military women who had been sexually

Moreover, as military leadership itself has recognized, there is a direct connection between past formal, and current informal, gender exclusion and the sexual harassment and assault crisis. Chairman of the Joint Chiefs of Staff Martin Dempsey observed that the ban on women in combat had “created a two-tiered military culture that fostered tolerance of sexual harassment and sexual assault.”²⁵⁶ With respect to the same crisis, Defense Secretary Chuck Hagel stated that “[c]reating a culture free of the scourge of sexual assault requires establishing an environment where dignity and respect is afforded to all, and where diversity is celebrated as one of our greatest assets as a force.”²⁵⁷ Because these problems have common roots, they share common solutions.

B. *The Importance of Leadership*

In determining what steps to take to address gender inequality and hostility toward women, the military can learn a great deal from the literature on gendered organizations.²⁵⁸ In general, studies have shown that the ability of women to advance and the presence of sexual harassment hinge on three factors: “women’s organizational power and status; sex-ratio; and professionalism or sexualization of the work environment.”²⁵⁹ With respect to all three factors, the military clearly falls short. Women lack power and status because they are underrepresented in leadership positions; they made up just 16% of the officer corps in FY 2012.²⁶⁰ Just 14% of all armed forces personnel,

assaulted, 99.7% had also been sexually harassed within the last twelve months with the definition of sexual harassment, consistent with the majority of social science literature on the topic, being “used throughout [the] article in a behavioral rather than a legal sense”).

256. J.K. Trotter, *Highest-Ranking Military Officer Ties Ban on Women to Sexual Assault*, ATLANTIC WIRE (Jan. 24, 2013, 3:55 PM), <http://www.thewire.com/politics/2013/01/highest-ranking-military-officer-says-combat-ban-women-tied-sexual-assault/61386/>; see also HELEN BENEDICT, *THE LONELY SOLDIER: THE PRIVATE WAR OF WOMEN SERVING IN IRAQ* 227 (2009) (“Many women believe that such recognition [of their service in combat] will win them more respect and so reduce sexual violence.”); *id.* at 4–5, 135–36, 172, 227–29 (describing how women have, in fact, been serving in combat situations during the wars in Iraq and Afghanistan).

257. See Chuck Hagel, *Message on Sexual Assault Awareness Month*, U.S. DEP’T DEF. (Apr. 2, 2013), <http://www.defense.gov/speeches/speech.aspx?speechid=1763>.

258. See, e.g., R.W. CONNELL, *MASCULINITIES* 72–73 (1995) (discussing the way in which masculinity and gender are produced at the personal level as well as within societal institutions); Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 GENDER & SOC’Y 139, 145–46 (1990); Dana M. Britton, *The Epistemology of the Gendered Organization*, 14 GENDER & SOC’Y 418, 423–24 (2000).

259. Myrtle P. Bell & Mary E. McLaughlin, *Sexual Harassment and Women’s Advancement: Issues, Challenges, and Directions*, in *ADVANCING WOMEN’S CAREERS: RESEARCH AND PRACTICE* 83, 89 (Ronald J. Burke & Debra L. Nelson eds., 2002).

260. OFFICE OF THE DEPUTY ASSISTANT SEC’Y OF DEF., 2012 DEMOGRAPHICS PROFILE OF

and a much lower percentage of combat personnel, were women.²⁶¹ And the work environment for women in the military in general is still a highly sexualized one.²⁶²

With respect to the military's sexualized culture, there are positive signs that the military has begun to understand that it is counterproductive to attempt to ground unit cohesion in expressions of male sexuality—at least so overtly. For example, in 2013, Defense Secretary Chuck Hagel ordered inspections for, and the removal of, sexually explicit material on military bases.²⁶³ The near-ubiquity of sexual harassment training is also likely to help reduce the sexually charged atmosphere by calling attention to some of its manifestations.²⁶⁴

But these sorts of changes are reactive and a far cry from the types of reforms the military's culture needs to see before it is no longer hostile to gender equality. Such long-dominant institutional norms cannot change without sustained and comprehensive effort. As with racial equality, a genuine transformation of the culture requires a fundamental reconstitution of the ranks.²⁶⁵ This means that the military must move aggressively to address the other factors—the ratio of men to women in the military in general and, perhaps more importantly, the number of women in leadership positions.

To be sure, increasing the proportion of women in leadership roles is not a panacea. In the literature on gendered organizations, scholars have observed that women who are promoted to leadership positions face intense pressure to re-enact and preserve the dominant culture, rather than resist it.²⁶⁶ In fact, women may be promoted precisely because they have not “made waves” in their careers by attempting to change the organization's culture.²⁶⁷ Tackling sexual harassment may

THE MILITARY COMMUNITY 19 (2012), available at http://www.militaryonesource.mil/12038/MOS/Reports/2012_Demographics_Report.pdf.

261. *Id.*

262. Sara Sorcher, *How the Military's 'Bro' Culture Turns Women Into Targets*, ATLANTIC (Sept. 9, 2013, 10:24 AM), <http://www.theatlantic.com/national/archive/2013/09/how-the-militarys-bro-culture-turns-women-into-targets/279460/>.

263. *Id.*

264. See Bell & McLaughlin, *supra* note 259, at 90 (referring to a study which found that women's lack of awareness about their organization's sex harassment policy was one of the key predictors of sex harassment in the workplace).

265. See *supra* notes 235–37 and accompanying text.

266. Deborah L. Rhode, *The Difference “Difference” Makes*, in THE DIFFERENCE “DIFFERENCE” MAKES: WOMEN AND LEADERSHIP 3, 20–23 (Deborah L. Rhode ed., 2003); see also Lee, *supra* note 243, at 659–60.

267. See Rhode, *supra* note 266, at 24 (“Those who ‘rock the boat’ on women's issues may lose the collegial support and career development opportunities that would provide a power base

be a difficult and lonely task for a female leader without the support of her male colleagues. Indeed, female officers in the military have been accused of failing to take sexual assault allegations seriously.²⁶⁸

On the other hand, this literature also suggests that, when there is a critical mass of women in leadership roles, an organization's culture will begin to change in ways that make sexual harassment less likely to occur.²⁶⁹ At the very least, female officers are less likely than their male counterparts to encourage and participate in sexual harassment, which should mean that moving more women into command positions will reduce the number of units in which sexual harassment and assault are likely to be pervasive problems. Perpetrators of sexual violence in the military are overwhelmingly male and tend to be of at least slightly higher rank than their victims—a fact that reinforces the importance of power dynamics to sexual assault.²⁷⁰ It follows that female enlisted personnel are less likely to face sexual harassment or assault when their immediate supervisors or commanding officers are also women. Of course, even female personnel who are commanded by women may still face sexual violence from their peers or others in the chain of command. But doubts about the effectiveness of limited gender integration are all the more reason for the military to move more swiftly toward fuller gender integration.

Even so, given the slow pace at which women have been promoted and assigned to combat positions that have been legally available to them, the meaningful and substantial gender integration necessary to transform the military's culture cannot be accomplished without gender-conscious policies that give women some advantages in the promotion and assignment process—especially with respect to the combat roles from which they traditionally have been excluded. Similarly, more explicitly race-conscious policies will be necessary to make progress toward fuller racial integration of the officer corps. For those who oppose all gender- and race-conscious policies as “reverse sexism and racism,” such measures would be intolerable, just as the military's

within their organizations and make their advocacy effective.”).

268. See Knowles & VanLandingham, *supra* note 40 (discussing the mishandling of a sexual assault case by Air Force Lt. Gen. Susan Helms, who ignored her senior military attorney's advice and overturned the sexual assault conviction of a male subordinate).

269. See Karst, *supra* note 27, at 538 n.154 (citing to studies suggesting that “the critical mass of women needed to avoid social problems in mixed groups is about one-quarter”).

270. See 1 DOD FY 2012 ANNUAL REPORT ON SEXUAL ASSAULT, *supra* note 8, at 50-51; Dep't of Def., Slide Presentation: Sexual Assault Prevention and Response Program, Response Systems Panel (June 27, 2013), available at http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140411_CSS/03b_DoD_SAPRO_Presentation_20130627.pdf.

current policies are.

But other critics of more aggressive gender-based affirmative action would also raise different objections—e.g., variations of the original argument against having women serving in combat—which are themselves variations of the old arguments against racial integration.²⁷¹ Rather than arguing against affirmative action on justice terms as unfair discrimination, these critics object instead on the ground that military effectiveness will be undermined.²⁷² These objections take two general forms. First, critics argue, because women are generally inherently less capable than men at the types of skills necessary for combat, fuller integration will mean sending women into combat who are unqualified.²⁷³ Second, critics contend, because cohesion in combat units depends on a peculiar solidarity rooted in masculinity, the presence of women fighting alongside men will undermine that solidarity and unit cohesion.²⁷⁴

As others have observed, these objections are based more on prejudice than fact.²⁷⁵ They do not withstand close scrutiny. Although some of the fitness standards for combat positions are more difficult for women to achieve due to natural differences in men's and women's bodies, these standards are generally a poor measure of the qualities that actually contribute to developing skills necessary for combat.²⁷⁶ As one

271. See Gipson, *supra* note 5, at 402–03 (providing a comprehensive review of the reasons historically given for excluding women from combat).

272. See Kingsley R. Brown, *Women at War: An Evolutionary Perspective*, 49 *BUFF. L. REV.* 51, 62 (2001) (“[T]here is reason to think that inclusion of women in combat positions may have negative effects on the cohesion and effectiveness of fighting forces.”).

273. See, e.g., *id.* (arguing that women may be less likely to possess the aggressive and risk-taking personality characteristics of a “warrior”).

274. See, e.g., LORRY M. FENNER & MARIE E. DE YOUNG, *WOMEN IN COMBAT: CIVIC DUTY OR MILITARY LIABILITY?* 6–7 (2001) (noting that some critics of gender integration argue that the presence of a woman's “sexuality and vulnerability would destroy men's essential battlefield bonds”); Brown, *supra* note 272, at 62 (contending that integration in combat units would have a negative impact on the cohesiveness of the military and would encourage military service to be viewed as a mere occupation instead of as a “calling” as it has been traditionally viewed).

275. See, e.g., MacKenzie, *supra* note 7 (“There are physically fit, tough women who are suitable for combat, and weak, feeble men who are not.”).

276. See JENNIFER KAVANAGH, *RAND CORP., DETERMINANTS OF PRODUCTIVITY FOR MILITARY PERSONNEL: A REVIEW OF FINDINGS ON THE CONTRIBUTION OF EXPERIENCE, TRAINING, AND APTITUDE TO MILITARY PERFORMANCE* 27 (2005), available at http://www.rand.org/content/dam/rand/pubs/technical_reports/2005/RAND_TR193.pdf.

Lawrence Korb, the former Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics under President Reagan, told researchers that:

In my view, women actually increase readiness, since they have more education and higher aptitudes than their male counterparts. But we hear a lot of anecdotes about women tending to be absent from duty for medical reasons more frequently than men. These anecdotes, though, overlook the fact that men are frequently absent for more

former marine observed, such standards (and the design of much of the equipment assigned to combat personnel) were “created to measure male fitness, not job effectiveness.”²⁷⁷ The “unit cohesion” objection is based on the same fundamental error that critics of racial and sexual orientation integration have also made—confusing social cohesion with task cohesion.²⁷⁸ Social cohesion measures the degree to which group members have affection for one another and socialize together, but task cohesion measures the degree to which members are devoted to a common cause.²⁷⁹ It is task cohesion, rather than social cohesion, that enhances military effectiveness.²⁸⁰ And while social cohesion may be easier when group members share a common gender, race, or background, task cohesion actually improves when a group is diverse.²⁸¹

However, the most powerful evidence against critics of gender integration consists simply of the heroism demonstrated by female servicemembers who have seen combat.²⁸² The more these women’s stories permeate the public consciousness, the less persuasive the critics’ speculative arguments will seem.

In the end, it is diversity, rather than masculinity, that should be the focus of military culture. In 2010 and 2011, the Department of Defense sought to reconsider what diversity means for the twenty-first century military and explore ways in which the armed forces could successfully

“traditional” reasons—being drunk and disorderly, for example

SHEILA NATARAJ KIRBY & HARRY J. THIE, RAND CORP., ENLISTED PERSONNEL MANAGEMENT: A HISTORICAL PERSPECTIVE 96–97 (1996), available at http://www.rand.org/content/dam/rand/pubs/monograph_reports/2009/MR755.pdf.

277. MacKenzie, *supra* note 7 (discussing studies of fitness standards).

278. Martha McSally, *Women in Combat: Is the Current Policy Obsolete?*, 14 DUKE J. GENDER L. & POL’Y 1011, 1034–35 (2007).

279. *Id.*

280. *See id.* (finding that while task cohesion has a “modest but reliable” effect on performance, social cohesion does not have an independent effect (after controlling for task cohesion) and that under certain conditions, high social cohesion is actually detrimental to unit performance).

281. A 2011 study of the impacts of racial integration on combat effectiveness during the Korean War found that integration “resulted in improvements in cohesion, leadership and command, fighting spirit, personnel resources and sustainment that increased the combat effectiveness.” Initial research indicates that mixed-gender units could provide similar benefits. Leora Rosen, a former senior analyst at the National Institute of Justice, found that when women were accepted into mixed-gender units, the groups’ effectiveness actually increased. Similarly, a 1993 RAND Corporation paper summarizing research on sexual orientation and the U.S. military’s personnel policy found that diversity “can enhance the quality of group problem-solving and decision-making, and it broadens the group’s collective array of skills and knowledge.” Mackenzie, *supra* note 7.

282. *See, e.g.*, Sarah Boyce, *The Girls Come Marching Home: Stories of Women Warriors Returning from the War in Iraq*, 3 VETERANS L. REV. 330, 335 (2011).

compete with civilian institutions to maintain a diverse pool of talent that reflects changes in American society. The Military Leadership Diversity Commission was one organization created to address these issues. It concluded that the military could only be successful if it leveraged the differences among its employees in service of its mission.²⁸³ Although changing an entrenched culture will be difficult, the military has done so in the past, and can do so again. It is, paradoxically, the bureaucratic, hierarchical nature of the military that simultaneously frustrates attempts at change while also making rapid change possible.²⁸⁴ A focus on diversity will help the military take the necessary measures.

IV. THE CONSTITUTIONALITY OF AFFIRMATIVE ACTION IN THE MILITARY

While the fate of affirmative action in civilian university admissions is very much in doubt, the military's programs stand on a different, more solid, footing. Even if the Court were ultimately to declare all forms of governmental affirmative action unconstitutional in the civilian educational setting, it would be difficult to predict from this that the military, too, would be constitutionally prohibited from using race- and gender-conscious policies. The military remains a unique institution, and its uniqueness has long impelled the courts to recognize a set of special doctrines for the military with their roots in constitutional interpretation. These doctrines, as well as the special circumstances that must drive military decision-making, could justify the continued use of affirmative action in the military, even after it had been banished by the courts from all other places in American public life.

What is strange, however, is that the military has done a poor job mounting a legal defense of its own programs and the lower courts have done a poor job in evaluating them. Although the Supreme Court once weighed in to uphold a gender-conscious military personnel policy, a handful of lower court decisions have rejected the military's use of affirmative action. In doing so, the lower courts failed to apply properly

283. MILITARY LEADERSHIP DIVERSITY COMM'N, DECISION PAPER #5: DEFINING DIVERSITY 2 (2011), available at www.hsdl.org/?view&did=716014.

284. See Karst, *supra* note 27, at 523–24; Barbara Reskin, *Imagining Work Without Exclusionary Barriers*, 14 YALE J.L. & FEMINISM 313, 315 (2002) (noting that “the traditionally excluded derive their rights and protections from organizational bureaucracies”). On the bureaucratization of the military, see MORRIS JANOWITZ, *Organizing Multiple Goals: War Making and Arms Control*, in THE NEW MILITARY: CHANGING PATTERNS OF ORGANIZATION 11, 17–20 (1964); David R. Segal & Joseph J. Lengermann, *Professional and Institutional Considerations*, in COMBAT EFFECTIVENESS: COHESION, STRESS, AND THE VOLUNTEER MILITARY 154, 160–62 (Sam C. Sarkesian ed., 1980).

either the special deference owed to the military as a unique institution or the appropriate level of deference for gender-conscious policies. Even in light of the Court's increasing skepticism of affirmative action, the military's programs should survive legal challenges.

A. The Military's Entitlement to Special Deference and Weaker Scrutiny

If the Supreme Court were to adhere to its precedents, gender-conscious policies aimed at moving women quickly into combat positions would be subject only to intermediate, rather than strict, scrutiny.²⁸⁵ In addition, such policies would be entitled to special deference that courts have traditionally given to military decision-making. This powerful combination should make challenges to gender-based policies especially difficult to challenge. And race-conscious policies, too, should stand on much firmer footing than their civilian counterparts.

In the 1970s, the military began attempting to compensate for the disadvantages women faced from the combat exclusions by giving women extra time to obtain a promotion before being discharged. In 1975, in *Schlesinger v. Ballard*, the Supreme Court upheld this affirmative action policy as constitutional, rejecting a claim by a male servicemember that it violated the Fifth Amendment's Due Process Clause.²⁸⁶ As it has with other gender-based classifications, the Court applied intermediate scrutiny, concluding that the policy was justified by military necessity.²⁸⁷ The Court recognized that gender integration in the officer corps was important for maintaining morale and, therefore, the effectiveness of the military—stating that the policy “results in a flow of promotions commensurate with the Navy's current needs and serves to motivate qualified commissioned officers to so conduct themselves that they may realistically look forward to higher levels of command.”²⁸⁸

As in *Ballard*, courts have long recognized the uniqueness of the military, and have usually given the military correspondingly unique deference. This special deference to military procedures and factual assertions is a subset of the very strong deference that the courts give to

285. See Levinson, *supra* note 19, at 3 (“[U]nlike race discrimination, gender discrimination, whether benign or invidious, has never triggered strict scrutiny, but rather, only the less rigorous intermediate scrutiny test, which requires only that the government prove that the classification is substantially related to the achievement of an important interest.”).

286. *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975).

287. *Id.*

288. *Id.*

the Executive Branch in foreign affairs in general.²⁸⁹ In some cases, the courts have exercised the most extreme form of deference by declining to hear, under the political question doctrine, cases implicating use of the military.²⁹⁰

In other cases involving the assertion of constitutional rights by military personnel, the courts have addressed the controversies but have given the military greater latitude than civilian government institutions.²⁹¹ For example, in *Goldman v. Weinberger*,²⁹² the Supreme Court upheld, against First Amendment challenge, an Air Force regulation that prohibited an Orthodox Jewish serviceman from wearing a yarmulke while on duty.²⁹³ The Court observed that its review of military regulations was “far more deferential than constitutional review of similar laws or regulations designed for civilian society,” noting that, “to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.”²⁹⁴ According to the Court, not only are courts “ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have,” but “[j]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.”²⁹⁵ In *Rostker v. Goldberg*,²⁹⁶ the Court rejected an Equal Protection challenge to the congressional decision barring women from registration for the selective service.²⁹⁷ In concluding that Congress

289. For a discussion of unique deference by the courts to the Executive in foreign affairs and why it is driven by certain views of geopolitics, see generally Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87, 101–11 (2009).

290. See *Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (holding that the issue of whether the President may unilaterally withdraw from a treaty, a decision with strong military implications was “a nonjusticiable political dispute that should be left for resolution by the Executive and Legislative Branches of the Government”); *Marbury v. Madison* 5 U.S. (1 Cranch) 137, 166 (1803) (establishing the political question doctrine and stating that “the opinion of the executive is conclusive” on actions of a political nature); *Bancoult v. McNamara*, 445 F.3d 427, 436 (D.C. Cir. 2006) (holding that the decision to establish a military base on the island of Diego Garcia was not reviewable); *Doe v. Bush*, 322 F.3d 109 (1st Cir. 2003) (dismissing a challenge to the U.S. involvement in Iraq based on ripeness).

291. See *Brown v. Glines*, 444 U.S. 348, 361 (1980) (upholding Air Force limits on the circulation of political petitions); *Greer v. Spock*, 424 U.S. 828, 840 (1976) (upholding limits on protests and political speeches); Barnes, *supra* note 26, at 744–45 (discussing cases).

292. 475 U.S. 503 (1986).

293. *Id.* at 509–10.

294. *Id.* at 507.

295. *Id.* at 507–08 (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962) (other internal citations omitted)).

296. 453 U.S. 57 (1981).

297. *Id.* at 83.

had satisfied the important governmental objective standard required for constitutional gender classifications, the Court observed that the military was an environment “governed by a separate discipline from that of the civilian”²⁹⁸ and that “[C]ongress is permitted to legislate both with greater breadth and with greater flexibility.”²⁹⁹

In recognizing special military deference in these and other cases,³⁰⁰ the courts have sent the clear message that they are open to the argument that affirmative action could still be necessary to the military’s mission, even if affirmative action no longer qualifies as sufficiently narrowly tailored in any other context. Relatedly, some courts have recognized a compelling government interest in taking race into consideration in job assignments in a handful of civilian professions, at least in limited circumstances where the needs of the profession, as with the military, seem truly to demand it.³⁰¹

A lower court following *Ballard* should have afforded gender-conscious military affirmative action policies especially strong deference. Special deference to the military, despite some post-9/11 exceptions regarding habeas and military commissions, remains a robust doctrine. Despite its increasing hostility to race-conscious affirmative action, the Court has not overruled *Ballard* or subsequent cases applying intermediate, rather than strict, scrutiny to gender-based affirmative action programs.

On the other hand, the Supreme Court has not evaluated a gender-based affirmative action plan since the 1980s and it has never addressed the constitutionality of such a program in the employment context.³⁰² Subsequent broad statements from the Court’s majority expressing skepticism about *any* form of group classification—gender included—have emboldened a few lower courts, which have applied strict scrutiny

298. *Id.* at 71 (quoting *Orloff v. Willoughby*, 345 U.S. 83, 93–94 (1953)).

299. *Id.* at 66 (quoting *Parker v. Levy*, 417 U.S. 733 (1974)). As discussed above, the Court had also held that the military was justified in treating men and women differently with respect to some requirements for promotion. *See Schlesinger v. Ballard*, 419 U.S. 498, 500, 509–10 (1975); *see also supra* notes 286–88 and accompanying text.

300. *See, e.g., Miller v. Dep’t of Navy*, 476 F.3d 936, 938 (D.C. Cir. 2007) (concluding that courts should be “unusually deferential” when applying standards of review to military personnel decisions).

301. *See, e.g., Reynolds v. City of Chi.*, 296 F.3d 524, 530–31 (7th Cir. 2002) (accepting a police department’s occupational need defense in response to alleged equal protection violations); *see also Leach, supra* note 28, at 1095 (observing that, where race- and gender-conscious practices “have . . . been challenged on Fourteenth Amendment grounds, courts have increasingly allowed a small number of professions—such as law enforcement and prison administration—to raise valid occupational need defenses”).

302. *See Levinson, supra* note 19, at 3.

to gender-based programs, including some in the military.

B. Decisions Striking Down Military Affirmative Action Programs

Despite the doctrines which should have afforded the military's affirmative action programs strong deference—especially to its gender-based policies—even the military did not escape the legal pressure brought to bear on all affirmative action after the Supreme Court sharply limited the permissible scope of such programs in *Croson*³⁰³ and *Adarand*.³⁰⁴ In the wake of these decisions, some scholars studying the Army's affirmative action programs predicted that these programs could not survive strict scrutiny because they were neither aimed at addressing, nor narrowly tailored to eliminate, present and specific discrimination in the military.³⁰⁵ These scholars pointed out that the Army had not stated with any certainty that the underrepresentation of minorities in the officer corps was due to present discrimination.³⁰⁶ Moreover, in setting numerical targets for racial minorities and women in the officer corps, the Army had, some believed, essentially adopted quotas, which were by that time strongly disfavored by the Supreme Court.³⁰⁷ And in fact, by the early 2000s, plaintiffs had successfully challenged in federal court the more aggressive uses of affirmative action by military promotion boards.³⁰⁸

303. 488 U.S. 469 (1989).

304. 515 U.S. 200 (1995). The boldness with which the conservative majority struck down the affirmative action programs in these cases led to overinterpretation of their holdings by some lower courts. See, e.g., Peter Lurie, *The Law As They Found It: Disentangling Gender-Based Affirmative Action Programs from Croson*, 59 U. CHI. L. REV. 1563, 1575 (1992) (observing that “*Croson* . . . had a mesmeric effect on conservative judges” who “interpreted the opinion to require the strict scrutiny standard for gender-based preference programs”)

305. Donovan R. Bigelow, *Equal but Separate: Can the Army's Affirmative Action Program Withstand Judicial Scrutiny After Croson?*, 131 MIL. L. REV. 147, 165 (1991); Capt. Holly O'Grady Cook, *Affirmative Action: Should the Army Mend It or End It?*, 151 MIL. L. REV. 113, 117 (1996). These studies gave too short shrift, however, to the special deference owed the military.

306. Bigelow, *supra* note 305, at 165; Cook, *supra* note 305, at 117.

307. Bigelow, *supra* note 305, at 165.

308. See *Saunders v. White*, 191 F. Supp. 2d 95, 138 (D.D.C. 2002) (holding that the written equal opportunity guidance the U.S. Army provided to its 1996 and 1997 Judge Advocate General's (“JAG”) Corps Colonel promotion boards was unconstitutional); see also *Berkley v. United States*, 287 F.3d 1076, 1091 (Fed. Cir. 2002) (prohibiting the use of racial preferences by Air Force retirement boards), *settlement approved by* 59 Fed. Cl. 675 (2004); *Christian v. United States*, 46 Fed. Cl. 793, 818 (2000) (prohibiting the use of racial preferences by the Army in mandatory retirement boards). For further discussion of these cases, see Barnes, *supra* note 26, at 715–17; see also MILITARY LEADERSHIP DIVERSITY COMM'N, ISSUE PAPER #51: AN OVERVIEW OF LEGAL CASES CHALLENGING EQUAL OPPORTUNITY GUIDANCE TO CERTAIN MILITARY PROMOTION AND RETIREMENT BOARDS (2010), available at <https://www.hsdl.org/?view&did=716204>.

The military itself is partly to blame for these setbacks. Aside from its highly effective defense of diversity as a compelling interest in *Grutter*, the military has made a surprisingly weak effort to defend its affirmative action programs in court. So far, the military has not attempted to assert in litigation any rationale for affirmative action other than two most closely connected to mission effectiveness—unit cohesion and relating to foreign citizens.³⁰⁹ Often, it has not even made these arguments. In one case, for example, the Army first insisted that it had not used racial classifications at all, and then relied on the argument that the plaintiff would not have been promoted even in the absence of the affirmative action policy.³¹⁰

What is also striking about these cases is the inconsistency and lack of clarity with which the courts applied the level of scrutiny for gender-conscious policies and the special deference to which the military has been traditionally entitled, particularly in regard to its personnel policies.

Saunders v. White,³¹¹ a district court case, best illustrates the failures of the courts to apply the correct standards and the failures of the military to marshal the necessary facts to properly evaluate the military's affirmative action policies. A white male retired Judge Advocate General ("JAG") officer sued the Army, claiming that he was discriminated against on the basis of race and gender in violation of the Fifth Amendment's Due Process Clause.³¹² Specifically, he alleged that the Promotion Selection Boards denied him promotion to Colonel due to application of the Army's equal opportunity policy.³¹³ The policy documents were ambiguous, but they could be interpreted as urging promotion boards to aim to approve promotion of specific numbers of minorities.³¹⁴ The Army precept instructed JAG Promotion Boards to "be alert to the possibility of past personal or institutional discrimination—either intentional or inadvertent—in the assignment patterns, evaluations, or professional development of officers in those

309. See Fisher Military Brief, *supra* note 101.

310. See *Saunders*, 191 F. Supp. 2d at 95.

311. *Id.*

312. The Fifth Amendment Due Process Clause incorporates the equal protection principles and jurisprudence from the Fourteenth Amendment, including those that limit racial and gender classifications. See *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995).

313. *Saunders*, 191 F. Supp. 2d at 98.

314. For further discussion of the Army's affirmative action policies with respect to officer promotion prior to *Saunders*, see Barnes, *supra* note 26, at 715; Bigelow, *supra* note 305, at 161–64; Cook, *supra* note 305, at 140–45 (observing that the boards' equal opportunity instructions were contained in D.A. Memo 600-2).

groups for which you have an equal opportunity selection goal.”³¹⁵ The boards were required to “review and report . . . the extent to which minority and female officers were selected at a rate less than . . . non-minority officers.”³¹⁶ The policy specifically denied that it should be “interpreted as guidance to meet a particular quota,” but in an appendix to the precept, boards were instructed that the goal was “to achieve a selection rate in each minority and gender group . . . that is not less than the selection rate for all officers in the promotion zone.”³¹⁷

The court concluded that the policy was unconstitutional, rejecting the Army’s justifications for the policy as required to remedy past discrimination in the promotion process and “create the perception of equal treatment.”³¹⁸ The *Saunders* court held that, in the Army JAG Promotion Board context, preferences based on neither gender nor race were constitutional.³¹⁹ The court found that the evidence submitted by the Army had failed to establish the “pervasive, systematic, and obstinate” discriminatory conduct that would justify the use of some racial preferences under *Adarand*.³²⁰ Although in *Ballard* the Supreme Court upheld gender classifications in the officer promotion context, in part based on the military’s unique requirements,³²¹ the *Saunders* court did not mention or cite to *Ballard* at all!

Moreover, as a true test of whether the military’s affirmative action policies were constitutional, *Saunders* was a problematic case because the Army manifestly failed to make the strongest possible argument for its own policies. The evidence it offered for past discrimination was largely based on a study of twenty years of data regarding black personnel,³²² but this data was ambiguous: it indicated that, during some periods, black officers had been promoted faster to lower ranks than white officers and that the differences in promotion rates to senior ranks had closed rapidly during the last decade studied.³²³ The court was also skeptical about the usefulness of the data because it covered the Army as whole, rather than just the JAG Corps.³²⁴ The court’s

315. *Saunders*, 191 F. Supp. 2d at 121.

316. *Id.*

317. *Id.* at 122.

318. *Id.* at 129.

319. *Id.*

320. *Id.* at 131–32 (citing *Adarand Constructors v. Peña*, 515 U.S. 200, 237 (1995)).

321. See *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975).

322. The data the Army relied on was contained in JAMES A. THOMAS, RACE RELATIONS RESEARCH IN THE UNITED STATES ARMY IN THE 1970’S: A COLLECTION OF READINGS (1988).

323. *Saunders*, 191 F. Supp. 2d at 130–31.

324. *Id.*

findings were contradicted by later, more comprehensive studies of promotion data from as recently as 2010 concluding that both racial minorities and women continued to systematically suffer from poorer rates of promotion than non-minorities.³²⁵

The court also found that the Army had failed to demonstrate that the plaintiff was not subjected to an unfair process during the two years he was up for promotion and before the boards.³²⁶ Here, the Army's case was especially difficult to make: the Army asserted that the plaintiff would not have been promoted, even in the absence of the equal opportunity policies, but the records of the promotion board proceedings had been destroyed, as mandated by Army procedures.³²⁷

In two other cases that are noteworthy for their thin analysis, courts held unconstitutional military affirmative action policies regarding promotion and retirement very similar to the ones struck down in *Saunders*. In *Christian v. United States*, the U.S. Court of Claims held that the Army's policies for Selective Early Retirement Boards ("SERBs") violated the Fifth Amendment.³²⁸ Like the equal opportunity policies governing the JAG Promotion Boards addressed in *Saunders*, the Army SERBs were directed to consider evidence of past discrimination and pursue the goal of limiting selection of minority and female candidates for early retirement to the same rate as non-minority candidates.³²⁹

In *Berkley v. United States*—the only Court of Appeals case addressing the military's use of affirmative action after *Ballard*—the Federal Circuit addressed a similar affirmative action policy for Air Force boards charged with selecting officers for termination after a Reduction In Force ("RIF").³³⁰ Unlike the boards that were the subject of *Saunders* and *Christian*, the Air Force RIF Boards were not charged with the goal of limiting minority terminations to a specific proportion of the whole; the Air Force policy instead instructed the Boards to consider past discrimination in its decision-making.³³¹ The Federal

325. See MILITARY LEADERSHIP DIVERSITY COMM'N, DECISION PAPER #4: PROMOTION (2011), available at <https://www.hsdl.org/?view&did=716012>; Barnes, *supra* note 26, at 716; see also RAND Sexual Orientation Study, *supra* note 27, at 44–45.

326. *Saunders*, 191 F. Supp. 2d at 111 (regarding the central issue as whether the 1996 and 1997 boards relied on, and were motivated by, race and gender classifications in the decision not to promote Saunders).

327. *Id.* at 112–13; see also Barnes, *supra* note 26, at 715–17 (discussing the arguments made and the decision reached by the *Saunders* court).

328. *Christian v. United States*, 46 Fed. Cl. 793, 804 (2000).

329. *Id.*

330. *Berkley v. United States*, 287 F.3d 1076, 1079 (Fed. Cir. 2002).

331. *Id.* at 1081.

Circuit held that this alone was sufficient to create racial *and* gender classifications subject to strict scrutiny.³³² As for special deference to the military, the Federal Circuit acknowledged that it existed, but declined to decide “what effect, if any, deference to the military would have on the judicial application of strict scrutiny.”³³³

C. *The Future of Affirmative Action in the Military*

After these reverse-discrimination lawsuits,³³⁴ the armed forces pulled back on the affirmative action mandates for officer-selection procedures.³³⁵ In 2006, for example, the Army’s revised guidance still required promotion boards to report race and gender statistics, but no longer contained language instructing boards to consider past discrimination or stating a particular selection rate for minorities as a goal.³³⁶ In 2011, the Army restored the instruction that boards should take into account the fact that there had been past institutional discrimination, but made clear that boards may not grant preferences based on past discrimination.³³⁷ The Navy’s most recent policy instructed boards that, to select the best officers, they “must ensure that officers were not disadvantaged by their race, religious preference, ethnicity, gender, or national origin.”³³⁸

With affirmative action temporarily curtailed in the officer-selection process, the affirmative action measures practiced by the service academies and ROTC programs became more important for achieving

332. *See id.* at 1082 (“Because we conclude that the MOI requires differential treatment of officers based on their race or gender, it must be evaluated under a strict scrutiny analysis.”).

333. *Id.* at 1091.

334. Other officer selection policies were challenged in court, with similar results in *Baker v. United States*, 127 F.3d 1081, 1083 (Fed. Cir. 1997); *Ricks v. United States*, 65 Fed. Cl. 826, 830 (2005); *Alvin v. United States*, 50 Fed. Cl. 295, 297 (2001); *Sirmans v. Brownlee*, 346 F. Supp. 2d 56, 62 (D.D.C. 2004). From *Sirmans*:

The instructions, which set numerical goals for promotion of women, violated the Fifth Amendment right to equal protection because they favored women during both the initial consideration and the review procedure without connection to an important government interest as required by intermediate scrutiny. . . . The Army’s sole argument in the face of *Saunders* is that *Saunders* involved a Caucasian, not a minority like plaintiff. This argument rehashes the Army’s standing argument and fails to comprehend that plaintiff, as a male, can claim the benefit of *Saunders* regardless of his race.

Sirmans, 346 F. Supp. 2d at 62 (citations omitted).

335. *See Barnes*, *supra* note 26, at 717.

336. *See* DEP’T OF THE ARMY, POLICIES AND PROCEDURES FOR ACTIVE-DUTY LIST OFFICER SELECTION BOARDS 52 (Sept. 25, 2006), available at http://www.army.mil/usapa/epubs/pdf/m600_2.pdf.

337. *See* DOD DIVERSITY PLAN, *supra* note 4, at 3.

338. 2012 DOD GENDER RELATIONS SURVEY, *supra* note 50, at 137.

the goal of representation in the officer corps. Because military leaders are selected from within rather than without, aggressive strategies toward educational institutions became crucial for achieving the accession of sufficient numbers of minority and women officers.³³⁹ From the 1970s until at least the early 2000s, the armed services used a number of race- and gender-conscious policies. To increase the numbers of minorities eligible for admission to the service academies, each service (except the Coast Guard) began to rely heavily on their preparatory schools, which gave strong preferences to minorities in admission. In 2009, racial minorities comprised nearly 50% of students at the United States Military Academy and United States Air Force Academy Preparatory Schools, and more than 50% at the United States Naval Academy Preparatory School. Fifteen to twenty percent of students in these preparatory schools were women.³⁴⁰ Junior ROTC programs for high school students have primarily served minority students as well: in 2010, the majority of participants were racial minorities, and 30–45% were women.³⁴¹

The service academies themselves all worked with some form of numerical targets for the admission of racial minorities and used race as a “plus factor” in admissions.³⁴² The ROTC, a second major conduit for civilians into the officer corps, heavily targeteded scholarships to minority students. In 2001, for example, black applicants were twice as likely to be awarded Army ROTC scholarships than white applicants because many such scholarships were earmarked for historically black colleges.³⁴³

Such policies yielded impressive results, particularly in the early years. In 1968, 110 blacks were admitted to all three service academies, but in 2004, the same number were enrolled at West Point alone.³⁴⁴ Still, these measures, aggressive as they were, did not enable the services to reach the military’s goal of the officer corps representing the diversity of society at large. In 2009, all racial minorities were still underrepresented in accession from ROTC and service academies.³⁴⁵

339. Leach, *supra* note 28, at 1113–14.

340. MILITARY LEADERSHIP DIVERSITY COMM’N, ISSUE PAPER #39: SERVICE ACADEMY PREPARATORY SCHOOLS AS A RESOURCE FOR RACIAL/ETHNIC DIVERSITY IN THE OFFICER CORPS (2010), available at <http://www.hsdl.org/?view&did=716180>.

341. MILITARY LEADERSHIP DIVERSITY COMM’N, DECISION PAPER #1: OUTREACH AND RECRUITING (2011) [hereinafter M.L.D.C. Decision Paper #1], available at <http://www.hsdl.org/?view&did=715994>.

342. Leach, *supra* note 28, at 1112.

343. *Id.* at 1113–14.

344. *Id.*

345. See M.L.D.C. Decision Paper #1, *supra* note 341.

Yet without these aggressive measures with respect to education, Defense Department officials have argued, the officer corps would rapidly revert to an almost exclusively non-minority one.³⁴⁶

Despite the setbacks suffered by the military's affirmative action programs during the 1990s and early 2000s, these programs still enjoyed widespread respect and support when the Supreme Court once again addressed the constitutionality of affirmative action programs in 2003—this time in public education—with *Grutter*.³⁴⁷ In using the military's affirmative action programs in education—for admission to the service academies, preparatory schools, and ROTC Programs—at the very least as a justification for the use of affirmative action in other contexts, the *Grutter* Court seemed to give these programs the highest stamp of constitutional approval. Nonetheless, the survival of affirmative action in the military—and perhaps affirmative action elsewhere as well—depends on the military's willingness not only to use affirmative action more aggressively, but also to defend its own affirmative action policies the way it has so vigorously defended affirmative action in general.

CONCLUSION

During a period when the viability of race- and gender-conscious measures in public institutions was suffering blow after blow, perhaps the most well-admired public institution of all—the U.S. Military—stepped in to persuade the U.S. Supreme Court to preserve some constitutional space for affirmative action. Why did the military draw on its deep reservoir of public respect to defend an unpopular set of practices? The military's own recent history tells the tale. Without decades of using race-conscious measures in its education, assignment, and promotion policies, the military could never have achieved the level of diversity in its ranks that, at least in part, has enabled it to earn the broad respect it used so effectively in persuading the Court.

Yet even as the military stepped in to rescue affirmative action in court, it struggled with its own failures to achieve racial and gender equality. Although the military presented to the public a racially diverse image, full racial integration of the officer corps, in particular, remained incomplete. And female servicemembers faced, not only formal exclusion from combat roles and the potential for advancement that came with them, but also a slow-boiling sexual assault and harassment epidemic, which the measures the military has taken so

346. See Becton Brief, *supra* note 16, at 5, 7, 30.

347. *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003).

far—such as intensive anti-harassment training and new procedures for dealing with sexual assault cases—have not been enough to stem.

Although the military has emerged as a staunch defender of affirmative action, its efforts at achieving full equality in its own ranks have fallen short because it has not used affirmative action aggressively enough. For one thing, perhaps due to confusing signals from civilian leadership, the military offered a woefully inadequate legal defense of its affirmative action policies when some of them were challenged in lower federal courts. Moreover, a military culture that has long associated combat effectiveness with masculinity in general, and a specific vision of male sexuality in particular, remained a stumbling block to gender integration. Even as more and more women saw combat, their status as second-class citizens in the military contributed to an environment in which they were often victims of harassment and assault. Aside from the fact that the persistence of the problem is an affront to the military's own best values, the resulting damage to productivity, morale, and unit cohesion surely outweighed any purely speculative benefit that might flow from preserving an antiquated gender supremacy. Strength through diversity, rather than masculinity, represents the future of military effectiveness.

As the literature on gendered organizations reveals, the problematic aspects of military culture can only be fully transformed through a reconstitution of military leadership. And that sort of reconstitution will not happen without robust efforts to promote and assign women quickly to the leadership positions from which, through formal or de facto norms, they have long been excluded. And to the extent that the officer corps does not reflect the full racial diversity of the nation it serves, a renewed effort to promote racial minorities will be necessary as well. Pursuing these policies does not mean that qualified non-minority officers need be denied deserved assignments or promotions. But it does mean that the military should re-examine whether the existing qualifications really match the actual requirements of positions.

By committing itself to using affirmative action more comprehensively, the military can banish lingering doubts about whether it truly offers equal opportunity for all, further burnish its reputation as a place where diversity works, and maintain its hard-won status as a revered American institution. With the military fully committed to expanding its use of affirmative action without hesitation, the military's past and present success can play an even larger role in persuading the Supreme Court when the viability of public affirmative action is next considered. Affirmative action needs the military, but the military needs affirmative action. Their fates are, indeed, intertwined.