Compelling Government Interests and Diversity Policy

MLDC Research Areas

Definition of Diversity

Legal Implications

Outreach & Recruiting

Leadership & Training

Branching & Assignments

Promotion

Retention

Implementation & Accountability

Metrics

National Guard & Reserve

This issue paper aims to aid in the deliberations of the MLDC. It does not contain the recommendations of the MLDC.

Military Leadership Diversity Commission
1851 South Bell Street
Arlington, VA 22202
(703) 602-0818

http://mldc.whs.mil/

Abstract

This issue paper (IP) explains the concept of a *compelling government interest* and how this concept fits within the *strict scrutiny* test. This IP should be of particular interest to the commissioners because it explains legal limitations on the interests that lawfully may be pursued in any diversity policy recommendations the commission decides to make.

This IP is one of a three-part series that covers the strict scrutiny test used by courts to decide whether policies that intentionally or unintentionally give differential treatment to members of suspect classes are legal. There are two parts to the strict scrutiny test: (1) the concept of *compelling government interest*—whether the goal the policy is trying to achieve is sufficiently important to justify a particular use of suspect classification (the subject of this IP) and (2) the concept of *narrow tailoring*—whether the policy achieves its goals with as little effect as possible on other groups (the subject of the third IP in the series). A policy must fulfill both of these requirements in order to pass the strict scrutiny test.

This paper shows that no list of accepted compelling government interests exists and that there is no consistent, accepted definition of *compelling interest*. Courts decide whether there is a compelling government interest on a case-by-case basis and depending on the specific facts and arguments of each case.

Only important, specific goals may satisfy this level of judicial scrutiny. Strong social science evidence and expert opinion may help build a successful compelling-government-interest argument in court.

In addition, we discuss several types of arguments—both successful and unsuccessful—that have already been ruled upon by courts. This exposition should assist the commissioners in developing a legal framework to apply to their own recommendations and to assess the level of litigation risk that they are willing to accept in making their recommendations. We also present several arguments for increasing diversity in military leadership that have not yet been tested in court for the commissioners to consider.

The MLDC has been chartered to "conduct a comprehensive evaluation and assessment of policies that provide opportunities for the promotion and advancement of minority members of the Armed Forces," including the military's diversity programs. The tasks of the charter indicate that the term *minority* is intended to include both women and members of underrepresented race/ethnicity groups. Also implicit in the tasks is the goal of increasing demographic diversity among the military's senior leadership.

Because the law generally prohibits public employers from treating people differently based on race, ethnicity, and (to a lesser extent) gender, a series of three issue papers (IPs) is devoted to describing and explaining the legal framework surrounding diversity programs, and particularly those that affect decisions regarding the recruitment, admission (to the military academies, the Reserve Officers' Training Corps [ROTC], and other officer accession programs), accession, assignment, promotion, and separation of military servicemembers.

This is the second IP in the series and deals specifically with the concept of *compelling government interests* (CGIs). It describes the first prong of the *strict scrutiny* test used by courts to determine the legality of employment policies and practices that treat members

of *suspect classes* differently.[1] This first prong deals with whether the goals and objectives that drive the policies or practices under scrutiny could be justified as a CGI. The laws governing the equal treatment of military members and the introduction of the strict scrutiny test are found in Military Leadership Diversity Commission (2010f). Military Leadership Diversity Commission (2010g) addresses the *narrow tailoring* prong of the strict scrutiny test.

In this IP, we discuss the concept of CGIs and the fact that demonstration of a CGI is a necessary part of the two-prong strict scrutiny test. We note that we cannot provide a definitive definition of a CGI because *compelling*, in the context of constitutional law, is a term of art, and its definitions vary over time and across courts. There is no list of accepted CGIs, and neither presidential nor congressional findings will establish a CGI that is binding upon a court. However, both presidential and congressional findings could be used as evidence to be considered in court.

Moreover, *compelling*, in this context, does not mean that the government is "compelled" to take some action. Instead, it refers to something that is deemed legally permissible.

Even if a CGI is held to exist, the policy must still satisfy the narrow tailoring prong of the strict scrutiny test. Narrow tailoring is explained in Military Leadership Diversity Commission (2010g).

Triggering the Strict Scrutiny Test

In its introduction to the strict scrutiny test, Military Leadership Diversity Commission (2010f) explains which types of diversity programs will and will not likely be subject to the strict scrutiny test if challenged in court:

- Programs that do *not* use different standards on the basis of membership in one or more suspect classes are presumed constitutional and are not subject to the strict scrutiny test.
- Programs that *do* use different standards on the basis of membership in one or more suspect classes are presumed to violate the Constitution and will be subject to strict scrutiny in court.

Examples of Policies That Do *Not* Trigger the Strict Scrutiny Test. Courts have consistently found that equal opportunity programs do not trigger strict scrutiny because they simply try to treat everyone alike. Within this context, efforts to locate and eliminate structural barriers that intentionally or accidentally frustrate equal opportunity are usually not subject to strict scrutiny. Instead, they are subject to rational basis review, a degree of review that the government is usually able to satisfy.

In addition, demographically neutral programs that happen to increase demographic diversity are not likely to be subjected to strict scrutiny.[2]

There is somewhat more risk—though how much is unclear—that a program that intentionally uses demographically neutral means in order to increase demographic diversity will be subjected to strict scrutiny.[3] There would probably be a relatively low risk of triggering strict scrutiny for programs that (1) fund recruitment outreach to communities that are underrepresented in particular military branches or in the military academies or (2) help aspiring servicemembers qualify for selection, as long as such programs do not use different standards on the basis of membership in one or more suspect classes in the accession or admission decision. Similarly, policies that lower the cut-score for standardized tests may widen the range of qualified applicants without using different standards at the actual moment of decision and, hence, are also unlikely to trigger strict scrutiny.

Examples of Policies That *Do* Trigger the Strict Scrutiny Test. In contrast, programs *do* trigger strict scrutiny when they use different standards based on suspect class membership. Affirmative action programs may do this. Programs that do this may be as explicit as instructing a selection board to select a certain number of candidates from suspect classes or to grant additional points to a candidate based on his or her suspect class membership, or they may be as subtle as instructing the board to report on the suspect class breakdown of the its decisions.[4] An empirical study of court decisions between 1990 and 2003 that applied strict scrutiny in lawsuits alleging discrimination based upon suspect classifications, Winkler (2006, p. 842; 2007, p. 1938) found that the court upheld the federal government's use of suspect classifications half the time.

Compelling Government Interests

If a program uses different standards on the basis of membership in one or more suspect classes and strict scrutiny applies, the government must demonstrate that it is pursuing a CGI—specifically, that an important problem exists that can only be addressed by using suspect classifications. If the goal can be accomplished without the use of suspect classes, it is less likely that the program will survive strict scrutiny.[5]

For the purposes of the MLDC, the issue is whether the lack of demographic diversity in the highest ranks of the military is an especially important problem: Does the government have a compelling interest in changing the demographic mix of senior leadership?

There are no general definitions of a CGI or of what constitutes an "important problem." Instead, a body of judicial decisions has formed as courts have accepted or rejected the CGI arguments made by the parties to individual cases. Moreover, even given this body of case law, it is important to remember that each individual judge views each new case based on the specific facts of the case and through his or her own interpretive lens.

Based on existing case law, there are two types of acceptable CGIs: those based on a need for remedial action (i.e., that are backward-looking) and those based on operational needs (i.e., that are forward-looking).

Historically, "remedial" arguments have been the most commonly accepted CGIs. Programs that have been upheld under this type of argument tend to be backward-looking

affirmative action plans created to remedy specific demographic imbalances in specific job categories that are the result of intentional discrimination or the current effects of past intentional discrimination. The U.S. military's history of integration makes it unlikely that a remedial-basis argument would exist to support a CGI, and the Army has lost on this point before.[6]

Military diversity programs are more likely to be successfully defended based on forward-looking "operational-needs" arguments. This type of argument is a relatively new frontier in strict scrutiny cases, and there are not many cases discussing it.[7] Some judges have been persuaded in specific cases that particular operational challenges justified using different standards based on suspect classes in making hiring, admission, assignment, promotion, or separation decisions.

Under this type of argument, national security interests may provide a partial basis for a CGI. For example, in *Grutter v. Bollinger*, then–U.S. Supreme Court Justice Sandra Day O'Connor favorably quoted the amicus curiae brief of retired Lt. Gen. Julius Becton, Jr. et al. that a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principal mission to provide national security."[8]

In *Grutter*, Justice Clarence Thomas, who takes a very limited view of when different standards based on membership in one or more suspect classes may be used, noted that pressing national security concerns, as well as violence prevention, may be adequately compelling.[9] In a different case, a Court of Appeals held that, "in a period of heightened public concern with the dangers posed by international terrorism," national security priorities "justif[y] some sacrifice of competing interests," including the interests that usually discourage using different standards in employment decisionmaking on the basis of membership in one or more suspect classes.[10]

Even so, a simple assertion of "national security" is extremely unlikely to be enough to persuade a judge that a CGI exists. No court has yet ruled in favor of the military in litigation regarding military diversity programs. This is not an area where traditional judicial deference to the military applies.[11]

Proof is needed. The key in operational-needs cases in which the government successfully demonstrated a CGI was the presentation of valid evidence supporting the existence and the importance of the stated operational need; mere aspiration, principle, or common sense is never legally adequate to establish a CGI that justifies using different standards based on suspect class membership.[12] Instead, there must be valid and persuasive social science evidence or professional expertise demonstrating the existence of a problem that can only be fixed by using different standards for individuals based on their membership in suspect classes in making accession, admission, assignment, promotion, or separation decisions. This is possible, albeit difficult.

It would be necessary to supply specific social science evidence or professional military expertise demonstrating the existence of a specific, important problem that can only be fixed by using different standards for servicemembers based on their suspect class membership. Although social science research on diversity continues to develop, courts have not been satisfied with the evidence presented in past lawsuits challenging military diversity policies.[13] Also, military experience has not been documented in such a manner that it has been persuasive to a court in a lawsuit against the military.[14]

What follows is a description of operational needs–based CGIs that have been upheld in court, selected proposed CGIs that have been rejected in court, and commonly asserted justifications for greater demographic diversity among military leadership that have not yet been tested in court. Although some arguments have been accepted in courts, no cases offer a clear path forward for military diversity programs: There are only a few cases that might be analogized to the military, and there are less than a handful that apply to the military directly.

Compelling Government Interests That Have Been Upheld in Past Court Cases

Demographic Diversity in Education for National Security Leaders

Argument. The amicus curiae brief submitted by Lt. Gen, Julius W. Becton, Jr. et al. in *Grutter* and *Gratz* asserted that

> the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies. . . . In the interest of national security, the military must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting.[15]

Discussion. The U.S. Supreme Court held that diversity is a CGI in public education in *Grutter* and *Gratz*, in part because the majority was persuaded by both this brief's argument *and* the evidence that was presented to support it. The court found the evidence persuasive because it was based on the brief's signatories' "decades of experience."[16]

This means that diversity can be pursued in higher education programs funded by the military (including the Service academies and ROTC programs) as long as they are "narrowly tailored" to pursue their objective without causing undue harm to groups that do not benefit from the program. Justice O'Connor anticipated that such programs would no longer be necessary 25 years in the future. It is worth noting, however, that *Grutter* was decided 5-4, and some people hope that the court will overrule its decision in *Grutter* in order to make diversity in public higher education no longer a CGI. Further, the *Grutter* decision explicitly stated that it was limited to the context of public higher education. In a later Supreme Court case—decided after the deciding justice

in *Grutter* retired from the court—the five-judge majority reinforced that limitation and held that diversity must involve more than just increasing the percentages of members of specific suspect classes.[17]

Demographic Diversity for Democratic Legitimacy

Argument. "In a democracy, it is believed that a broadly representative military force is more likely to uphold national values and to be loyal to the government—and country—that raised it" (Armor, 1996, p. 2). A corollary argument, also based on democratic values, asserts that both the risks and the benefits of military service should be shared equally by all members of society. Specifically, the risk of injury and death during wartime and access to employment, educational, and leadership opportunities during peacetime should be equal across communities. The American people are diverse, and increasingly so. Although the lower ranks of the military are actually more diverse than the American public at present, a significant degree of improvement in the demographic diversity in military leadership is necessary for the leadership to reflect a diverse nation.[18]

Discussion. In its finding that diversity is a CGI interest in public higher education, the *Grutter* decision noted that "effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." Further, it noted that, "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[19]

In addition, there are several Court of Appeals decisions holding that demographic diversity in police leadership is necessary to promote the public's trust in the police department, which in turn makes the police more effective.[20] One court stated that

> effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions.[21]

In each of these decisions, the court was persuaded by social science evidence presented by experts as well as the experience of senior law enforcement officers.

However, improving representation should not be "merely racial balancing in disguise."[22] The Supreme Court has stated that racial balancing is "patently unconstitutional."[23] Again, it is worth noting that *Grutter* was decided 5-4, that the deciding justice is no longer a member of the Supreme Court, and that some people hope that the Court will overrule its decision in *Grutter* in order to make diversity in public higher education no longer a CGI. In subsequent decision, a plurality of Supreme Court justices noted that proportional goals needed to be tied to the proportions that would yield the benefits of diversity rather than simply reflect the population at large because to do that would be akin to racial balancing.[24] In addition, as just noted, the court held that diversity must involve more than suspect class membership.[25] This would damage the argument that effective participation is a CGI.

Specific Assignments Based on Demographics

Argument. Some specific national security assignments have operational requirements that might benefit from selecting individuals of particular demographics. Commonly cited examples include undercover assignments, having native speaker–quality fluency in a particular foreign language, and having a cultural background that is relevant to an assignment.[26]

Discussion. The essential question is whether there is evidence that demographic group membership will inherently provide the ascribed benefits. Regarding culture, there is little evidence that demographic group membership will inherently provide these benefits (Military Leadership Diversity Commission, 2009, 2010a). Therefore, cultural sensitivity is unlikely to be a successful CGI.

Native speaker–quality language ability may be necessary for some job assignments. Of course, native speakers may not always be members of the demographic group most commonly associated with the language. In addition, in the current military data system, someone who speaks, for example, Arabic because he or she is of Arab descent would be classified as white.

There is a small number of decisions regarding employment preferences in contexts where demographics were held to be important for the specific mission assignments. For example, in *Wittmer v. Peters*, the Court of Appeals held that a race-based preference given to an African American correctional officer who applied for promotion to lieutenant survived strict scrutiny, basing its decision on expert evidence demonstrating that the "black lieutenant is needed because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp."[27]

In the 1968 case of *Baker v. City of St. Petersburg*, the Court of Appeals accepted that race might be considered for "the undercover infiltration of an all-Negro criminal organization or plainclothes work in an area where a white man could not pass without notice. Special assignments [on the basis of race] might also be justified during brief periods of unusually high racial tension."[28] (The practice at issue in the case—of only assigning African American police officers to predominantly African American neighborhoods—was struck down by the Court of Appeals.)

Such decisions regarding preferences based on race are rare. This is because existing case law involves employers that were bound by both the Fourteenth Amendment's Equal Protection Clause and Title VII of the Civil Rights Act of 1964. TitleVII allows limited discrimination or preferences in job

assignments as long as it is based on "bona fide occupational qualifications" (BFOQs), but race is excluded from this provision (42 U.S.C. § 2000e-2(a), 2009). Although these cases allowed the limited creation of a race-based BFOQ, other courts have refused to do so.[29]

Accurate Assessments of Individual Servicemembers to Identify Past Discrimination

Argument. The Army instructed involuntary retirement selection boards to look for evidence of possible past discrimination in the records of minorities and women. The Army argued that there is a CGI "in preventing possible past discrimination against a particular minority officer from detrimentally affecting the Army's present consideration of that officer's professional attributes and potential for future contributions if retained on active duty."[30]

Discussion. The court did not accept this particular CGI, finding that the specific guidance allowed boards to use "lower achievement" as a proxy for evidence of past discrimination. However, the court stated that "accurately assessing the professional attributes of the officers it reviews for retirement" would indeed be a CGI for the Army, as long as the endeavor was to determine whether an individual officer was actually discriminated against.[31]

Select Past Failures to Establish a Compelling Government Interest

Demographic Diversity for Role Models

Argument. The issue of the diversity of role models is particularly important in the military because its internal promotion system virtually eliminates the possibility of lateral hiring. Symbolically, demographic diversity in senior leadership is a signal of upward career mobility and opportunity for all. If minority and female servicemembers perceive the lack of demographic diversity in leadership as a glass ceiling, this could frustrate efforts to recruit and retain members of these groups, particularly individuals whose skill and experience make them competitive applicants for employment outside the military.

Role models and mentors can also make an important contribution to a servicemember's career progression. For example, Hosek et al. (2001) reported that mentoring and peer networks for black officers were important to success. However, as noted in Military Leadership Diversity Commission (2010c), there is concern that the lack of women and minorities among senior leadership limits the availability and quality of mentoring relationships for women and minorities in the junior ranks.[32]

Discussion. The role-model theory has not yet been an acceptable argument in the courts. In *Wygant v. Jackson (Mich.) Board of Education*, a public school had a program designed to preserve the balance of minority teachers by giving them preferential protection in layoffs against white teachers, even white teachers with greater seniority.[33] The school board justified this program by asserting that it was necessary for there to be sufficient minority teachers to act as role models to minority students; this would in turn alleviate the effects of societal discrimination. In a plurality decision, the U.S. Supreme Court struck down the program, in part due to a rejection of this justification. The court noted that it "never has held that societal discrimination alone is sufficient to justify a racial classification. . . . Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." Instead, the court's approach is to insist "upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."[34] This way, the remedy can "fit" the problem.[35] However, it is worth noting that the school board did not base its argument on a need to have diverse faculty or diverse role models, just same-race role models.[36] In addition, it does not appear that strong social science evidence was presented to the court regarding the impact of minority teachers on minority students' performance and later outcomes.

Perception of Equal Opportunity

Argument. In two reverse-discrimination lawsuits against the Army, white lieutenant colonels claimed that they had been discriminated against due to equal opportunity instructions given to promotion boards (in one case) and an early retirement board (in the other). The Army justified the instructions by arguing that the *perception* of equal opportunity is an important government objective.

Discussion. The courts rejected the Army's argument. In one of the cases, the judge noted that the Army did not argue both that the purpose was *actual* equality of opportunity and that "one person's perception of equal opportunity is another person's perception of outright discrimination."[37] It appears that the Army did not present social science evidence demonstrating the importance of the perception of equal treatment, although it is hard to know whether such evidence would have been persuasive to the judges.

Commonly Mentioned Justifications That Have Not Been Tested in Court

Demographic Diversity for the Recruitment of Highly Qualified Candidates

Argument. The U.S. Census Bureau projects that the nation will continue to become increasingly racially and ethnically diverse, especially among youth. To successfully staff the all volunteer force, the military needs to better tap the full array of U.S. recruiting markets, either to recruit currently untapped talent *or* simply to fulfil its annual recruiting missions (or both). The military is more likely to be able to tap the markets if the existing force—and especially its leadership—is similarly diverse.

Discussion. Relationship to previously tested arguments: This argument appears to be analogous to the as-yet-unsuccessful role-model argument.

Possible use of suspect classes: Given the military's closed personnel system, creating a more diverse leadership to attract today's diverse recruits might require considering demographics in promotion. Similarly, creating a more diverse future leadership to attract future recruits might require considering demographics in accessions. However, no CGI would need to be established to *recruit* diverse candidates as long as different standards based on suspect class membership are not used at the moment of selection decision.[38]

Necessary evidence: It would be necessary to demonstrate that (1) tapping these markets is necessary for military missions, (2) the military is not currently doing an adequate job of tapping these markets, and (3) proactively creating a more diverse current leadership would help achieve these goals. Anecdotal evidence shows that the perception of having an advantage due to reasons other than merit may do some harm, which may undermine this argument.

Demographic Diversity for Individual Performance

Argument. Although they are a small part of the officer corps, minority and female servicemembers comprise a very large proportion of overall military manpower. Steps need to be taken to ensure that the military is successful in encouraging this portion of its manpower to succeed. Implicit in this is an interest in morale and retention. This interest requires the military to be an organization that welcomes demographic diversity, provides an inclusive environment, encourages everyone to put forward their best efforts, and rewards excellent performance.[39] Demographic diversity in senior leadership is a signal of rewarding individuals for their performance.[40]

Discussion. Relationship to previously tested arguments: This argument appears to be analogous to the as-yet-unsuccessful role-model argument.

Possible use of suspect classes: Given the military's closed personnel system, creating a more diverse leadership to attract today's diverse recruits and to retain junior personnel might require considering demographics in promotion.

Necessary evidence: Evidence would be necessary to demonstrate that having a more diverse leadership is indeed an incentive *and* that any derived benefits would outweigh the potential costs of creating a promotional system that could be perceived to be unfair. It is possible that a court would be persuaded by social science evidence or the experience of senior officers (as was the case in *Grutter*). To date, we are unaware of any such evidence.

Demographic Diversity for Diplomacy and Foreign Policy

Argument. Secretary of Defense Robert Gates and others have asserted that having a diverse military workforce and culture communicates to coalition forces, allies, and the rest of the world that the United States is culturally and religiously tolerant. In this way, the U.S. military can help change negative perceptions of Americans around the world.[41]

Discussion. Relationship to previously tested arguments: This argument might be analogized to the democratic-legitimacy argument mentioned above. However, it might be more analogous to the as-yet-unsuccessful general-societal-improvement argument.

Possible use of suspect classes: It would be a challenge to identify an appropriate representative mix, particularly because "outright racial balancing . . . is patently unconstitutional."[42] It would also involve preferences based on religion, which would raise First Amendment issues. (See Military Leadership Diversity Commission, 2010b).

Necessary evidence: Currently, there is no evidence that this argument is valid. Absent extremely persuasive evidence, it seems unlikely that this would be a successful argument.

Conclusion

This IP describes the concept of a CGI that justifies the use of different standards in accession, admission, assignment, promotion, or separation decisions based on suspect class membership. The key points to take away from the discussion are

1) Programs only need a CGI if strict scrutiny is triggered. Therefore, if there is no use of different standards based on suspect classifications, there is no need for a CGI.
2) There is no consistently acceptable CGI. Litigation by its nature is case to case. Whether a judge accepts that a CGI exists will be a matter of the specifics of each case: the policies or practices in question, the arguments and evidence presented to defend them, and the particular judges presiding.
3) Given current case law, if the military chooses to use different standards based on suspect classifications, it should focus on an operational-needs–based CGI. However, this is a relatively untested area in general and with the military in particular.
4) For any such argument to be accepted, the military would need to present valid research that is specific to the military and to the particular problem that the policy seeks to address. We are unaware of such evidence, though it may exist, and it is likely that new research would need to be performed.
5) The commissioners can decide the extent of litigation risk that they want their recommendations to embrace. The federal government wins most cases in which the standard of review is rationality, whereas it wins about half of cases in which strict scrutiny is applied.

Notes

[1]The suspect classes include race, color, ethnicity, national origin, and religion (and, to a lesser extent, gender). Gender receives a slightly lower degree of scrutiny because, unlike such categories as race and ethnicity, courts have held that there are a limited number of legitimate reasons to treat women differently from men in employment contexts—the most obvious being pregnancy. However, even though courts do not treat gender classifications as presumptively illegal, courts are highly skeptical of gender-based classifications. Therefore, for the sake of simplicity, gender is also treated as a suspect class in this IP. There is no body of case law involving employment policies or decisions using different standards that favor members of specific religions for diversity or affirmative-action purposes other than for religious organizations and professional religious positions (e.g., chaplains). Most case law involving religion in employment involves First Amendment religious

freedom and reasonable accommodation claims, which are not relevant to this discussion. Some groups, such as those related to age, disability, and veteran status, are not considered suspect under the Constitution but are statutorily protected.

[2]Justice Kennedy provides an analogous example in his concurring opinion in Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 788-89 (2007).

> If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race. School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.

[3]See Forde-Mazrui (2000).

[4]See, e.g., Gratz v. Bollinger, 539 U.S. 244 (2003) (granting additional points to undergraduate applicants to the University of Michigan); Berkley v. United States, 287 F.3d 1076 (Fed. Cir. 2002) (requiring a reduction-in-force board to report on the demographic breakdown of its decisions).

[5]Parents Involved, 551 U.S. at 726–728 (plurality opinion).

[6]Saunders v. White, 191 F.Supp. 2d 95 (D.D.C. 2002). For a discussion of this case, see Barnes (2007).

[7]Indeed, prior to Grutter, several Circuit Courts of Appeal stated (sometimes as nonauthoritative *obiter dictum*, sometimes as actual holdings) that there can never be a nonremedial CGI. See Hunter v. Regents of the University of California, 190 F.3d 1061, 1070-71 (9th Cir. 1999) (citing cases).

[8]Grutter v. Bollinger, 539 U.S. 306, 331 (2003).

[9]Grutter, 539 U.S. at 351–353 (Thomas, J., concurring in part and dissenting in part), citing Korematsu v. United States, 323 U.S. 214 (1944).

[10]Reynolds v. City of Chicago, 296 F.3d 524, 530 (7th Cir. 2002).

[11]Courts have not deferred to the military on these issues. Judicial deference in employment-type issues addresses distinctions between servicemembers and civilians, not between servicemembers (Frontiero v. Richardson, 411 U.S. 677 (1973)). See also Lichtman (2006).

[12]See, e.g., Wygant v. Jackson (Mich.) Board of Education, 476 U.S. 267 (1986).

[13]See Military Leadership Diversity Commission (2010a).

[14]The military was not a party to the University of Michigan cases. Congressional hearings and the resulting congressional findings might be a way to collect and present this information persuasively.

[15]Lt. Gen. Julius W. Becton, Jr., et al., amicus curiae brief in support of respondent, Case No. 02-241, 02-516 (February 19, 2003, pp. 5, 29).

[16]Grutter, 539 U.S. at 331. It should be noted that in both *Grutter* and its companion case, *Gratz*, the Supreme Court found that diversity in public education was a compelling government interest. The difference in outcomes in the two cases was based on differences between the admissions programs for undergraduates and for law students. This was an issue of "narrow tailoring," which is discussed in Military Leadership Diversity Commission (2010f).

[17]Parents Involved, 551 U.S. at 722–725: "[W]hat was upheld in *Grutter* was consideration of a 'far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.'"

[18]See Military Leadership Diversity Commission (2010c); Quester and Gilroy (2001). If the military were to argue that democratic legitimacy requires greater representation of minorities and women in leadership, courts are unlikely to accept a measure of representation based on the general population. See Parents Involved, 551 U.S. at 729–730 (plurality opinion). Instead, the proper measure would be of the proportions of minorities or women in specific job categories compared with the proportions of qualified minorities or women in the applicant pool for each of those job categories (City of Richmond v. J. A. Croson Company, 488 U.S. 469 (1989)).

[19]Grutter, 539 U.S. at 332.

[20]See, e.g., Petit et al. v. City of Chicago et al., 352 F.3d 1111 (7th Cir. 2003); Reynolds v. City of Chicago, 296 F.3d 524 (7th Cir. 2002); Talbert v. City of Richmond, 648 F.2d 925 (4th Cir. 1981); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979). See also Barhold v. Rodriguez, 863 F.2d 233, 238 (2nd Cir. 1988): "[a] law enforcement body's need to carry out its mission effectively, with a workforce that appears unbiased, is able to communicate with the public and is respected by the community it serves."

[21]Detroit Police Officers' Ass'n, v. Young, 608 F.2d at 695–696.

[22]Christian v. United States, 46 Fed. Cl. 793, 814 (2000), quoting Wessman v. Gittens, 160 F.3d 790, 794 (1st Cir. 1998).

[23]Grutter, 539 U.S. at 329–330, citing Regents of the University of California v. Bakke, 438 U.S. 265, 307 (1978) (opinion of Powell, J.); Croson, 488 U.S. at 507; Freeman v. Pitts, 503 U.S. 467, 494 (1992).

[24]Parents Involved, 551 U.S. at 729–730 (plurality opinion).

[25]Parents Involved, 551 U.S. at 722–725.

[26]These arguments were raised by commissioners at the March 2010 MLDC meeting in Annapolis, MD.

[27]Wittmer v. Peters, 87 F.3d 916, 920 (7th Cir. 1996).

[28]Baker v. City of St. Petersburg, 400 F.2d 294, 301 n. 10 (5th Cir. 1968). See also Wygant, 476 U.S. at 314 (Stevens, J., dissenting):

> [I]n law enforcement, if an undercover agent is needed to infiltrate a group suspected of ongoing criminal behavior—and if the members of the group are all of the same race—it would seem perfectly rational to employ an agent of that race rather than a member of a different racial class. Similarly, in a city with a recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of white officers.

[29]See, e.g., Ferrill v. The Parker Group, 168 F.3d 468 (11th Cir. 1999).

[30]Christian, 46 Fed. Cl. at 807.

[31]Christian, 46 Fed. Cl. at 807.

[32]Race/ethnicity, gender, and other demographic categories may also be important in building the networking and mentoring relationships that are shown to increase career effectiveness and success (Triandis, Kurowski, & Gelfand, 1994). See Riche, Kraus, Hodari, and DePasquale (2005) for a comprehensive literature review on this type of research.

[33]Wygant v. Jackson (Mich.) Board of Education, 476 U.S. 267 (1986). As Military Leadership Diversity Commission (2010f) notes, suspect classifications appear to rarely survive strict scrutiny in situations involving layoffs or reductions in force. See, e.g., Justice White's concurrence in Wygant, 476 U.S. at 294–295.

[34]Wygant, 476 U.S. at 274, 276. See also Justice O'Connor's concurring opinion (p. 288): "[A] governmental agency's interest in remedying 'societal' discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny."

[35]The concept of "fit" is discussed in Military Leadership Diversity Commission (2010f).

[36]Wygant, 476 U.S. at 288 n* (O'Connor, J., concurring). Other reasons the court struck down the program include discomfort with using suspect classes in layoff decisions and a disagreement with how the school board measured its balance among suspect classes.

[37]Saunders, 191 F.Supp. 2d at 129; Christian, 46 Fed. Cl. at 806: "Private attitudes are simply too subjective to rely upon as a justification for trampling an individual's right to be treated equally regardless of race."

[38]The use of resources to attract recruits or improve the qualifications of recruits from specific groups probably presents a low litigation risk. This degree of risk could likely be eliminated by Congress through hearings and findings and through specific authorization and funding of such programs. As the Supreme Court has noted, executive power is "at its maximum" when the President acts pursuant to express congressional authorization (Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, concurring)).

[39]Of course, diversity must be promoted in a way that does not undermine the morale of nonminorities. See, e.g., Military Leadership Diversity Commission (2010a), which points to a branch of the literature that identifies the costs of poorly managed diversity.

[40]See Military Leadership Diversity Commission (2010d) for a more detailed review of this issue.

[41]See, for example, Secretary Gates' April 14, 2008, speech at the Association of American Universities, available at http://www.defense.gov/speeches/.

[42]Grutter, 539 U.S. at 329–330 (2003), citing Bakke, 438 U.S. at 307 (opinion of Powell, J.); Croson, 488 U.S. at 507; Freeman, 503 U.S. at 494.

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