Narrow Tailoring and Diversity Policy

Abstract

This issue paper (IP) explains the concept of *narrow tailoring* and how the concept fits within the *strict scrutiny* test. This IP should be of particular interest to the commissioners because it explains the legal limitations on how recommendations made by the MLDC can be implemented.

This IP is one of a three-part series that covers the strict scrutiny test used by courts to decide whether policies that use different standards for individuals based on membership in one or more *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 the second IP in the series) and (2) the concept of *narrow tailoring*—whether the policy achieves its goals with as little negative effect as possible on other groups (the subject of this IP). A policy must fulfill both of these requirements to pass the strict scrutiny test. A party challenging a policy under the strict scrutiny test will prevail if he or she demonstrates either that the cited government interest is not compelling or that the policy is not narrowly tailored.

This paper shows that, for a policy to be narrowly tailored, policymakers designing a policy must consider demographically neutral approaches, and the policy must be designed to achieve its set goals, have a focused scope, be flexible and not use quotas, not unduly trammel the rights of others, and be temporary.

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, Reserve Officers' Training Corps, and other officer accession programs), accession, promotion, assignment, and separation of military servicemembers.

This is the third IP in the series and deals specifically with the concept of *narrow tailoring*. Its primary aim is to help the commissioners understand this aspect of the legal framework for diversity policy design and implementation. It describes the second prong of the strict scrutiny test used by courts to determine the legality of employment policies and practices that use different standards for individuals based on their membership in one or more suspect classes.[1] This second prong requires that any such policies and practices be narrowly tailored to achieve the stated compelling government interest (CGI) with the least possible negative impact on individuals who do not benefit from the policy. The first paper in the series, Military Leadership Diversity Commission (2010b), describes the laws governing the equal treatment of military members and introduces the strict scrutiny test. The second paper, Military Leadership Diversity Commission (2010c), addresses the CGI prong of the strict scrutiny test.

Background

As noted in previous IPs, strict scrutiny was once called "strict in theory, fatal in fact" because virtually no program was able to satisfy the test (Gunther, 1972). However, an

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

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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. And, of course, policies that involve categories of diversity that are not suspect classes are not subject to strict scrutiny but rather to rational basis review, which the government routinely satisfies.

Nevertheless, it is very difficult to satisfy the strict scrutiny standard. The Supreme Court has never provided a detailed or generally applicable definition of a narrowly tailored program. Although it is easy to identify the features of a policy that would fail the narrow tailoring test, it is much more difficult to predict what policies courts would uphold as being narrowly tailored. The unique structure of the military, which is distinct from the private or civilian public sectors, does not appear to have made a significant difference in the analysis of this issue in the one judicial decision addressing narrow tailoring in a military case.[2]

To help the commission understand the concept of narrow tailoring, we present a list of various elements that courts have stated are required to consider policies or practices that trigger strict scrutiny (i.e., those that use different standards for individuals based on their membership in one or more suspect classes) to be narrowly tailored.[3] Several elements of this list come from cases involving Title VII of the Civil Rights Act of 1964, which courts often use to interpret the Equal Protection Clause.[4] For simplicity, we have grouped these elements into the six categories described below.

Consider Neutral Approaches to Achieve Stated Goals

Courts require that there be a good-faith attempt to design the program to accomplish its goals (the CGI) without resorting to suspect classifications.[4] This effort must be shown to the court in evidence. Two related reasons why the Supreme Court struck down two school districts' policies on school assignments (decided in one consolidated case) are illustrative here. First, the districts failed to show that they had considered policies that would achieve their goals without the use of suspect classes. Second, it appeared to the five-judge majority that the districts' goal of diversity could have been achieved without using suspect classes and that the effects of the program were small.[5]

Given that strict scrutiny is difficult (though not impossible) to satisfy, in developing policies related to diversity, the military should first determine whether using suspect classifications is indeed necessary. Then, if it deems this to be so, the military must be able to demonstrate why a neutral program would not achieve its goals. This is essentially a reminder that any diversity program that does not use different standards in making accession, admission, assignment, promotion, or separation decisions based on suspect class membership *does <u>not</u> need to satisfy the strict scrutiny test* and therefore would be preferable to the courts. Evidence of this consideration needs to be collected so that it can be presented to a court. The failure to present such evidence is one reason that the Court of Claims, applying strict scrutiny, cited in striking down an Army instruction to involuntary retirement boards.[6]

"Fit" the Policy to the Problem

Any use of different standards based on membership in one or more suspect classes must be narrowly tailored to achieve the specific stated CGI. In other words, the program's scope must be tightly limited to—i.e., it must "fit"—what is necessary to achieve its stated goals or to fix the stated problem. (Conversely, the more the solution fits the problem, the more likely it is that a court would be persuaded that a problem in need of fixing exists.)

In particular, every aspect of the use of suspect classes must be justified by the asserted CGI. If a program is not designed such that it tightly fits the stated problem, the extraneous elements will likely be struck down, and judges may even infer that the stated problem itself does not rise to the level of a CGI. For example, the Supreme Court struck down a city's program that was specifically intended to remedy discrimination against African Americans partly because the program also provided preferences to a number of other protected groups but the city presented no evidence of past discrimination against them.[7]

Similarly, in the school district case referenced above, the districts asserted diversity as the CGI justifying their use of suspect classes, and the Supreme Court struck the programs down partly because the programs were tied only to suspect class membership and no other aspect of diversity.[8] In addition, the school districts only considered suspect class membership in terms of white and "other," which made it difficult to determine when diversity had been achieved.[9]

The Policy Must Not Be "Mechanistic"

If a program is designed in such a way that it directly or indirectly causes the decisionmaker to give some degree of preference to individuals due to their membership in one or more suspect classes, strict scrutiny is likely to be triggered. For example, in two reverse-discrimination cases against the Air Force, the courts addressed Memoranda of Instruction given to the boards charged with selecting officers to be involuntarily terminated or retired under a 1993 reduction in force.[10] The Memoranda had identical language requiring board members to compile a report for their superiors comparing the selection rates of minority and women officers with all other officers. The courts held that this reporting requirement could not help but create an institutional pressure on the board members by advising them "that their selections regarding minorities and women would be monitored for specific results." Therefore, strict scrutiny applied.[11]

If strict scrutiny is indeed triggered, the program may survive if it is designed to encourage a "whole-person" consideration of all individuals, granting at most a "plus factor" based on suspect class membership. The different results of the *Grutter* and *Gratz* cases are instructive here. In *Grutter*,

the court stated that a goal is permissible if it "requires only a good-faith effort . . . to come within a range demarcated by the goal itself, and permits consideration of race as a 'plus' factor in any given case while still ensuring that each candidate competes with all other qualified applicants."[12] The "plus" factor must operate "in the context of individualized consideration of each and every applicant," not as a mechanical tool that results in a favorable decision.[13] The University of Michigan Law School used a whole-person approach in its admissions process, making suspect class membership a plus factor. The University of Michigan's undergraduate admissions system used a mechanical point system that automatically raised the scores of minorities and women by a certain number of additional points, thereby automatically granting admission to many based on their suspect class membership. It was this mechanical functioning that caused the Supreme Court to strike down the University of Michigan's undergraduate admissions program in *Gratz*, whereas the court upheld the law school's whole-person approach in *Grutter*.[14]

A 5-4 majority of the Supreme Court followed this approach in the school district case referenced above. The majority interpreted the *Grutter* decision to mean that

> [t]he point of the narrow tailoring analysis in [*Grutter*] was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance, which the Court explained would be "patently unconstitutional."[15]

The majority then said that the school districts' plans " do not provide for a meaningful individualized review of applicants but instead rely on racial classifications in a nonindividualized, mechanical way."[16] Suspect class membership "is not simply one factor weighed with others in reaching a decision, as in *Grutter*, it is *the* factor."[17]

This has created an approach to narrow tailoring that Ayres and Foster (2007) call "don't tell, don't ask": If the government "does not tell how much of a preference it grants racial minorities, then the Court is not searching in its review of whether the preferences are differentiated or excessive" (pp. 564–565). On the flip side, if the government "does tell how much of a preference it grants racial minorities by quantifying racial preferences, then the Court subjects the program to intense scrutiny as to whether the preferences are differentiated and excessive" (p. 565). This creates a problem of transparency.[18]

The Policy Must Avoid Quotas

"Some attention to numbers . . . does not transform a flexible admissions system into a rigid quota."[19] How the Services use numbers may itself trigger strict scrutiny, and, if the use is interpreted by a court as a rigid quota, it may be struck down.

If the military measures the demographics of applicants for admission, accession, promotion, assignment, or separation *before the decision* and/or of selectees *after decision*, and if this measurement does not influence the decisionmaker, strict scrutiny will likely not be triggered. Accordingly, if a Service has a proportional *target* for admissions to its academy but *not a quota for actual admissions,* it can make recruitment resourcing decisions that may increase application rates of qualified minorities to increase the likelihood that an incoming class will be more diverse.

Current Supreme Court decisions hold that a policy must be "flexible" or have a provision for a "waiver." Essentially, these are terms of art intended to forbid quotas. Quotas are difficult to define. According to the Supreme Court in *Grutter*, a quota "is a program in which a certain fixed number or proportion of opportunities are reserved exclusively for certain minority groups."[20]

Quotas are disfavored because of fears that pressures to satisfy a quota may cause employers to hire or promote underqualified individuals, lay off nonminorities to create open positions, or both. They are also disfavored because quotas may be used "to assure . . . some specified percentage of a particular group merely because of its race or ethnic origin . . . [which] would amount to outright racial balancing, which is patently unconstitutional."[21]

Proportional *goals*, *targets*, or *benchmarks*[22] may be acceptable if they are not mere quotas in disguise. To avoid having their targets struck down as illegal quotas, the Services should follow two precepts.

First, *the target should be flexible, not fixed, and it should not include set-asides*. The Supreme Court has given as examples of quotas programs that "impose a fixed number or percentage which must be attained, or which cannot be exceeded" and those that "insulate each category of applicants with certain desired qualifications from competition with all other applicants."[23] Accordingly, a hard-and-fast number or percentage that must be achieved or not exceeded is unlikely to survive judicial scrutiny. General, aspirational targets are more likely to succeed. Similarly, any programs that are strictly limited to members of specific suspect classes are unlikely to survive judicial scrutiny.[24] Any program that acts as an absolute bar to competition by others is unlikely to be legal. However, programs that may be primarily intended to benefit particular suspect classes but are open to everyone may survive scrutiny.

Second*, the number or percentage of the target should not be arbitrary or irrational*. The target must be connected to the asserted CGI. (This is an aspect of the requirement that the program fit the CGI.) The need for a target and the basis for the selected target should be demonstrable. For example, in a case involving preferences given to minority-owned businesses in city contracts, the Supreme Court stated that the appropriate percentage of the target should be the proportion of minority-owned businesses in the city that qualified for the particular contract, not the proportion of minority

residents of the city.[25] If the benefits of diversity are the CGI, then the target should be the proportion that may create those benefits. Merely tying the target to the general population may be construed as unconstitutional "racial balancing."[26]

Do Not Unduly Trammel the Rights of Others

The policy must be narrowly tailored to achieve its goals while minimizing the harm done to the rights and interests of members of groups that do not benefit from it.[27] There should be no alternative means of achieving the goal at hand that would be less restrictive on the rights or interests of the people affected by the policy. Meaningful harm may be caused by even well-crafted policies and is even more likely to be caused by poorly crafted policies that use different standards based on suspect class membership.

Different standards based on suspect class membership are most frequently found to be unconstitutional in cases involving layoffs. Any policy furthering diversity that involves layoffs or preferences in layoffs is highly likely to fail the narrow tailoring test.[28] "Lay-offs impose the entire burden . . . on particular individuals, often resulting in serious disruption of their lives."[29] As a part of the law's disfavor of quotas, there is a concern that efforts to hire or promote members of specific suspect classes will lead employers to open positions for them by terminating employees who are not members of those groups. When an employer is in the unfortunate position of having to reduce its overall workforce, it cannot give preferences based on suspect classes when determining precedence in layoffs or in mandatory retirement boards. This is a common theme in court decisions. In a reverse-discrimination lawsuit against the Army involving involuntary separation, the Court of Claims held that "[t]here are less intrusive means of battling the effects of discrimination in Army promotions" than giving "minorities an opportunity to be retained which is unavailable to nonminorities."[30] This may also be an issue for applicants for promotion for whom being passed over means mandated retirement—a circumstance that is possible in the military personnel system.

In addition, court decisions have discouraged programs that give minorities or women accelerated promotions or consideration in layoffs ahead of their degree of seniority if doing so conflicts with an established seniority system like the one used for military officers. This has arisen most often in cases involving Title VII, which protects bona fide seniority systems if the systems are not created with a discriminatory intent (42 U.S.C. § 2000e-2(h)).[31]

The Policy Must Be Temporary

The use of different standards based on suspect classifications can only be a temporary measure. It cannot be a permanent effort to maintain a balance once one has been achieved.[32] The goals of diversity program must be very narrowly defined, the program can only be designed to achieve those goals, and the program must cease as soon as the goals are achieved. This rule does not require programs to be brief but simply not to be perpetual.[33] Improving diversity in senior leadership positions is a long-term undertaking, but institutional systems should be in place to periodically review progress and determine when the goal has been achieved.[34] The lack of an explicit end date in an Army instruction to separation boards was one reason that the court held that the instruction was not narrowly tailored.[35] One reason why some Supreme Court justices hold that the general population cannot be used as a target in diversity programs is that demographics are ever-changing, making it impossible for a program to be temporary.[36]

Conclusion

The main takeaways from this IP concern the design of policies that trigger strict scrutiny. If a policy triggers strict scrutiny, the government has the burden of proving that the policy is justified by its CGI and narrowly tailored to achieve its goal with the least amount of infringement on the rights of others. In general, for a policy to be narrowly tailored, a policymaker must be able to show that

- There are no neutral approaches that can achieve the same goal.
- The policy fits the problem—every element of the policy is justified through the CGI.
- The policy is not mechanical.
- The policy does not use a quota.
- The policy does not unduly trammel the rights of others or apply to layoffs.
- The policy is temporary and will cease if the interest pursued is achieved.

Also, because demographic representation is frequently stated to be a goal (see, for example, Military Leadership Diversity Commission, 2009a, 2009b, 2010a), it is imperative that any MLDC recommendation be of a type that can be implemented as a goal rather than a quota. Characteristics distinguishing goals from quotas include the following:

- Goals are not arbitrary or irrational.
- Goals are flexible and not fixed.
- Goals do not create set-asides.
- Goals are not applied mechanistically.

In closing, we emphasize that narrow tailoring is a term of art and that the list of factors presented here constitute only guidelines derived from past cases. This list should not be considered definitive.

Notes

[1]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 is a limited number of legitimate reasons to treat women differently from men in employment contexts—the most obvious being pregnancy and separate bathrooms. 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. Some groups, such as those related to age, disability, and veteran status, are not considered suspect under the Constitution but are statutorily protected (although several of these statutes do not apply to servicemembers).

[2]Christian v. United States, 46 Fed. Cl. 793 (2000). This was a reverse-discrimination case brought by a white retired Army lieutenant colonel who was twice passed over for promotion to colonel and then recommended for early retirement by a Selective Early Retirement Board. He sued the Army, alleging that an instruction to the board violated the Equal Protection Clause by ordering the board to (1) have the goal of ensuring that the rate of minorities and women recommended for early retirement was no greater than that of all officers under consideration, (2) look for evidence of personal and institutional discrimination in the records of minority and female officers, court struck down the instruction on both CGI and narrow tailoring grounds.

[3]It should be noted that the most detailed recent discussion of narrow tailoring by the Supreme Court occurred in decisions that the Court explicitly stated are limited to the context of education. Even though they are not directly applicable to the context of employment or to diversity in the military, those discussions are addressed here because they are the best evidence of the current thinking regarding narrow tailoring by the Supreme Court. The cases are: Gratz v. Bollinger, 539 U.S. 244 (2003), Grutter v. Bollinger, 539 U.S. 306 (2003), and Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007).

[4]These cases often involve Title VII litigation brought by racial/ethnic minorities and females that is resolved by consent decree (a formal agreement that settles litigation with court approval). When a consent decree involves affirmative action, it often faces—sometimes years later—a subsequent challenge alleging reverse discrimination against white males. (These are referred to as *collateral* challenges, meaning that they are brought separately from the original litigation.) It appears that consent decrees, even if they involve programs that would be subject to strict scrutiny, may be treated somewhat more favorably than programs undertaken at the initiative of a federal agency because they not only resolve claims of discrimination but also receive the judicial imprimatur (Winkler, 2007).

[5]E.g., Adarand v. Pena, 515 U.S. 200, 238 (1995), quoting City of Richmond v. J. A. Croson Company, 488 U.S. 469, 507 (1989).

[6]Parents Involved, 551 U.S. at 733–35.

[7]Christian, 46 Fed. Cl. at 813.

[8]Croson, 488 U.S. at 506. The other groups were "Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts" (at 478).

[9]Parents Involved, 551 U.S. at 726 (plurality opinion).

[10]Parents Involved 551 U.S. at 727, 786:

> Nor did [Seattle] demonstrate in any way how the educational and social benefits of racial diversity or avoidance of racial isolation are more likely to be achieved at a school that is 50 percent white and 50 percent Asian-American, which would qualify as diverse under Seattle's plan, than at a school that is 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white, which under Seattle's definition would be racially concentrated.

[11]Berkley v. United States, 287 F.3d 1076 (Fed. Cir. 2002); Alvin v. United States, 50 Fed. Cl. 295 (2001).

[12]Berkley, 287 F.3d at 1086. Similarly, the *Alvin* court said, "[W]e see the instructions . . . as a directive to assign minorities and women candidates higher scores . . . ." (Alvin, 50 Fed. Cl. at 299.) The Air Force settled these cases after strict scrutiny was held to apply (but before courts actually applied the test). In another case involving a similar instruction, the Court of Claims reminder" and not "a racial classification subject to strict scrutiny." (Baker v. United States, 34 Fed. Cl. 645, 656 (1995)). However, on appeal, the Court of Appeals for the Federal Circuit vacated this decision and returned the case to the lower court for further proceedings, whereupon the Air Force settled.

[13]Grutter, 539 U.S. at 335, quoting Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 495 (1986) (O'Connor, J., concurring in part and dissenting in part), and Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 638 (1987).

[14]Grutter, 539 U.S. at 335, quoting Regents of the University of California v. Bakke, 438 U.S. 265, 315–16 (opinion of Powell, J.).

[15]Gratz v. Bollinger, 539 U.S. 244 (2003).

[16]Parents Involved, 551 U.S. at 723, quoting Grutter, 539 U.S at 330.

[17]Parents Involved, 551 U.S. at 723, quoting Gratz, 539 U.S. at 276, 280 (O'Connor, J., concurring) (internal quotation marks omitted).

[18]Parents Involved, 551 U.S. at 723.

[19]In his concurrence, Justice Kennedy challenges this approach, noting that the burden is on the government to demonstrate precisely how it will use suspect classifications in its program: Courts "cannot construe ambiguities in favor of the [government]" (Parents Involved, 551 U.S. at 786 (Kennedy, J., concurring)).

[20]Grutter, 539 U.S. at 336, quoting Bakke, 438 U.S. at 323 (opinion of Powell, J.) (internal quotation marks omitted).

[21]Grutter, 539 U.S. at 335, quoting Croson, 488 U.S. at 496 (plurality opinion) (internal quotation marks omitted).

[22]Grutter, 539 U.S. at 329–30 (2003), quoting Bakke, 438 U.S. at 307 (opinion of Powell, J.), citing Croson, 488 U.S. at 507, and Freeman v. Pitts, 503 U.S. 467 (1992).

[23]The terms *goal*, *benchmark*, and *target* are interchangeable.

[24]Grutter, 539 U.S. at 334, 335, quoting Sheet Metal Workers, 478 U.S. at 495 (O'Connor, J., concurring in part and dissenting in part), and Bakke, 438 U.S. at 315 (opinion of Powell, J.).

[25]See, e.g., Bakke, 438 U.S. 265 (1978); Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994); Rothe Development Corporation v. DoD, 545 F.3d 1023 (Fed. Cir. 2008).

[26]Croson, 488 U.S. at 500.

[27]Parents Involved, 551 U.S. at 726 (plurality opinion).

[28]E.g., United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

[29]See, e.g., Wygant v. Jackson Board of Education, 476 U.S. 267, 283 (1986) (plurality decision); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); Taxman v. Board of Education of the Township of Piscataway, 91 F.3d 1547 (3d Cir. 1996).

[30]Wygant, 476 U.S. at 283 (plurality decision).

[31]Christian, 46 Fed. Cl. at 812. The court went on to note that "[t]he government could always use targeted affirmative action measures at the hiring or recruitment stage to remedy past institutional discrimination in promotions" (p. 812).

[32]See also, e.g., Weber, 443 U.S. 193; International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

[33]Johnson, 480 U.S. 616; Weber, 443 U.S. 193.

[34]Wygant, 476 U.S. 267.

[35]Johnson, 480 U.S. 616.

[36]Christian, 46 Fed. Cl. at 812–13.

[37]Parents Involved, 551 U.S. at 731 (plurality opinion).

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