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## The Diversity Rationale for Affirmative Action in Military Contracting

Hugh B. McClean

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# The Diversity Rationale for Affirmative Action in Military Contracting

## **Cover Page Footnote**

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# THE DIVERSITY RATIONALE FOR AFFIRMATIVE ACTION IN MILITARY CONTRACTING

*Hugh B. McClean*<sup>+</sup>

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The federal government has a long history of helping small businesses gain access to the mainstream American economy. One way the government achieves this goal is by awarding government contracts to small businesses. Congress mandated that a “fair proportion” of government contracts should be placed with small businesses.<sup>1</sup> The President establishes annual government-wide goals for small business contracting, which Congress said “shall be no less than [twenty-three] percent of the total value” of prime federal contracts.<sup>2</sup> Specialized contracting programs authorized by Congress help government agencies meet these small business contracting goals.<sup>3</sup>

The Department of Defense (DOD) awards contracts to businesses that support our military—an industry referred to as defense contracting.<sup>4</sup> Given the recent drawdowns in our military forces, many of the jobs traditionally performed by military members have been outsourced to small businesses.<sup>5</sup> Troop transportation, equipment manufacturing and maintenance, security, and logistics support are just a few examples of the work performed by small businesses.<sup>6</sup>

The “8(a) program,” named after Section 8(a) of the Small Business Act, permits the government to award certain contracts exclusively to small businesses that are certified as socially and economically disadvantaged.<sup>7</sup> There is a presumption that members of designated racial groups are socially disadvantaged.<sup>8</sup> As such, the government is permitted to award contracts to a pool of minority-owned businesses to the exclusion of non-minority-owned businesses.

The 8(a) program is an affirmative action program that remains politically controversial and legally unresolved because non-minority contractors continue to wage successful Equal Protection challenges against the program.<sup>9</sup> The

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1. See 15 U.S.C. § 631(a) (2012).

2. See § 644(g)(1)(a)(i).

3. See JOHN CIBINIC ET AL., *FORMATION OF GOVERNMENT CONTRACTS 1571–73* (4th ed. 2011).

4. See MOSHE SCHWARTZ, CONG. RES. SERV., R43074, *DEPARTMENT OF DEFENSE’S USE OF CONTRACTORS TO SUPPORT MILITARY OPERATIONS: BACKGROUND, ANALYSIS, AND ISSUES FOR CONGRESS 1* (2013) [hereinafter SCHWARTZ, *USE OF CONTRACTORS TO SUPPORT MILITARY OPERATIONS*].

5. See *id.* But see KATE M. MANUEL & ERICA K. LUNDER, CONG. RES. SERV., R42390, *FEDERAL CONTRACTING AND SUBCONTRACTING WITH SMALL BUSINESS: ISSUES IN THE 112TH CONGRESS 26* (2013) (describing recent attempts by the DOD to save money by insourcing work that had been traditionally outsourced to contractors).

6. See SCHWARTZ, *USE OF CONTRACTORS TO SUPPORT MILITARY OPERATIONS*, *supra* note 4, at i.

7. See Small Business Act § 8, 15 U.S.C. § 637(a)(1)(B) (2012).

8. See 13 C.F.R. § 124.103(b) (2016).

9. See *DynaLantic Corp. v. U.S. Dep’t of Def.*, 885 F. Supp. 2d 237, 290, 292 (D.D.C. 2012) (finding that the 8(a) program is facially constitutional, but unconstitutional as applied to the

government has defended the program on remedial grounds, and has argued that the program eliminates barriers to business development created by past discrimination.<sup>10</sup> However, in light of the Supreme Court's recent endorsement of the diversity rationale in higher education, the time is ripe to consider non-remedial justifications for the 8(a) program. This article argues that the diversity rationale justifies the use of affirmative action in defense contracting—an argument that has not been adequately explored by scholars or the courts.

In 2012, the U.S. District Court for the District of Columbia examined the constitutionality of the 8(a) program in *DynaLantic v. United States Department of Defense*.<sup>11</sup> *DynaLantic* involved a U.S. Navy contract for the development of flight simulators for the “Huey” helicopter; a contract that the Navy determined it would award through the 8(a) program. *DynaLantic*, a non-8(a) firm, challenged the award, “claim[ing] it would have competed for th[e] procurement but for” the Navy’s decision to award the contract through the 8(a) program.<sup>12</sup> The District Court found the program constitutional on its face, but unconstitutional as applied to the military training simulator industry.<sup>13</sup> The court applied a strict scrutiny standard, and found that the government did not present evidence of discrimination in the military training industry sufficient to support race-based remedial action.<sup>14</sup>

Though *DynaLantic*’s holding is limited to the “military simulator and training industry,” the case has far-reaching consequences.<sup>15</sup> Under *DynaLantic*’s reasoning, the government must produce evidence of

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military training simulator industry); *Cortez III Serv. Corp. v. NASA*, 950 F. Supp. 357, 361–62 (D.D.C. 1996) (finding that the 8(a) program is facially constitutional, but unconstitutional as applied to the relevant industries because the agency lacked evidence of discrimination in the particular industries at issue). *But see* *Rothe Dev., Inc. v. U.S. Dep’t of Def.*, 836 F.3d 57, 63 (D.C. Cir. 2016) (affirming the decision of the D.C. District Court denying a business’ facial challenge to the 8(a) program after reviewing the program under rational basis scrutiny because the statute in question lacked a racial classifications and other circumstances that would warrant a stricter level of scrutiny).

10. *See DynaLantic*, 885 F. Supp. 2d at 251.

11. *See id.* at 242.

12. *See id.* at 246–47.

13. *See id.* at 293.

14. *See id.* at 250, 280.

15. *See id.* at 247. As of a fiscal year 2015 General Services Administration report, the DOD had over 52,404 8(a) contract actions in various stages of performance. *See* GEN. SERV. ADMIN., SMALL BUSINESS GOALING REPORT: FISCAL YEAR 2015, <https://www.fpds.gov/fpdsngcms/index.php/en/reports/63-small-business-goaling-report.html>. When the *DynaLantic* decision was announced, the Under Secretary of Defense immediately suspended all future 8(a) contract awards for military simulator and service contracts. *See* Memorandum from Richard Ginman, Director, Defense Procurement and Acquisition Policy, to Secretaries of the Military Departments et al. (Aug. 22, 2012), <http://www.acq.osd.mil/dpap/policy/policyvault/USA004988-12-DPAP.pdf>. He further directed the military services to consult with their attorneys regarding issues related to individual contracts. *Id.* The Air Force undertook significant efforts to ensure its current 8(a) simulator contracts were not exposed to liability.

discrimination in the hundreds of industries that it awards contracts to satisfy strict scrutiny.<sup>16</sup> For example, to award 8(a) contracts in the transportation industry, including air, rail, and water, the government must have evidence of discrimination in those industries.<sup>17</sup> Contract awards in other industries, from waste management to health care and social services, all require the same requisite evidence.<sup>18</sup> If the government fails to meet its evidentiary burden in any of these markets, it risks exposure to Equal Protection challenges. While the program remains constitutional on its face, the risk of as-applied challenges stalled its use in particular industries, reduced its overall effectiveness, and made it only a marginal tool for meeting small business contracting goals.<sup>19</sup>

This precarious situation is due in part to the DOD's failure to look beyond remedial justifications for the 8(a) program. The DOD has consistently argued that the goal of the program is to remove barriers to minority business development "created by discrimination and its lingering effects."<sup>20</sup> However, a new war-labor paradigm that co-mingles military services and civilian contracts demands that the military maintain diversity across both the military and defense contracting communities.<sup>21</sup> The way we fight wars has changed dramatically in recent decades.<sup>22</sup> The reduction in military personnel demands a greater reliance on contractors.<sup>23</sup> Today, contractors and military members work in close proximity on and off the battlefield. By fostering diversity in the military contracting industry, the 8(a) program helps maintain a level of private

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16. See generally NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM, U.S. CENSUS BUREAU (Dec. 5, 2016), <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?chart=2012>. The North American Industry Classification System (NAICS) is the federal government's standardized system for classifying business industries.

17. See generally *id.*

18. See generally *id.*

19. See Memorandum from Richard Ginman, Director, Defense Procurement and Acquisition Policy, to Department of Defense Acquisition Executives (Mar. 14, 2014), <http://www.acq.osd.mil/dpap/policy/policyvault/USA000970-14-DPAP.pdf>; see also CONG. RES. SERV., R42981, SET-ASIDES FOR SMALL BUSINESSES: LEGAL REQUIREMENTS AND ISSUES 32 (2016).

20. *DynaLantic Corp. v. U.S. Dep't of Def.*, 885 F. Supp. 2d 237, 251 (D.D.C. 2012).

21. See Michael H. LeRoy, *The New Wages of War—Devaluing Death and Injury: Conceptualizing Duty and Employment in Combat Zones*, 22 STAN. L. & POL'Y REV. 217, 218 (2011).

22. See *id.* at 217–18.

23. See Steven L. Schooner, *Why Contractor Fatalities Matter*, in PARAMETERS 78–79 (2008) (arguing contractor fatalities matter because increased government outsourcing has led to an increased reliance on contractors as opposed to military personnel in our country's war efforts). Steven L. Schooner is Co-Director of the Government Procurement Law Program at the George Washington University Law School and the Nash & Cibinic Professor of Government Contract Law. His publications on government contractor fatalities include: Steven L. Schooner & Collin D. Swan, *Contractors and the Ultimate Sacrifice*, SERV. CONTRACTOR 16 (2010) [hereinafter Schooner & Swan, *Contractors and the Ultimate Sacrifice*]; Steven L. Schooner & Collin D. Swan, *Dead Contractors: The Un-Examined Effect of Surrogates on the Public's Casualty Sensitivity*, 6 J. NAT'L SEC. L. & POL'Y 11, 13 (2012) [hereinafter Schooner & Swan, *Dead Contractors*].

sector heterogeneity that is in line with diversity in the military forces. The U.S. Supreme Court recognized that a racially integrated military is a matter of national security.<sup>24</sup> Thus, our national security objectives are dependent on minority representation in the military, which unquestionably includes defense contractors who support our military.

The government never articulated a non-remedial justification for the 8(a) program in court, though the U.S. Department of Justice (DOJ) suggested the strategy.<sup>25</sup> The Supreme Court has accepted diversity as a compelling interest in other cases, but never considered the question in the context of government contracting.<sup>26</sup> Given the Supreme Court's recent endorsement of the diversity rationale, and the military's renewed focus on diversity as a military strategy, the diversity rationale should be considered for the 8(a) program.

This article is divided into three parts. Part I provides an overview of the 8(a) program and constitutional challenges that have been raised against the program. Part II explains the current legal framework for affirmative action in government contracting. Part III examines the extent and importance of diversity in the military and defense contracting communities, and juxtaposes affirmative action in contracting and higher education. The article demonstrates that the benefits that flow from diversity across the total force of active duty members, reservists, and contractors, are critical to national security. The Supreme Court has upheld the diversity rationale for affirmative action in the context of higher education, and this rationale applies equally in the military context. Accordingly, the 8(a) program should be upheld against future constitutional challenges under the diversity rationale.

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24. See *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003).

25. See Memorandum from Walter Dellinger, Assistant Attorney General, Dep't of Justice, to General Counsels, Dep't of Justice (June 28, 1995), <http://clinton2.nara.gov/WH/EOP/OP/html/aa/ap-b.html>. The DOJ suggested non-remedial justifications for affirmative action in the aftermath of *Adarand Constructors, Inc. v. Peña* as promoting racial diversity and inclusion. *Id.* The 8(a) program has not implemented many of the recommendations in the DOJ memo, presumably because government officials maintain that *Adarand Constructors, Inc.* does not apply to the 8(a) program.

26. See, e.g., *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2210 (2016) (stating that there is a compelling government interest in diversity because diversity enables universities to better prepare students for an increasingly diverse workforce and society); *Grutter*, 539 U.S. at 328, 331 (agreeing with military officials that having competent and diverse armed forces is essential for national security).

## I. OVERVIEW OF THE 8(A) PROGRAM

### A. History of the 8(a) Program

The movement toward equality in government contracting began in the 1940s, spurred by the nation's transition to a wartime economy.<sup>27</sup> African-Americans faced discrimination throughout the economy, including in public and private job sectors supporting the war effort, as well as in the segregated U.S. military.<sup>28</sup> In the spring of 1941, African-American leaders organized one of the first "march on Washington" demonstrations to protest segregation in the armed forces, and to advocate for equal employment in defense contracting.<sup>29</sup> In response to the threat of civil disobedience on the capitol, President Franklin D. Roosevelt used his executive order authority to establish the first Fair Employment Practice Committee (FEPC).<sup>30</sup> The FEPC was charged with enforcing President Roosevelt's mandate to eradicate discrimination in government contracting.<sup>31</sup> While the FEPC lasted only five years, committee chairs made significant progress, settling nearly 5,000 discrimination

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27. See RUTH P. MORGAN, *THE PRESIDENT AND CIVIL RIGHTS: POLICY-MAKING BY EXECUTIVE ORDER* 37 (1970).

28. See *id.*

29. See *id.* The African American civil rights leader A. Philip Randolph, President of the Brotherhood of Sleeping Car Porters, is credited with the idea for a march on Washington. *Id.* The March-on-Washington Committee (MOWC), which Randolph chaired, was responsible for many of the gains by African Americans in desegregating the armed forces and providing equal working opportunities in the defense industry. *Id.*; see also *March on Washington Movement*, BLACKPAST.ORG, <http://www.blackpast.org/aah/march-washington-movement-1941-1947> (last visited Jun. 12, 2015).

30. See MORGAN, *supra* note 27, at 38. On June 18, 1941, Roosevelt met with Randolph and other civil rights leaders to convince them not to hold the march. *Id.* Randolph wanted an executive order prohibiting discrimination in defense contracting, but Roosevelt feared such an order would upset Southern conservatives. *Id.* Roosevelt eventually conceded, issuing an executive order, and civil rights leaders cancelled the march. *Id.* The order established the Fair Employment Practice Committee (FEPC), a body that addressed grievances and complaints of discrimination in violation of the order. *Id.* President Roosevelt's FEPC was terminated on June 30, 1946, under President Truman, who pursued his own fair employment initiatives. *Id.* at 41.

31. See Exec. Order No. 8802, 6 Fed. Reg. 3,109 (June 25, 1941). The order mandated that all defense-related contracts contain language prohibiting discriminating on the basis of "race, creed, color, or national origin." *Id.* It also stated a nondiscrimination policy for the defense industry, and directed departments and agencies to take measures to ensure equal hiring. *Id.* Two years later President Roosevelt expanded the order to cover all government contracts. See Exec. Order No. 9346, 8 Fed. Reg. 7,183 (May 29, 1943). In 1948, President Harry S. Truman ordered the desegregation of the U.S. military through executive order. See Exec. Order No. 9981, 13 Fed. Reg. 4,313 (July 26, 1948). Later, President Richard M. Nixon established the Office of Minority Business Enterprise (OMBE), the first federal agency dedicated exclusively to minority businesses. See Exec. Order No. 11458, 34 Fed. Reg. 4,937 (Mar. 5, 1969).



complaints.<sup>32</sup> The FEPC's work eventually gave rise to the Equal Employment Opportunity Commission, established in 1964, which is still in existence today.<sup>33</sup>

As historic as these efforts were, racial inequality remained rampant in the U.S. and reached a boiling point in the 1960's. Between 1963 and 1967, race became the preeminent issue in a number of major U.S. cities.<sup>34</sup> In 1968, President Lyndon B. Johnson established a commission to study the etiology of the racial disturbances.<sup>35</sup> The Kerner Commission conducted a broad range of studies and investigations and concluded the nation was "moving toward two societies, one black, one white—separate and unequal."<sup>36</sup> The Commission urged the creation of programs designed to "encourage integration of substantial numbers of Negroes into the society outside the ghetto."<sup>37</sup>

Reacting to the study, Presidents Lyndon Johnson and Richard Nixon implemented programs under the authority of Section 8(a) of the Small Business Act of 1958 intended to spur minority business growth and incentivize businesses to relocate to urban areas.<sup>38</sup> Authority for small business contracting had existed since 1958, but the Small Business Administration (SBA) was

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32. See Morgan, *supra* note 27, at 51.

33. *Id.* at 57.

34. See, e.g., *Eyes on the Prize: America's Civil Rights Movement 1954-1985*, PBS (Aug. 23, 2006), [hereinafter *Eyes on the Prize*]. In 1963, Martin Luther King, Jr., gave his "I Have a Dream" speech at the march on Washington. See *id.* The following year, President Johnson signed the Civil Rights Act of 1964. See *id.* In 1965, protesters in Alabama marched from Selma to Montgomery, Alabama demonstrating for voting equality. See *id.*

35. See Exec. Order 11365, 32 Fed. Reg. 11,111 (July 29, 1967).

36. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968), <https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf>.

37. *Id.* at 10.

38. See Major Thomas Jefferson Hasty, III, *Minority Business Enterprise Development and the Small Business Administration's 8(a) Program: Past, Present, and (Is There A) Future?*, 145 MIL. L. REV. 1, 11 (1994); see also 13 C.F.R. § 124.8-1(c) (1973); 13 C.F.R. § 124.8-1(6) (1970). Under the authority of the Small Business Act, President Johnson initiated the President Test Cities Program, a program that offered contracts to small businesses, regardless of race, that moved to urban areas and hired the unemployed. Hasty, *supra*, at 12. President Johnson's program was principally a training program and relied heavily on the Departments of Labor and Commerce to provide training grants to companies hiring and training unemployed minorities. See *id.* at 11–12. President Nixon took a more direct approach to assisting minorities, establishing the Office of Minority Business Enterprise and directing the SBA to devote its resources specifically to minority businesses. *Id.* at 13–14. Under Nixon's direction, the SBA promulgated race-specific regulations limiting certain contracts to "disadvantaged persons," including "Black Americans, American Indians, Spanish-Americans, Oriental Americans, Eskimos and Aleuts." See 13 C.F.R. § 124.8-1(c) (1973); Hasty, *supra*, at 14; Nixon called for increased representation of small businesses in federal departments and agencies, encouraged government contractors to subcontract with minority small businesses, authorized OMBE to provide technical assistance to minority businesses, and called on the Secretary of Commerce to promote minority business development. See Hasty, *supra* note 38, at 13–14.

hesitant to focus the 8(a) program on minority small businesses because the statute authorized the SBA to contract with “all” small business firms, not minority firms exclusively.<sup>39</sup>

In 1972, Congress responded to the Kerner Commission by undertaking a massive study examining minority business development in the U.S.<sup>40</sup> Between 1972 and 1978, Congress issued four reports that examined the obstacles to minority business development.<sup>41</sup> Based on research by the Government Accountability Office (GAO) and the U.S. Commission on Civil Rights, the reports disclosed staggering statistics on the disparities between minority and other business owners in the U.S.<sup>42</sup> Census data showed that minorities, who accounted for approximately seventeen percent of the U.S. population, owned only 4.3 percent of U.S. businesses.<sup>43</sup> Moreover, minority-owned businesses had gross operating receipts of less than 0.7 percent of the total receipts reported for all businesses.<sup>44</sup> Despite the opportunities for minority-owned businesses in construction at the state and local level, Congress found that minority-owned businesses received a disproportionately smaller number of these contracts.<sup>45</sup> Based on the reports, Congress concluded that until all people have the same economic opportunities, “remedial action must be considered as a necessary and proper accommodation for our Nation’s socially or economically disadvantaged persons.”<sup>46</sup> In 1978, Congress amended the Small Business Act and provided the SBA with clear statutory authority to limit participation in the 8(a) program to socially and economically disadvantaged businesses.<sup>47</sup>

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39. See *id.* at 10–11; see also Small Business Act of 1958, Pub. L. No. 85-536, 72 Stat. 384 (codified as amended at 15 U.S.C. § 631 (2012)).

40. See *DynaLantic Corp. v. U.S. Dep’t of Def.*, 885 F. Supp. 2d 237, 253 (D.D.C. 2012).

41. See *id.* at 253–55; see generally S. REP. NO. 95-1070 (1978); H.R. REP. NO. 94-1791 (1977); H.R. REP. NO. 94-468 (1975); H.R. REP. NO. 92-1615 (1972). Congressional reviews found President Nixon’s minority small business program subpar. Although the program was effective in directing contracts to minority businesses, it was ineffective in long-term business development, with an initial report from the GAO describing the program’s impact on business self-sufficiency as minimal. See *DynaLantic*, 885 F. Supp. 2d at 255. In fairness to the SBA, most of the GAO’s criticism was attributed to a lack of resources supporting the program. See, e.g., H.R. REP. NO. 94-468, at 12 (1975). The GAO also blamed program failures on the SBA’s inability to control the supply of government contracts awarded to small businesses, mismanagement of small business mentors, lack of management and training for participants, and Congress’s failure to provide statutory authority for the program. H.R. REP. NO. 92-1615, at 5 (1972).

42. See *DynaLantic*, 885 F. Supp. 2d at 254–57.

43. *Id.* at 253.

44. See *id.*; see also H.R. REP. NO. 92-1615, at 3.

45. See U.S. COMM’N ON CIVIL RIGHTS, MINORITIES AND WOMEN AS GOVERNMENT CONTRACTORS 122 (1975).

46. See *DynaLantic*, 885 F. Supp. 2d at 254 (citing H.R. REP. NO. 94-468, at 1–2 (1975)).

47. See Small Business Act of 1978, Pub. L. No. 95-507, 92 Stat. 1757 (1978).

### B. Framework of Small Business Contracting Programs

Congress has authorized a number of programs that facilitate contracting with specialized classes of small business (see Figure 1), such as Women-Owned Small Businesses and Service-Disabled Veteran-Owned Small Businesses.<sup>48</sup> All of these programs are race-neutral except for the Small Disadvantaged Business (SDB) program and the 8(a) program.<sup>49</sup> Notably, only the 8(a) program reserves contracts exclusively for socially and economically disadvantaged businesses.<sup>50</sup> This feature makes the 8(a) program a target for Equal Protection lawsuits.<sup>51</sup>

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48. See CIBINIC ET AL., *supra* note 3, at 1599. The special classes of small businesses include Historically Underutilized Business Zone (HUBZone), Service-Disabled Veteran-Owned Small Business (SDVOSB), Women-Owned Small Business (WOSB), and Small Disadvantaged Business (SDB) concerns. See *Government Contracting Programs*, U.S. SMALL BUSINESS ADMINISTRATION, <https://www.sba.gov/contracting/government-contracting-programs> (last visited Apr. 27, 2017). The 8(a) program has unique statutory authority to carry out its goal of developing minority businesses, and is one of two programs authorized to use race-conscious admissions criteria to select its participants. Contracting officers use a variety of contracting “preferences” to award contracts to small businesses, including (1) set-asides; (2) sole source awards; (3) evaluation preferences; and (4) subcontracting programs. See CIBINIC ET AL., *supra* note 3, at 1590, 1956. Set-asides and sole-source awards offer advantages to minority businesses by limiting the number of participants in the competitive pool. See *id.* at 1035, 1590. Evaluation preferences give minority businesses a “plus” factor in competitions with large businesses, while subcontracting programs offer monetary incentives to prime contractors that subcontract with minority businesses. See *id.* at 1596. These preferences are used to assist small businesses that are often competing with larger and more established firms.

49. All 8(a) firms fall under the SDB program, but not all firms in the SDB program are 8(a) firms. See *Disadvantaged Businesses*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/contracting/government-contracting-programs/small-disadvantaged-businesses> (last visited Apr. 28, 2017).

50. See CIBINIC ET AL., *supra* note 3, at 1601 (citing 15 U.S.C. § 637(a)(4)). After *Adarand Constructors, Inc. v. Peña*, the Under Secretary for Defense directed the SDB program to discontinue set-asides to socially disadvantaged business. See *infra* note 105 and accompanying text. Two other programs, the “Price Evaluation Program” and the “Participation Program,” were struck down in *Rothe Dev., Corp. v. Department of Defense*. See *Rothe Dev., Corp. v. U.S. Dep’t of Def.*, 545 F.3d. 1023, 1027–28, 1050 (Fed. Cir. 2008). The Participation Program was incorporated into the overall incentive subcontracting program at FAR Part 19.7. See, e.g., FAR 19.706 (2017). As a result, the 8(a) program is the only stand-alone SDB program that offers contracts exclusively to minority-owned small businesses.

51. Race-neutral small business programs, such as the Women-Owned Small Business program, have not created as much controversy as the 8(a) program, likely because of the lower level of judicial scrutiny that courts apply in race-neutral challenges. See Y. Lisa Colon Heron & Brian Anthony Williams, *Government Contracting Preference Programs After Schuette: What’s Next? Achieving Parity Through Race-Neutral Methods*, THE CONSTR. LAWYER 29, 35 (2015). Also, race-neutral programs are in parity with each other, meaning that businesses in these categories can compete with each other for contracts. See *id.* at 35–36; CIBINIC ET AL., *supra* note 3, at 1599–1600. In contrast, the 8(a) program is a stand-alone program, and only 8(a) firms can be awarded 8(a) contracts. See Heron & Williams, *supra*, at 30.

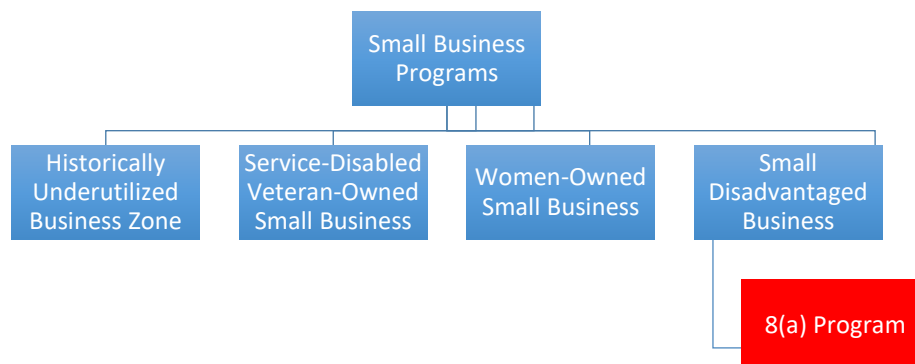


Figure 1

The 8(a) program authorizes the SBA to enter into contracts with federal agencies and to perform those contracts by subcontracting with socially and economically disadvantaged small businesses.<sup>52</sup> Socially and economically disadvantaged small businesses are defined as businesses that are at least fifty-one percent owned and operated by one or more socially and economically disadvantaged individuals.<sup>53</sup> Socially disadvantaged individuals are defined as “those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.”<sup>54</sup>

Statutorily recognized socially disadvantaged groups include, among other minorities, “Black Americans, Hispanic Americans, Native Americans, Indian

52. See CIBINIC ET AL., *supra* note 3, at 1603. The contractual relationship between the parties in the 8(a) program is unique. See *id.* at 1607. The SBA contracts with procuring federal agencies, and subcontracts with SDBs to provide the goods or services. See *id.* at 1606. Administration of the contract is allocated to the procuring agency. See *id.* at 1606–07. Once the contract is awarded, the procuring agency stands in the shoes of the SBA, conducts business directly with the minority businesses, and can even terminate the contract without SBA approval. See *id.*

53. 15 U.S.C. § 637(a)(4)(A) (2012).

54. § 637(a)(5). In 1981, Congress expanded the scope of the 8(a) program to include entity-owned small businesses. JOHN R. LUCKEY & KATE M. MANUEL, CONG. RESEARCH SER., R40744, THE “8(A) PROGRAM” FOR SMALL BUSINESSES OWNED AND CONTROLLED BY THE SOCIALLY AND ECONOMICALLY DISADVANTAGED: LEGAL REQUIREMENTS AND ISSUES 6 (2012). The first entity-owned small businesses were Community Development Corporations, non-profit groups serving their local communities. *Id.* Alaska Native Corporations and Indian tribes were added in 1986, and Native Hawaiian Organizations in 1988. *Id.*

tribes, Asian Pacific Americans, [and] Native Hawaiian Organizations.”<sup>55</sup> Individuals who are not members of one of the designated groups may establish individual social disadvantage by a preponderance of the evidence.<sup>56</sup>

Economically disadvantaged individuals are defined as those “whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.”<sup>57</sup> The burden of proving economic disadvantage is on individual participants who must submit personal financial information and a narrative statement describing their economic disadvantage.<sup>58</sup>

### C. Benefits of the 8(a) Program

Despite criticism that the 8(a) program is simply a mechanism to steer contracts to minority businesses, the program provides a variety of assistance.<sup>59</sup> Participating 8(a) firms can receive financial, technical, and contract management support.<sup>60</sup> Firms can also receive business planning, loan packaging, accounting and bookkeeping, marketing, and financing support.<sup>61</sup> In 2012, the SBA spent over \$3 million providing training, counseling, and

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55. 15 U.S.C. § 631(f)(1)(C). Some of these broad groups are further divided into subgroups. For instance, Asian Pacific Americans include “persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru,” and Subcontinent Asian Americans include “persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal.” See 13 C.F.R. § 124.103(b)(1) (2016).

56. See 13 C.F.R. § 124.103(c) (“Evidence of individual social disadvantage must include . . . [(1)] At least one objective distinguishing feature that has contributed to social disadvantage . . . ; [(2)] Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and [(3)] Negative impact on entry into or advancement in the business world because of the disadvantage. . .”).

57. 15 U.S.C. § 637(a)(6)(A). Economic disadvantage is based on income, assets, and personal net worth, an amount which must be less than \$250,000 upon acceptance into the 8(a) program, and less than \$750,000 after admission to the program. See 13 C.F.R. § 124.104(a), (c).

58. See 13 C.F.R. § 124.104(b).

59. See Helaman S. Hancock, *America’s War on Tribal Economies: Federal Attacks on Native Contracting in the SBA 8(a) Business Development Program*, 49 WASHBURN L.J. 717, 722 (2010) (discussing congressional skepticism about large contract awards to Alaskan Native Corporations without competition).

60. See 15 U.S.C. § 637(a)(7)(A).

61. See 15 U.S.C. § 636(j)(10)(A)(i)–(iii). Most 8(a) participants, because of their economic disadvantages, are eligible to receive loans through two needs-based companion programs, the 7(a) Loan Program, and the Certified Development Company/504 Loan Program. See *Office of Financial Assistance: Resources*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/offices/headquarters/ofa/resources/4049> (last visited Apr. 26, 2017). As of 2012, loans to 8(a) businesses under these programs totaled nearly \$50 million. *Id.*

marketing assistance to socially and economically disadvantaged individuals.<sup>62</sup> The program also offers mentorship through its Mentor-Protégé Program, a partnering effort that enables larger non-8(a) firms to act as mentors to protégé 8(a) firms.<sup>63</sup> Mentorship includes providing technical, managerial, and financial assistance, as well as participating in teaming arrangements to compete for, and perform on, federal contracts.<sup>64</sup>

Indeed, the 8(a) program is a comprehensive development program that provides extraordinary access to the federal contracting system. The 8(a) industry generates about \$16 billion in revenue and has more than 7,390 participating businesses.<sup>65</sup> Between 2008 and 2011, the 8(a) program graduated 1,938 firms,<sup>66</sup> or an average of 646 firms a year, and provided jobs for about 72,408 employees.<sup>67</sup> Of those firms, 1,713 were still actively doing business in 2012.<sup>68</sup>

There is a wide representation of underrepresented groups within the 8(a) program. In 2012, women-owned firms accounted for thirty-two percent of all 8(a) firms.<sup>69</sup> For the same year, the ethnic categories of the individual firm owners included Black American (32.5 %), Hispanic American (22.3 %), Asian Pacific American (11.4 %), Subcontinent Asian American (10.5 %), Native

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62. See U.S. SMALL BUS. ADMIN., OFFICE OF BUSINESS DEVELOPMENT, FY 2012 408 REPORT TO THE CONGRESS 14 (2012) [hereinafter FY 2012 408 REPORT TO THE CONGRESS]. The FY 2012 report is the most recently published report.

63. See 13 C.F.R. § 124.520.

64. See *Mentor-Protégé Program*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/contracting/government-contracting-programs/8a-business-development-program/mentor-protége-program> (last visited Mar. 1, 2017).

65. See FY 2012 408 REPORT TO THE CONGRESS, *supra* note 62, at 5. Most participating businesses generate their revenue from a mix of government and private contracts, with 8(a) sales accounting for about forty-eight percent of their total revenue. *Id.* at 21.

66. See *id.* at 15–17. The development period for minority firms in the program is limited to nine years, after which time firms “graduate” and can no longer participate in the program. See *SBA 8 (a) Fact Sheet*, NANA DEV. CORP., [http://nana-dev.com/news\\_and\\_press/media\\_kits/sba\\_8\\_a\\_fact\\_sheet/](http://nana-dev.com/news_and_press/media_kits/sba_8_a_fact_sheet/) (last visited Apr. 26, 2017).

67. See FY 2012 408 REPORT TO THE CONGRESS, *supra* note 62, at 15. Entity-owned 8(a) businesses, owned by groups of minorities, often provide valuable employee benefits such as employee education reimbursements, college preparatory classes, internship programs, and drug and alcohol treatment programs. *Id.* at 19. These firms have helped establish community family crisis centers and after-school summer programs and provide housing for elders, individuals, and families. *Id.* In 2012, entity-owned 8(a) firms provided an estimated \$183.7 million in benefits to their local communities. *Id.* The four entity-owned 8(a) firms, including Alaskan Native Corporations (ANCs), Tribally Owned, Native Hawaiian Organizations, and Community Development Corporations, are required to provide annual spending reports to Congress. *Id.*

68. See *id.* at 15. Firms may become non-active due to various reasons, such as economic conditions, mergers, retirement, illness, death of owner, or pursuit of other interests by the owner. *Id.*

69. See *id.* at 19. Men-owned firms accounted for roughly sixty-three percent of all 8(a) firms, and about five percent of the firms did not list a gender. *Id.*

American (8.5 %), Caucasian American (2.1 %), Native Hawaiian American (0.2 %), and Other American (12.5 %).<sup>70</sup>

## II. LEGAL FRAMEWORK FOR AFFIRMATIVE ACTION IN GOVERNMENT CONTRACTING

Affirmative action contracting programs have been controversial since their inception.<sup>71</sup> Not surprisingly, the scope of these programs has been largely shaped by litigation that challenged the programs over the last two decades.<sup>72</sup> This section provides a brief background of the litigation, and examines the more recent decisions in *Rothe* and *DynaLantic* that articulate and apply the current standards. This section will also discuss the impact of recent decisions on the 8(a) program and identify unresolved questions raised by those decisions.

### A. Early Challenges to Affirmative Action Contracting Programs

Two Supreme Court cases that dramatically shaped the Equal Protection law of affirmative action in government contracting are *City of Richmond v. J.A. Croson Company*<sup>73</sup> and *Adarand Constructors, Inc. v. Peña*.<sup>74</sup> Since 1980, the Supreme Court has struggled with the application of strict scrutiny to race-conscious federal, state, and local contracting programs.<sup>75</sup> The test, as articulated in *Adarand*, is whether the government can demonstrate a compelling government interest to justify the use of racial classifications, and whether race-conscious measures are narrowly tailored to further that interest.<sup>76</sup>

#### 1. *City of Richmond v. J.A. Croson Company (1989)*

*Croson* focused on the compelling interest prong of the strict scrutiny analysis. In *Croson*, the Court considered the constitutionality of a city ordinance that required prime contractors to subcontract thirty percent of their work to minority-owned businesses.<sup>77</sup> The City of Richmond, Virginia passed the ordinance in 1983 because, while the general population of Richmond was fifty percent African-American, only 0.67% of the city's prime construction contracts had been awarded to minority-owned businesses between 1978 and

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70. See *id.* at 18.

71. See CIBINIC ET AL., *supra* note 3, at 1600 (discussing Equal Protection challenges to affirmative action programs by non-minority businesses).

72. See *infra* Part II. A–B.

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

74. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

75. See *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980). In *Fullilove*, the Court applied an ambiguous standard that clearly was not strict scrutiny, and upheld a congressional spending program mandating that ten percent of federal funds for public works projects go to local minority businesses. See *id.* at 473, 490–92.

76. See *Adarand Constructors, Inc.*, 515 U.S. at 227.

77. See *Croson*, 488 U.S. at 477.

1983.<sup>78</sup> The city's business associations, who had virtually no minority businesses in their membership, opposed the ordinance, and argued that although the statistics were disparaging, there was no evidence of discrimination by the City of Richmond.<sup>79</sup> After its passage, the ordinance was quickly challenged by J.A. Croson, a company that bid on a city contract for the provision and installation of urinals and water closets in the city jail.<sup>80</sup> The U.S. District Court for the Eastern District of Virginia upheld the ordinance, and the Fourth Circuit affirmed.<sup>81</sup> Both courts relied on Supreme Court precedent that afforded deference to Congress' findings of past discrimination in the construction industry, and held that Richmond's action was reasonable.<sup>82</sup>

The Supreme Court disagreed. Justice O'Connor explained that the city of Richmond did not hold the same remedial power as Congress.<sup>83</sup> She noted that Section 5 of the Fourteenth Amendment is a positive grant of legislative power to Congress, while Section 1 is an explicit restraint on state power stemming from a distrust of state legislative enactments based on race.<sup>84</sup> While Congress has broad remedial authority to enforce Equal Protection guarantees, state and local governments must make specific findings of discrimination to engage in race-remediation.<sup>85</sup>

Justice O'Connor relied on *Wygant v. Jackson Board of Education*, a decision the Court issued two terms prior.<sup>86</sup> In *Wygant*, the Court held that a school board policy extending minority employees protection from layoffs was unconstitutional because the board lacked a "strong basis in evidence" for its conclusion that remedial action was necessary.<sup>87</sup> Applying *Wygant*, Justice O'Connor found that the city of Richmond had not presented the Court with specific instances of racial discrimination in the city's contracting industry, and thus lacked a strong basis in evidence to demonstrate a compelling interest.<sup>88</sup> She reiterated, "an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota."<sup>89</sup>

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78. *See id.* at 479–80.

79. *See id.* at 480.

80. *See id.* at 481.

81. *See id.* at 483–84 (citing *J.A. Croson Co. v. City of Richmond*, 779 F.2d 181 (4th Cir. 1985), *vacated*, *J.A. Croson Co. v. City of Richmond*, 478 U.S. 1016 (1986)).

82. *See id.* at 484.

83. *See id.* at 488, 490.

84. *See id.* at 490–91 (citing U.S. CONST. amend XIV) ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.... Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

85. *See id.* at 491–92.

86. *See id.* at 492 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986)).

87. *See Wygant*, 476 U.S. at 277–78.

88. *See Croson*, 488 U.S. at 500.

89. *Id.* at 499.



The decision suggested a bifurcated standard of review for federal and state affirmative action contracting programs. Federally administered programs were treated to a watered-down form of strict scrutiny, as courts afforded deference to congressional and agency findings of discrimination.<sup>90</sup> In contrast, state and local programs were held to more exacting strict scrutiny.<sup>91</sup> The Supreme Court later had an opportunity to address the standard of review for federal programs in a seminal affirmative action case that reviewed the constitutionality of 8(a) and other federal contracting programs.<sup>92</sup>

## 2. *Adarand Constructors v. Pena (1995)*

*Adarand* dramatically changed the affirmative action landscape because it unequivocally held that strict scrutiny applies to all federal affirmative action contracting programs. *Adarand* did not reverse previous affirmative action contracting cases.<sup>93</sup> Rather, it shifted the Court's compelling interest analysis away from affording deference to Congress in federal contracting cases, and closer to the exacting form of strict scrutiny applied to state and local programs.<sup>94</sup> After *Adarand*, courts looked to *Croson* for guidance to apply the compelling interest analysis under strict scrutiny to affirmative action contracting programs.<sup>95</sup> *Croson*'s "strong basis in evidence" test became a guidepost for courts reviewing such programs.

*Adarand* involved a federal statute that granted monetary incentives to prime contractors who employed minority businesses to perform a portion of their contracts.<sup>96</sup> The prime contractor in the case solicited offers from small business subcontractors for a Colorado federal highway project, and selected a minority-owned subcontractor over a non-minority-owned subcontractor because of the incentives.<sup>97</sup> The prime contractor submitted an affidavit that stated, but for the incentive program, he would have subcontracted with the lower priced non-minority-owned business.<sup>98</sup>

Justice O'Connor methodically analyzed and retreated from a number of considerations that the Court had formerly reserved for federal programs, such

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90. *See id.* at 484.

91. *See id.* at 490–93.

92. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 207 (1995).

93. *See id.* at 235.

94. *See id.*

95. *See Rothe Dev. Inc. v. U.S. Dep't of Def.*, 107 F. Supp. 3d 183, 208 (D.D.C. 2015); *DynaLantic Corp. v. U.S. Dep't of Def.*, 885 F. Supp 237, 251 (D.D.C. 2012); *Cortez III Serv. Corp. v. NASA*, 950 F. Supp. 357, 361 (D.D.C. 1996).

96. *See Adarand Constructors, Inc.*, 515 U.S. at 208 (citing the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. 100-17, 101 Stat. 132 (1987)).

97. *See id.* at 205.

98. *See id.*

as deference to Congress and benign racial classifications.<sup>99</sup> The end result was the Court's adoption of a uniform strict scrutiny standard of review for federal, state, and local affirmative action programs.<sup>100</sup> Unfortunately, by remanding the case, the Court offered no insight into how to apply the standard.<sup>101</sup> While the bright-line rule brought consistency to the Court's jurisprudence, the pivot wreaked havoc for courts and the procurement system.

On remand, the lower courts struggled to apply the test announced in *Adarand*.<sup>102</sup> The Colorado District Court granted summary judgment for the subcontractor, holding that the affirmative action program failed to satisfy strict scrutiny.<sup>103</sup> The Tenth Circuit reversed, holding that evidence of discrimination supported the government's remedial action.<sup>104</sup> Government officials were similarly perplexed. In the wake of *Adarand*, the Under Secretary of Defense for Acquisition and Technology suspended all set-aside programs for Small Disadvantaged Businesses.<sup>105</sup> The 8(a) program was spared because it was a separately authorized program, and its authorizing statute was not directly implicated in *Adarand*.<sup>106</sup> However, contractors quickly challenged the 8(a) program, arguing that its authorizing statute could not withstand strict scrutiny under *Croson* and *Adarand*.<sup>107</sup>

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99. See *id.* at 213–14. Justice O'Connor engaged in an exhaustive review of equal protection cases examining the Court's interpretation of the differences in language of the Fifth and Fourteenth Amendments. *Id.* She concluded that the Court's fractured affirmative action cases had three general propositions in common. First, any preference based on race must receive a "most searching examination." *Id.* at 219. Second, the standard of review must not depend on the race of the person burdened or benefited. *Id.* at 226–27. Third, for congruence, equal protection analysis must be the same under the Fifth and Fourteenth Amendments. *Id.* at 231–32. Justice O'Connor derived from these three propositions the principle that both the Fifth and Fourteenth Amendments protect persons, not groups. *Id.* at 227. She concluded that all governmental action based on race must be subject to strict scrutiny to ensure that the personal right to equal protection is not infringed. *Id.*

100. See *id.* at 227, 231–32.

101. See *id.* at 238–39 ("The question whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny, and any relevance distinctions such as these may have to that question, should be addressed in the first instance by the lower courts.").

102. See *Adarand Constructors, Inc., v. Slater*, 228 F.3d 1147, 1187–88 (10th Cir. 1999) (reversing the lower court's decision after a lengthy review of strict scrutiny jurisprudence).

103. See *Adarand Constructors, Inc., v. Pena*, 965 F. Supp. 1556, 1584 (D. Colo. 1997).

104. See *Adarand*, 228 F.3d at 1188. The Supreme Court dismissed a second writ of certiorari as improvidently granted. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001). Thus, the Tenth Circuit decision upholding the program is controlling.

105. See Memorandum from Paul G. Kaminski, Undersecretary of Defense for Acquisition and Technology, Department of Defense, to Secretaries of the Military Departments (Oct. 23, 1995), [http://farsite.hill.af.mil/reghtml/changes/afac/afa92\\_50.htm](http://farsite.hill.af.mil/reghtml/changes/afac/afa92_50.htm).

106. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 209–10 (1995).

107. See *Rothe Dev., Inc. v. U.S. Dep't of Def.*, 107 F. Supp. 3d 183, 190–92 (D.D.C. 2015), *aff'd sub nom.*, *Rothe Dev., Inc. v. U.S. Dep't of Def.*, 836 F.3d 57 (D.C. Cir. 2016); *DynaLantic*

*a. The Current Standard: Rothe and DynaLantic*

In 2008, the SBA offered three affirmative action programs that exclusively assisted minority-owned businesses. These included the 8(a) program, Participation Program, and Price Evaluation Adjustment (PEA) Program.<sup>108</sup> The Participation and PEA programs were struck down in *Rothe Development, Corp. v. United States Department of Defense*.<sup>109</sup> As such, the 8(a) program is the only remaining program congressionally authorized to exclusively assist minority-owned businesses.<sup>110</sup>

*i. Rothe Development Corporation v. U.S. Department of Defense (2008)*

In *Rothe*, the Federal Circuit provided a detailed analysis of the application of strict scrutiny to the SDB programs under *Adarand*. At issue in *Rothe* was the constitutionality of 10 U.S.C. § 2323, the authorizing statute for the Participation Program and PEA Program.<sup>111</sup> Both programs offered exclusive benefits to minority-owned businesses. The Participation Program permitted the government to evaluate prime contractors' proposals based in part on their plans to subcontract with minority-owned businesses.<sup>112</sup> If a prime contractor's proposal included a plan that called for SDBs to perform a portion of the work, the government could give extra credit to that contractor's proposal.<sup>113</sup> While

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Corp. v. U.S. Dep't of Def., 885 F. Supp. 2d 237, 276–77 (D.D.C. 2012); *Cortez III Serv. Corp. v. NASA*, 950 F. Supp. 357, 361–62 (D.D.C. 1996).

108. See *Rothe Dev. Corp. v. U.S. Dep't of Def.*, 545 F.3d 1023, 1027–29 (Fed. Cir. 2008).

109. See *id.* at 1050.

110. After *Adarand*, the 8(a) program was one of three remaining programs exclusively serving minority-owned businesses. See *id.* at 1027–29. The other two programs were the “Participation Program” and the “Price Evaluation Adjustment (PEA) Program.” *Id.* Government officials attempted to shield these programs from the *Adarand* fallout, but their efforts were preempted. In 1998, Congress passed legislation suspending the PEA Program. *Id.* at 1029 n.2. Section 801 of the National Defense Authorization Act for FY 1999 amended 10 U.S.C. § 2323, the programs' implementing statute, by mandating suspension of the programs if the DOD met its five percent SDB contracting goal in the previous year. *Id.* at 1028 (citing Strom Thurmond National Defense Authorization Act for FY 1999, Pub. L. 105-261, 112 Stat. 2080, 2081 (1998)). The DOD met its goal that year, and in every subsequent year, until the Federal Circuit struck down both programs in 2009. See *id.* at 1050 (holding that both programs authorized under 10 U.S.C. § 2323 violated equal protection and were unconstitutional). The 8(a) program is the only remaining affirmative action program congressionally authorized to exclusively assist minority-owned businesses. See *Contracting: Mentor-Protégé Program*, U.S. SMALL BUS. ADMIN. (last visited Mar. 4, 2017), <https://www.sba.gov/contracting/government-contracting-programs/8a-business-development-program/mentor-protege-program>.

111. *Rothe*, 545 F.3d at 1035–36; see National Defense Authorization Act of 1987, Pub. L. No. 99-661, 100 Stat. 3859, 3973 (1986).

112. See FAR 19.1202.3 (2012).

113. See FAR 19.1203 (2012). Plans were evaluated based on a number of factors, including proposed percentage targets for the amount of small business participation, and detailed descriptions of how the targets would be achieved. FAR 19.1202-4 (2012). The government

the subcontracting plan was only one factor in the source selection evaluation, it offered a significant advantage to prime contractors utilizing SDBs, especially in close competitions.<sup>114</sup>

The PEA Program provided price adjustments to SDBs competing against non-minority contractors in source selection competitions.<sup>115</sup> Under this program, SDBs were granted a ten percent price adjustment in competitions when the SBA determined that SDBs were underrepresented in the industry.<sup>116</sup> For example, if the SBA determined that minorities were underrepresented in the construction industry, the government could adjust the offerors' prices so that proposals submitted by non-minority businesses would reflect a ten percent price increase over an SDB's price.

The Federal Circuit held that 10 U.S.C. § 2323, the authorizing statute for both programs, violated Equal Protection.<sup>117</sup> The court said that the *Croson* "strong basis in evidence" test was the appropriate test to analyze the government's compelling interest under strict scrutiny.<sup>118</sup> Applying *Croson*, the court found that the government's six state and local disparity studies did not provide a probative and broad-based statistical foundation to satisfy the test.<sup>119</sup> In particular, the Court found that the government's proposed benchmark analysis, a formula that the government used to calculate the share of contracts that minorities would have received without discrimination, did not account for whether minority-owned businesses were qualified, willing, and able to perform the contracts.<sup>120</sup> The Court held that defects in the studies, in addition to their

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selected contracts based on the strength of the subcontracting plan, among other evaluation factors. *Id.*

114. See FAR 19.1203. Contracting officers were authorized to incentivize contractors who surpassed their subcontracting goals. The incentives ranged from zero to ten percent of the dollars in excess of plan goals. See *Rothe*, 545 F.3d at 1027. After *Rothe*, the government incorporated the Participation Program into the overall incentive subcontracting program, which supports all small businesses, including SDBs. See FAR 19.703 (2012).

115. See *Rothe*, 545 F.3d at 1027.

116. See *id.* at 1027–30.

117. See *id.* at 1050 (citing U.S. CONST. amend. V).

118. See *id.* at 1036.

119. See *id.* at 1047. The court found that the government's disparity studies did not account for the relative size differences of minority firms. *Id.* This, the court said, rendered the studies less probative because it was impossible to know the relative capacities of the businesses, and whether larger businesses, though fewer, could handle more volume. *Id.* The court further found the studies lacked probative value because of their limited geographical coverage, representing only one state and six local municipalities. *Id.* at 1045–46.

120. See *Id.* at 1037, 1041–42. The benchmark analysis was the government's response to *Adarand*, and was supposed to be a defense to a *Croson* challenge. *Id.* at 1049. Its purpose was to ensure that the programs were only used in industries with underrepresented minorities. *Id.* at 1041–42. After *Adarand*, the Department of Commerce (DOC) was tasked with using disparity studies to determine benchmarks that would guide officials when determining whether racial disparities in each industry were so significant as to warrant affirmative action measures. *Id.* at

limited geographic coverage, rendered them insufficient to satisfy the *Croson* “strong basis in evidence” test.<sup>121</sup> As such, the government failed to demonstrate a compelling interest under strict scrutiny that justified the use of race-conscious measures.

ii. *DynaLantic Corporation v. U.S. Department of Defense (2012)*

*DynaLantic* was not the first time the D.C. District Court considered the constitutionality of the 8(a) program. In 1996, the court ruled the program unconstitutional as applied to a NASA contract because the government did not present evidence of discrimination in the industry in which the contract would be performed.<sup>122</sup> The NASA contract proposed a range of agency services, including transportation, property disposal, and video production.<sup>123</sup> The court noted that the same DOJ that represented the government in the current litigation issued a memorandum, after *Adarand*, advising the DOD that it must have a strong basis in evidence before engaging in race-conscious remedial action.<sup>124</sup>

In *DynaLantic*, the D.C. District Court reached the same conclusion on a DOD contract for military simulators that raised similar issues.<sup>125</sup> In this case, the Navy awarded an 8(a) contract to buy military flight simulators for the “Huey” helicopter.<sup>126</sup> *DynaLantic*, a non-8(a) manufacturer of flight simulators, brought suit alleging that the 8(a) program was unconstitutional on its face and as applied to the military simulation and training industry.<sup>127</sup> The court denied *DynaLantic*’s motion for a preliminary injunction and dismissed the case on standing grounds.<sup>128</sup> On appeal, the D.C. Circuit granted *DynaLantic*’s motion

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1029 n.2. However, the DOC never followed through with its benchmark analysis, presumably because Congress suspended the PEA Program in 1998. *See id.* Without this analysis in *Rothe*, the government was forced to rely on one state and five local disparity studies to defend the programs. *Id.* at 1038.

121. *See id.* at 1045. In dicta, the court suggested that DOC’s benchmark analyses would have at least allowed the court to determine whether the programs met the *Croson* standard. *Id.* at 1049. In fact, the court stated that the initial DOC studies were exactly the type of “true capacity studies” that were needed to account for various sizes of businesses, a critical factor in determining utilization of minority-owned firms. *Id.* at 1044.

122. *See DynaLantic Corp. v. U.S. Dep’t of Def.*, 885 F. Supp 237, 247, 282 (D.D.C. 2012).

123. *Id.* at 282–83 (citing *Cortez III Serv. Corp v. NASA*, 950 F. Supp. 357, 361 (D.D.C. 1996)).

124. *See Cortez III*, 950 F. Supp. at 361–62 (citing Memorandum from Walter Dellinger, Assistant Attorney General, Dep’t of Justice, to General Counsels, Dep’t of Justice (June 28, 1995), <http://clinton2.nara.gov/WH/EOP/OP/html/aa/ap-b.html>).

125. *See DynaLantic*, 885 F. Supp. 2d at 281, 292.

126. *See id.* at 247.

127. *Id.* at 242. *DynaLantic* initially challenged a separate DOD program that obligated the DOD to participate in the 8(a) program. *Id.* However, the court ruled that the challenge was moot after the DOD program was found unconstitutional in *Rothe*. *Id.*

128. *See id.* at 247 (citing *DynaLantic Corp. v. U.S. Dep’t of Def.*, 937 F. Supp 1, 5 (D.D.C. 1996)). The D.C. District Court found that because *DynaLantic* did not seek participation in the

to enjoin the procurement during the pendency of the appeal.<sup>129</sup> Shortly after this ruling, the Navy cancelled the contract.<sup>130</sup>

Despite the cancelled contract, the D.C. Circuit held that DynaLantic had standing to challenge the 8(a) program because the program prevented DynaLantic from competing for future contracts.<sup>131</sup> On remand, the D.C. District Court denied DynaLantic's facial challenge, but upheld the as-applied challenge.<sup>132</sup> The court found that the DOD, by its own admission, did not produce any evidence of discrimination in the military simulation and training industry.<sup>133</sup> The court explained, "the government cannot simply rely on broad expressions of purpose or general allegations of historical or societal racism. Rather, its legislation must rest on evidence at least approaching a *prima facie* case of discrimination in the relevant industries."<sup>134</sup> Without this evidence, the DOD could not demonstrate a compelling interest in remedying discrimination in this industry.<sup>135</sup> DynaLantic appealed the denied facial challenge, but the parties entered into a settlement agreement before the D.C. Circuit reached the merits of the case.<sup>136</sup>

### *B. Impact of the Current Standard and Unresolved Questions*

*Rothe* and *DynaLantic* make clear that the 8(a) program carries significant litigation risk, particularly in markets where the government has no statistical evidence of discrimination. The cases also make clear that the government will not be afforded deference under the compelling interest prong of the strict scrutiny analysis in as-applied challenges to the program.

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8(a) program, the firm lacked standing because it would not be directly affected by the outcome of the litigation. *DynaLantic*, 937 F. Supp at 5–6.

129. See *DynaLantic*, 885 F. Supp. 2d at 247.

130. See *id.*

131. See *id.* The D.C. Circuit also invited DynaLantic to file an amended complaint in order to raise a facial challenge to the authorizing statute, in addition to their as-applied challenge. *Id.*

132. See *id.* at 293. The government presented evidence of discrimination in the construction, architecture, engineering, and professional services industries. *Id.* at 273–74. The court found that the evidence, which spanned multiple decades and represented various regions of the country, was sufficient for Congress to authorize a nationwide remedy. *Id.* The ultimate burden for the facial challenge rested with the plaintiffs to show that Congress lacked a strong basis in evidence to conclude that there is any set of circumstances in which it was necessary or appropriate to set aside contracts for the program. *Id.* at 274. The court held that DynaLantic had not done so, and ruled for the government on the facial challenge. *Id.* at 274, 279–80.

133. See *id.* at 280.

134. See *id.* at 281.

135. See *id.*

136. See Memorandum from Richard Ginman, Director, Defense Procurement and Acquisition Policy, to DOD acquisition executives (Mar. 14, 2014), <http://www.acq.osd.mil/dpap/policy/policyvault/USA000970-14-DPAP.pdf><http://www.acq.osd.mil/dpap/policy/policyvault/USA000970-14-DPAP.pdf>.

In contrast, courts will afford some deference on facial challenges. For example, the *DynaLantic* court did not require evidence of discrimination in all fifty states in order to deny the facial challenge to the 8(a) program.<sup>137</sup> However, both the *Rothe* and *DynaLantic* courts were unwilling to allow the government to operate the facially valid program in individual markets based on the evidence the government presented on the facial challenge.<sup>138</sup>

While courts are wary of affording deference to the government's decision to employ race-conscious measures to remedy past discrimination, they are less wary when the government offers a non-remedial purpose. The Supreme Court has recognized the diversity rationale as a non-remedial purpose that may justify race-conscious measures, a rationale that the government has articulated in a variety of contexts.

For instance, in *Metro Broadcasting, Inc. v. Federal Communications Commission*,<sup>139</sup> the Supreme Court deferred to the FCC's expertise on the issue of whether minority ownership of licenses actually promoted programming diversity.<sup>140</sup> The Court said, "[t]he FCC's conclusion that there is an empirical nexus between minority ownership and broadcasting diversity is a product of its expertise, and we accord its judgment deference."<sup>141</sup> Likewise, in *Regents of the University of California v. Bakke*,<sup>142</sup> the Court held that the attainment of a diverse student body was clearly a compelling interest in the context of a university's admissions program.<sup>143</sup> The Court did not require the university to present evidence of discrimination at its school or any other school. Rather, it deferred to the university regarding whether a diverse student body was essential to the quality of higher education.<sup>144</sup> Most recently, in *Fisher v. University of*

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137. See *DynaLantic*, 885 F. Supp. 2d at 274 n.13 ("We do not think that Congress needs to have evidence before it of discrimination in all fifty states in order to justify a nationwide program. Contrarily, evidence of a few isolated instances of discrimination would be insufficient to uphold the nationwide program.") (citing *Rothe Dev. Corp. v. U.S. Dep't of Def.*, 262 F.3d 1306, 1329–30 (Fed. Cir. 2001)).

138. See *id.* at 293; see also *Rothe Dev. Corp. v. U.S. Dep't of Def.*, 545 F.3d 1023, 1050 (Fed. Cir. 2008).

139. *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), overruled by *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

140. See *Metro Broad. Inc.*, 497 U.S. at 593–594. *Adarand* overruled *Metro Broadcasting*, but only to the extent that *Metro Broadcasting* did not comport with the Court's ruling that all racial classifications must be analyzed under strict scrutiny. See *Adarand*, 515 U.S. at 227 ("Accordingly, we hold today that all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny . . . . To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled.")

141. See *id.* at 569.

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

143. See *id.* at 311–12 (finding that a university's pursuit of a diverse student body is an act of "[a]cademic freedom, [which] though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.")

144. See *id.* at 312.

*Texas at Austin (Fisher II)*, the Supreme Court examined the appropriate level of deference courts should afford universities when, examining under strict scrutiny, universities claim that diversity would advance their educational goals.<sup>145</sup> The Court concluded that a university's determination that diversity has educational value is an academic judgment to which some deference is owed.<sup>146</sup>

In the aftermath of *Adarand*, the DOJ contemplated the application of non-remedial justifications for government contracting programs. The DOJ recognized that the Supreme Court never addressed the question, and advised agency general counsel to consider the rationale for federal contracting programs.<sup>147</sup> However, 8(a) program officials ignored the advice and continued to articulate remedial justifications for the program; they believed that *Croson* and *Adarand* did not apply to the 8(a) program.<sup>148</sup> More than twenty years after *Adarand*, the legal framework for affirmative action is substantially more developed. Last year, the Supreme Court reaffirmed diversity in higher education as a compelling government interest.<sup>149</sup> Thus, the application of the diversity rationale in other affirmative action contexts is again ripe for consideration.

### III. THE DIVERSITY RATIONALE FOR AFFIRMATIVE ACTION IN MILITARY CONTRACTING

This section is divided into three parts. Section A examines the diversity rationale in the context of the Supreme Court's affirmative action jurisprudence in higher education. Section B explains how the diversity rationale applies in other contexts. Lastly, Section C applies the rationale to the military contracting context.

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145. See *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2207–08 (2016). In *Fisher I*, the Court vacated the judgment of the Fifth Circuit and remanded the case. See *Fisher v. University of Texas at Austin (Fisher I)*, 133 S. Ct. 2411, 2422 (2013). On re-hearing, the Court affirmed the decision of the Fifth Circuit. See *Fisher II*, 136 S. Ct. at 2207.

146. See *id.* at 2207–08.

147. See Walter Dellinger, Memorandum to General Counsels Regarding *Adarand*, at 1 (June 28, 1995), <http://clinton2.nara.gov/WH/EOP/OP/html/aa/ap-b.html>; Memorandum from Walter Dellinger, Assistant Attorney General, Dep't of Justice, to General Counsels, Dep't of Justice (June 28, 2016), <http://clinton2.nara.gov/WH/EOP/OP/html/aa/ap-b.html>.

148. See *DynaLantic Corp. v. U.S. Dep't of Def.*, 885 F. Supp. 2d, 237, 280 (D.D.C. 2012). The government argued that Section 8(a) was a minority development program, not an affirmative action program, and therefore evidence of discrimination in specific industries was not constitutionally required. *Id.*

149. See *Fisher II*, 136 S. Ct. at 2210.



A. *The Legal Framework for Affirmative Action in Higher Education*

The argument that diversity in government contracting is a compelling interest is grounded in higher education affirmative action case law. For almost four decades, the Supreme Court has deliberated the constitutionality of affirmative action in higher education. In June 2016, by a four-to-three vote, the Supreme Court upheld the affirmative action admission program at issue in *Fisher II*.<sup>150</sup> The decision placed affirmative action on its strongest footing since the Court first considered the issue in *University of California v. Bakke*.<sup>151</sup>

In *Bakke*, the Court considered an admissions program at the Medical School of the University of California at Davis.<sup>152</sup> The university had reserved sixteen admission seats for minorities and eighty-four seats for white applicants.<sup>153</sup> Bakke was a white student who was denied entry despite having an overall higher admission score than minority students who were admitted through the minority program.<sup>154</sup> The Court held that racial distinctions of any sort require “the most exacting judicial examination” regardless of the program’s purportedly benign purpose.<sup>155</sup> The Court stated that the university must show: (1) “that its purpose or interest is both constitutionally permissible and substantial”; and (2) “that the use of racial classifications is necessary to achieve its purpose.”<sup>156</sup>

The university advanced four purposes for the program: “(i) reducing the historic deficit of traditionally disfavored minorities in medical schools . . . (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.”<sup>157</sup> The Court dispensed with all but the last justification because the Court never approved racial classifications in the “absence of judicial, legislative, or administrative findings of constitutional or statutory violations.”<sup>158</sup> The Court added that, “in the absence of legislative mandates and legislatively determined criteria,” universities were in no position to make such

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150. *See id.* at 2207, 2215. The decision surprised analysts, many of whom believed the Court would strike down the program after granting certiorari to hear the case a second time. *See* Adam Liptak, *Supreme Court to Weigh Race in College Admissions*, N.Y. TIMES (June 29, 2015), [https://www.nytimes.com/2015/06/30/us/supreme-court-will-reconsider-affirmative-action-case.html?\\_r=0](https://www.nytimes.com/2015/06/30/us/supreme-court-will-reconsider-affirmative-action-case.html?_r=0).

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

152. *See id.* at 269–70.

153. *See id.* at 289.

154. *See id.* at 277 (“[A]pplicants were admitted under the special program with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke’s.”).

155. *See id.* at 291.

156. *Id.* at 305 (quoting *In re Griffiths*, 413 U.S. 717, 721–22 (1973) (footnotes omitted)).

157. *Id.* at 306 (footnote omitted) (citations omitted).

158. *See id.* at 307.

findings and could not be permitted to rely on amorphous claims of societal discrimination to justify a race-conscious admissions program aimed at remedying past discrimination.<sup>159</sup>

Turning to the non-remedial purpose, Justice Powell found that the attainment of educational benefits that flow from a diverse student body was a permissible goal.<sup>160</sup> As he explained, courts have long recognized academic freedom as a special concern of the First Amendment.<sup>161</sup> Universities must be free to make decisions concerning “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>162</sup> The university’s First Amendment right to select the students who, in the university’s opinion, will most likely contribute to the “robust exchange of ideas,” is of paramount importance to its mission.<sup>163</sup>

Finding that a diverse student body was a permissible and substantial interest, Powell turned to the necessity prong of the analysis and stated that the complexity of the interest did not require the rigid quota system at issue in the case.<sup>164</sup> He explained that diversity is a concept that encompasses a “broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”<sup>165</sup> He concluded that race may be considered a “plus” in an applicant’s file, but may not be used to insulate an individual from competition with other applicants.<sup>166</sup> No other judge joined Justice Powell in the part of the opinion discussing the diversity justification.<sup>167</sup> Subsequently, courts were not sure how to apply the precedent until Justice O’Connor addressed the issue again in *Grutter v. Bollinger*.<sup>168</sup>

In *Grutter*, the Court considered the constitutionality of the University of Michigan Law School’s admissions program that included race as a factor, but that did not reserve seats or have quotas for minority applicants.<sup>169</sup> Justice O’Connor dispelled the notion that racial classifications are reserved for remedial settings.<sup>170</sup> Relying on Justice Powell’s First Amendment rationale,

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159. *See id.* at 309–10 (citing *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 (1976)).

160. *Id.* at 311–12.

161. *Id.* at 312.

162. *Id.* (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment)).

163. *Id.* (quoting *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)).

164. *See id.* at 315.

165. *Id.*

166. *Id.* at 317.

167. *See id.* at 267.

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

169. *Id.* at 315–16.

170. *Id.* at 328.

she found that diversity was a compelling government interest.<sup>171</sup> She described the benefits that can be achieved through diversity as “not theoretical but real,” and listed cross-cultural understanding, breaking down racial stereotypes, and creating livelier classroom discussion as among the benefits.<sup>172</sup>

A contingent of *amici curiae* petitioners filed briefs that discussed the tangible benefits of diversity in the military and corporate America.<sup>173</sup> Military leaders asserted that a “highly qualified racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.”<sup>174</sup> They described the racial tension that existed in the enlisted and officer corps during Vietnam, and the breakdown of unit cohesion that ultimately led to failed missions.<sup>175</sup> Major businesses including 3M, Microsoft, General Motors, American Airlines, General Dynamics, and Coca-Cola stressed the importance of diversity to multinational companies.<sup>176</sup> They argued that universities, as feeder pools to their companies, contributed to the development of diverse and eclectic employees who understand the global marketplace and who regularly practice cross-cultural competencies for the benefit of the company.<sup>177</sup>

Finding the arguments persuasive, the Court moved their attention to the narrow tailoring prong of the strict scrutiny analysis. The Court identified several factors to consider. First, a narrowly tailored program cannot use a quota system, but may consider race or ethnicity as a “plus,” without insulating applicants from comparisons with other applicants.<sup>178</sup> Race or ethnicity cannot be the defining feature of an applicant, and race-neutral means cannot be available to achieve the government’s stated purpose.<sup>179</sup> Finally, the effects of the program on non-minorities must be considered, as well as limitations on the

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171. *Id.* at 329.

172. *Id.* at 330.

173. See Brief for Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents at 5, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241, 02-516); Motion for Leave to File Amicus Curiae Brief and Brief of Exxon Mobil Corporation as Amicus Curiae in Support of Neither Party, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241, 02-516); Motion for Leave to File Brief Amicus Curiae Out of Time and Brief of MTV Networks in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241, 02-516).

174. Brief for Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents at 5, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241, 02-516).

175. See *id.* at 5–6.

176. See generally Brief for 65 Leading American Businesses as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241, 02-516).

177. See Brief for 3M et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241, 02-516).

178. See *Grutter*, 539 U.S. at 335–36 (comparing U.C. Davis Medical School’s quota in *Bakke* to Harvard’s more flexible use of race as a “plus” factor).

179. See *id.* at 337.

duration of the program.<sup>180</sup> The Court held that the law school admissions program satisfied these narrow tailoring requirements.<sup>181</sup>

In *Gratz v. Bollinger*,<sup>182</sup> a case decided the same day as *Grutter*, the Court struck down Michigan's undergraduate admissions program on narrow tailoring grounds.<sup>183</sup> The undergraduate admissions program automatically awarded twenty points, or one-fifth of the points needed for admission, to every minority applicant.<sup>184</sup> Following *Grutter*, the Court said that automatically awarding points to minority applicants did not provide for the individualized consideration that is required of a narrowly tailored race-conscious program.<sup>185</sup>

The most recent case to examine affirmative action in higher education is *Fisher II*. The central issue in *Fisher II* was whether the Fifth Circuit correctly applied strict scrutiny when reviewing the University of Texas at Austin (UT) undergraduate admissions program.<sup>186</sup> The case involved an affirmative action plan at UT that granted admission to the top graduates from every high school in the state.<sup>187</sup> The "Top Ten Percent Plan," as it is known, is a race-neutral admissions program that was successful in recruiting minorities because of the de facto segregation of the Texas high school system.<sup>188</sup> The program accounted for seventy-five percent of the university's undergraduate admissions, while the other twenty-five percent of students were admitted through a race-conscious program that considered race as a factor in its admission criteria.<sup>189</sup> It is the race-conscious program that was at issue in *Fisher II*.

In *Fisher I*, the Supreme Court found that the Fifth Circuit improperly applied strict scrutiny when it erroneously granted deference to UT under the narrow tailoring prong of the test.<sup>190</sup> In its analysis, the Fifth Circuit concluded that, under *Grutter*, "the narrow tailoring inquiry—like the compelling interest inquiry—is undertaken with a degree of deference to the Universit[y]."<sup>191</sup>

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180. See *id.* at 341–42 ("To be narrowly tailored, a race-conscious admissions program must not "unduly burden individuals who are not members of the favored racial and ethnic groups.").

181. See *id.* at 343.

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

183. See *id.* at 275.

184. See *id.* at 256.

185. See *id.* at 271.

186. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2207–08 (2016).

187. See *id.* at 2205–07.

188. See *id.* at 2205–06; see also Rodney A. Smolla, *Fisher v. University of Texas: Who Put the Holes in "Holistic"?*, 9 DUKE J. CONST. L. & PUB. POL'Y 31, 36 (2013) ("The Top Ten Percent Law was in a curious sense both race-neutral and race-based. On its surface it was entirely race-neutral, creating a reward for any student finishing in the top ten percent of his or her class. Yet race was indisputably the animating purpose behind the law.").

189. See *Fisher II*, 136 S. Ct. at 2206.

190. See *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2419–21 (2013).

191. *Id.* at 2420 (citing *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 232 (5th Cir. 2011), *vacated*, 133 S. Ct. 2411 (2013), *remanded to* 758 F.3d 633 (5th Cir. 2014)).

Because it applied the wrong legal standard, the Supreme Court found that the Fifth Circuit did not carefully consider the narrow tailoring factors in *Grutter*, deferring too much to UT's "serious, good faith consideration" of race-neutral alternatives.<sup>192</sup> This, the Supreme Court said, confined the strict scrutiny analysis and did not permit the court to give "close analysis to the evidence of how the process works in practice."<sup>193</sup>

On remand, the Fifth Circuit applied the correct legal standard and again upheld the program.<sup>194</sup> When the Supreme Court granted certiorari in *Fisher II*, legal experts thought that the decision signaled the end of affirmative action in higher education.<sup>195</sup> However, the Court affirmed the Fifth Circuit's decision, finding that the court correctly applied strict scrutiny in upholding the program a second time.<sup>196</sup> Fisher argued that the plan was unnecessary because UT already achieved a "critical mass" of minorities by 2003 through the Top Ten Percent Plan, which had been in effect since 1998.<sup>197</sup> The university disagreed, arguing that it conducted a year-long study on diversity, including holding retreats, conducting interviews, and reviewing data after the *Grutter* and *Gratz* decisions in 2003.<sup>198</sup> University officials drafted a thirty-nine-page analysis considering the use of race-neutral alternatives, which concluded that the Top 10 Percent Program alone was not sufficient to achieve a critical mass of minority students.<sup>199</sup>

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192. *See id.* at 2420–21. The Fifth Circuit's error is not totally misguided. In *Grutter*, the Court said that narrow tailoring does not require an exhaustion of every conceivable race-neutral alternative. Rather, it requires a "serious, good faith consideration of race-neutral alternatives that will achieve the diversity the university seeks." *Grutter*, 539 U.S. at 339. The Fifth Circuit adopted its "good faith" standard based on the language in *Grutter*. *See Fisher*, 631 F.3d at 231.

193. *Fisher I*, 133 S. Ct. at 2421 ("Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.").

194. *See Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 660 (5th Cir. 2014), *aff'd*, 136 S. Ct. 2198 (2016) (holding that the program satisfied *Grutter* because it did not have a quota, was sufficiently flexible, and because there were no workable race-neutral alternatives).

195. *See, e.g., Eric Levitz, The Supreme Court May Be on the Verge of Ending Affirmative Action*, MSNBC (June 29, 2015, 6:50 PM). Levitz stated:

The Supreme Court will very likely end affirmative action at UT Austin, and may even end affirmative action at all public universities. The trouble for the policy's supporters is twofold. First, it took Sandra Day O'Connor joining the court's four liberals to uphold Bakke in 2003. Since then, O'Connor has been replaced by the far more conservative Samuel Alito. Second, the court's liberal quartet will be shorthanded for Fisher; Elena Kagan has been forced to recuse herself because of her involvement with the Fisher case back when she was solicitor general.

*Id.*

196. *See Fisher II*, 136 S. Ct. 2198, 2213–15 (2016).

197. *See id.* at 2211.

198. *See id.* at 2211–12.

199. *See id.* at 2212.

The Court found UT's evidence persuasive. Between 1996 and 2002, the university had experienced "consistent stagnation" in minority demographics.<sup>200</sup> In 1996, UT enrolled 266 African-American freshmen, about the same number as UT enrolled in 2003.<sup>201</sup> In 2002, fifty-two percent of undergraduate classes had no African-American representation, and twenty-seven percent had one African-American student.<sup>202</sup> The Court found that UT's conclusion that race-neutral alternatives were not successful at achieving diversity was reasonable.<sup>203</sup>

Fisher also argued that the program was not necessary because its impact was minimal in advancing UT's compelling interest.<sup>204</sup> The Court compared diversity statistics before and after the enactment of the program and found that the consideration of race had a "meaningful, if still limited" impact on achieving UT's interests.<sup>205</sup> The Court stated that the relatively minor impact of the program was "a hallmark of narrow tailoring, not evidence of unconstitutionality."<sup>206</sup>

### B. *The Diversity Rationale Outside the Context of Higher Education*

*Bakke*, *Grutter*, *Gratz*, and *Fisher II* clearly established that diversity in higher education is a compelling government interest. Importantly, the Court has accepted the diversity justification outside the context of higher education. In *Metro Broadcasting*, the Court upheld an affirmative action program implemented by the FCC aimed at increasing diversity on the radio.<sup>207</sup> The case put the diversity question squarely before the Court, and did so outside the context of higher education.

At issue in *Metro Broadcasting* were two minority preference programs authorized by Congress under the Communications Act of 1934.<sup>208</sup> The programs permitted the FCC to grant broadcasting licenses to minority-owned businesses for the purpose of increasing diversity in the broadcasting industry.<sup>209</sup> The programs offered separate avenues for minority businesses to obtain the licenses. Under the "enhancement" program, the FCC gave special

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200. *See id.*

201. *See id.* In 2003, UT enrolled 267 African-American students, a paltry increase of one student from 1996. *Id.*

202. *See id.*

203. *See id.*

204. *See id.*

205. *See id.*

206. *See id.*

207. *See Metro Broad., Inc. v. FCC*, 497 U.S. 547, 600–01 (1990).

208. *See id.* at 552–53.

209. *Id.* at 553–54; *see also* Communications Act of 1934, 47 U.S.C. § 151 (2012). The Act was amended in 1996 to specify that a purpose of the Act is to make available service to all the people of the United States "without discrimination on the basis of race, color, religion, national origin, or sex." *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (2012).

consideration to minority businesses that applied for new licenses.<sup>210</sup> The “distress sale” program transferred licenses from broadcasters facing license revocation to minority businesses, a practice that was otherwise prohibited by FCC policy.<sup>211</sup>

The Court held both programs were constitutional.<sup>212</sup> Writing for the Court, Justice Brennan considered whether the FCC’s objective of promoting racial diversity on the airwaves was an important government interest.<sup>213</sup> He noted that Congress explicitly mandated that the FCC maintain its minority policies while the case was pending before the D.C. Circuit.<sup>214</sup> Citing *Fullilove v. Klutznick*, an earlier affirmative action decision by the Court that placed considerable significance on congressional deference, Justice Brennan stated that when Congress explicitly directs an administrative agency to adopt a benign racial classification, the Court is “bound to approach [its] task with appropriate deference to the Congress. . . .”<sup>215</sup> Invoking Justice Powell’s First Amendment rationale in *Bakke*, Justice Brennan compared the radio to the classroom, stating, “[j]ust as a diverse student body contribut[es] to a robust exchange of ideas . . . the diversity of views and information on the airwaves serves important First Amendment values.”<sup>216</sup>

The precedential significance of *Metro Broadcasting* was diminished by *Adarand*, but only to the extent *Metro Broadcasting* did not apply strict scrutiny. In writing the *Adarand* opinion, Justice O’Connor was careful to leave the diversity rationale intact by overruling *Metro Broadcasting* only “to the extent that *Metro Broadcasting* is inconsistent with [this] holding.”<sup>217</sup>

Supreme Court Justices have contemplated the use of non-remedial justifications in a variety of contexts. In her concurring opinion in *Wygant*, a case examining school board protections against minority layoffs, Justice O’Connor stated that there might be government interests other than diversity in

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210. See *Metro Broad., Inc.*, 497 U.S. at 552.

211. See *id.* at 552, 555.

212. See *id.* at 552.

213. See *id.* at 566–67.

214. See *id.* at 560, 572. *Metro Broadcasting* sought review of the FCC’s decision in the D.C. Circuit, but the appeal was delayed while the FCC conducted its own internal investigation into their minority and female ownership policies. *Id.* at 559. Litigation continued when the FCC abandoned its internal investigation after Congress passed the Continuing Appropriations Act for Fiscal Year 1988 prohibiting the FCC from changing its minority ownership policies. *Id.* at 560.

215. See *id.* at 563 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980)) (upholding a congressional spending program mandating that ten percent of federal funds for public works projects go to local minority businesses).

216. See *id.* at 568.

217. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

higher education and remedying past discrimination that are compelling.<sup>218</sup> She suggested that promoting racial diversity among the faculty in primary and secondary schools might be considered a compelling government interest.<sup>219</sup> Dissenting in *Wygant*, Justice Stevens opined that a police superintendent might reasonably conclude that an integrated police force might do a more effective job of maintaining law and order in a city with a history of racial unrest than an all-white force.<sup>220</sup> He also stated that it may be appropriate for the government to consider race when selecting undercover agents to investigate crime rings involving members of the same race.<sup>221</sup> In *United States v. Paradise*,<sup>222</sup> a case involving a “one-black-for-one-white promotion requirement” in the Alabama Department of Public Safety, the Court upheld the interim promotion requirement for minority law enforcement officers.<sup>223</sup> The Court considered arguments that race-based hiring in law enforcement “restores community trust in the fairness of law enforcement and facilitate[s] effective police service by encouraging citizen cooperation.”<sup>224</sup> The Court found that the Department’s prior discriminatory policies justified remedial action, a finding that preempted a ruling on the diversity justification.<sup>225</sup>

Notably, the Supreme Court has imposed limits on the diversity justification. In *Bakke*, the U.C. Davis Medical School argued that diversity would advance the goal of “improving the delivery of health-care services to communities currently underserved.”<sup>226</sup> Justice Powell said the school did not present empirical data to suggest that “any one race is more selflessly socially oriented or by contrast that another is more selfishly acquisitive.”<sup>227</sup> In *Croson*, a case involving a requirement for contractors to subcontract thirty percent of their work to minority-owned businesses, Justice O’Connor said that the goal of developing “role models” in the minority business community was not a sufficiently compelling interest to justify a minority subcontracting requirement.<sup>228</sup>

Scholars examining the application of the doctrine outside the context of higher education view *Grutter* and subsequent affirmative action cases as a shift

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218. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O’Connor, J., concurring) (striking down a collective bargaining agreement between the school board and employee union granting protections against layoffs to minority employees).

219. See *id.* at 288.

220. See *id.* at 314 (Stevens, J., dissenting).

221. See *id.*

222. *United States v. Paradise*, 480 U.S. 149 (1987).

223. See *id.* at 153, 165–66.

224. See *id.* at 167 n.18.

225. See *id.* at 167.

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

227. *Id.* at 311.

228. See *City of Richmond v. J.A. Croson Co. (Croson)*, 488 U.S. 469, 497 (1989).



in the Court's jurisprudence.<sup>229</sup> Cynthia Estlund notes that *Grutter's* shift from "backward-looking and inward-looking perspectives" about diversity in the classroom, to "forward-looking and outward-looking perspectives" about diversity in the workforce, lends credence to the doctrine's application in the employment context.<sup>230</sup> Nancy Leong argues that the application of strict scrutiny under *Adarand* made remedial affirmative action less likely to withstand constitutional muster.<sup>231</sup> As a result, the justification for affirmative action shifted to diversity. She notes that although the Supreme Court has not expanded the doctrine beyond higher education, the Court has never foreclosed the possibility.<sup>232</sup>

As Estlund states, the link between the diversity justification and the military has already been established.<sup>233</sup> If the diversity justification carries any weight outside of higher education, it carries weight in the military context. The military's mission is national defense—a compelling interest.<sup>234</sup> The military has recognized the strategic value of diversity to its mission.<sup>235</sup> Further, the military incorporated contractors into its ranks in unprecedented fashion.<sup>236</sup> The 8(a) program unquestionably increases diversity across the contracting force, which in turn helps the military accomplish its diversity goals. As such, the diversity rationale is apropos for justifying affirmative action in military contracting programs.

### C. *The Diversity Rationale and Military Contracting*

The diversity rationale for the 8(a) program rests on two fundamental attributes of our military. This section will explore those attributes, and then discuss their import to the diversity rationale for military contracting. The first attribute is that our defense contractors work more closely with the military today than at any other time in our nation's history.<sup>237</sup> In official documents, the military factors this relationship into its assessment of its "total force."<sup>238</sup> Total force refers to the active duty members, reservists, and contractors that make up

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229. See Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 5 (2005).

230. *Id.*

231. See Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2163–64 (2013).

232. See *id.* at 2164.

233. See Estlund, *supra* note 229, at 31–32.

234. See *Haig v. Agee*, 453 U.S. 280, 307 (1981).

235. DEP'T OF DEF., NO. 1020.02E, DIVERSITY MANAGEMENT AND EQUAL OPPORTUNITY IN THE DOD (2015), [http://www.dtic.mil/whs/directives/corres/pdf/102002e\\_DODd\\_2015.pdf](http://www.dtic.mil/whs/directives/corres/pdf/102002e_DODd_2015.pdf).

236. See LeRoy, *supra* note 21, at 217.

237. *Id.*

238. See DEP'T OF DEF., OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE FOR READINESS & FORCE MANAGEMENT, DEFENSE MANPOWER REQUIREMENTS REPORT FISCAL YEAR 2014 v (2013) <http://prhome.defense.gov/Portals/52/Documents/RFM/TFPRQ/Docs/FY14%20DMRR%2028%20Aug%2013%20FINAL.pdf>.

our military.<sup>239</sup> In 2012, the Chairman of the Joint Chiefs of Staff said, “we should acknowledge that [operational contract support] is no longer a niche capability....Contractors are part of our total military forces.”<sup>240</sup> Second, our military is diverse. This diversity is not merely cosmetic, but rather critical to mission success.<sup>241</sup> The 8(a) program is a necessary tool in building diversity across the total force, particularly in the defense contracting community. The military has recognized this diversity as a military strategy, one that is necessary to accomplish its national security objectives.<sup>242</sup>

### *1. Contractor Integration is a Defining Feature of Modern Warfare*

The distinction between the military and government contractors has never been more blurred than in recent wars. Many of the jobs traditionally performed by military personnel are now outsourced.<sup>243</sup> Today, the military relies on contractors to transport troops, build supply chains, maintain equipment, and build infrastructure in deployed locations.<sup>244</sup> This new war-labor scheme requires “integrate[d] contractor support in all military operations.”<sup>245</sup>

A few statistics are illustrative. During a two-year period beginning in 2011, contractors and military personnel in Iraq were represented in nearly a one-to-one ratio.<sup>246</sup> In March 2011, there were 155,000 contractors and 145,000 military personnel in Iraq and Afghanistan.<sup>247</sup> Between January and June of 2010, more contractors were killed in Iraq and Afghanistan than military personnel.<sup>248</sup> Since 2001, roughly three times as many contractor injuries have been reported than military injuries.<sup>249</sup> In a nine-year period following 9/11, contractor deaths rose

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239. *Id.* at v–vi.

240. See SCHWARTZ, USE OF CONTRACTORS TO SUPPORT MILITARY OPERATIONS, *supra* note 4, at 12.

241. See DEP’T OF DEF., DEP’T OF THE ARMY, UNITED STATES ARMY DIVERSITY ROADMAP 3 (2010), [http://www.armydiversity.army.mil/document/Diversity\\_Roadmap.pdf](http://www.armydiversity.army.mil/document/Diversity_Roadmap.pdf).

242. See *id.* at 7.

243. See *id.*

244. See *id.*

245. See DEP’T OF THE ARMY, NO. 3-100-21, CONTRACTORS ON THE BATTLEFIELD § 6-4 (Jan. 2003).

246. See MOSHE SCHWARTZ & JOYPRADA SWAIN, CONG. RESEARCH SERV., R40764, DEPARTMENT OF DEFENSE CONTRACTORS IN AFGHANISTAN AND IRAQ: BACKGROUND AND ANALYSIS Summary (2011), <https://fas.org/sgp/crs/natsec/R40764.pdf>.

247. See *id.*

248. Rogene Fisher Jacquette, *Contractor Deaths in Iraq and Afghanistan Outnumber Service Member Deaths*, N. Y. TIMES (Sept. 23, 2010, 2:27 PM), <http://atwar.blogs.nytimes.com/2010/09/23/contractor-deaths-in-iraq-and-afghanistan-outnumber-service-member-deaths/?scp=1&sq=contractor%20deaths%20outnumber&st=cse>.

249. See Schooner & Swan, *Contractors & the Ultimate Sacrifice*, *supra* note 23, at 16; see also Schooner & Swan, *Dead Contractors*, *supra* note 23, at 30.

from five percent of the death toll to over fifty percent.<sup>250</sup> In all, about thirty percent of U.S. lives lost in the wars in Iraq and Afghanistan were contractors.<sup>251</sup> Remarkably, the combination of military members and contractors on the battlefield has become a hallmark of current military operations.<sup>252</sup>

Responsibility for military personnel and contractors on the battlefield, or what the military refers to as “command authority,” is a duty of military commanders.<sup>253</sup> Of course, contractors’ duties are governed by a host of authorities, including the relevant government contract, but in many cases contractors follow military orders just like soldiers.<sup>254</sup> In fact, citing immunity doctrines, some courts have refused to hear lawsuits brought by soldiers’ families against contractors following military orders, as seen in one case where an Army soldier was killed in Iraq when a suicide bomber detonated explosives in a military dining facility owned, operated, and secured by Halliburton contractors.<sup>255</sup> The soldier’s family sued Halliburton for negligence and premises liability, but the court declined to hear the case citing the Army Field Manual that stated that military commanders are responsible for the safety of contractors.<sup>256</sup> After analyzing the factors relating to the political question doctrine, the court declined to hear the case, stating it could not make judgments about battlefield operations that are reserved for the Commander-in-Chief and the military.<sup>257</sup> In another case, a contractor truck convoy hit and killed an Army soldier.<sup>258</sup> The soldier’s parents sued Kellogg Brown & Root for the negligence of its drivers. The court barred the suit because it found that the contractors were subject to military orders, rules, and convoy plans of the Army, and thus the political question doctrine was applicable to the military contractors in this

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250. See Schooner & Swan, *Contractors & the Ultimate Sacrifice*, *supra* note 23, at 17–18.

251. See Schooner & Swan, *Dead Contractors*, *supra* note 23, at 17.

252. Schooner & Swan have attributed this phenomenon to economic theory, suggesting that increases in contractor deaths generally fall outside public awareness (the lack of awareness can be attributed to a host of reasons). See *id.* at 17 n.25. This desensitization to contractor deaths “decreases” the cost of war in terms of military deaths in the eyes of the public. *Id.*

253. See DEP’T OF THE ARMY, *supra* note 245, at § 6-4 (Jan. 2003).

254. See LeRoy, *supra* note 21, at 231–32.

255. See *id.* (citing *Smith v. Halliburton Co.*, No. CIV-A-H-06-0462, 2006 WL 2521326, at \*1 (S.D. Tex. Aug. 30, 2006)).

256. See *id.* at 232 (citing DEP’T OF THE ARMY, *supra* note 245, at § 6-2). The court refused to hear the case because it said the issue implicated political questions. *Id.* The political question doctrine is a justiciability concept that states courts lack jurisdiction over political questions that are reserved to the political branches. *Id.*

257. See *id.* In applying the political question doctrine, the court found that the questions presented in the case were inextricably linked to issues the Constitution reserves for the political branches. The court believed that the issues could not be decided without the court substituting its judgment for that of the branches of government responsible for military decision-making. *Id.*

258. See LeRoy, *supra* note 21, at 233 (citing *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1278 (M.D. Ga. 2006)).

case.<sup>259</sup> In both cases, soldiers' suits against the military were barred under *Feres v. United States*,<sup>260</sup> a case holding that the government is not liable under the Tort Claims Act for injuries to service members arising out of activities incident to military service.<sup>261</sup> Thus, courts have recognized that contractors are not only integrated with the military, but that they often operate under the legal authority of the military, especially on the battlefield.

Despite battlefield mishaps, there are a number of benefits to contractor integration. Contractors allow the military to sustain prolonged conflicts without exceeding military personnel limits imposed by Congress.<sup>262</sup> As the military continues its reduction in forces, contractors increasingly make up for personnel losses.<sup>263</sup> Contractors relieve military personnel of support duties, and allow the military to perform combat missions and other inherently governmental functions.<sup>264</sup> Contractors supply and maintain an increasing cache of hi-tech equipment and can be deployed or re-deployed faster than military troops.<sup>265</sup>

Contractors are similarly intertwined with service members in stateside missions.<sup>266</sup> For example, contractors and military members work together in military maintenance depots that are government-owned and operated facilities located on military installations that provide for the maintenance and sustainment of weapon systems.<sup>267</sup> Weapon systems include airplanes, missiles, satellites, and other major platforms.<sup>268</sup> The military has increasingly relied on depot maintenance as battlefield equipment has become more advanced.

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259. *See id.*

260. *Feres v. United States*, 340 U.S. 135 (1950).

261. *See id.* at 146.

262. *See* Hugh B. McClean, *Defense Base Act Insurance: Allocating Wartime Contracting Risks Between Government and Private Industry*, 41 PUB. CONT. L. J. 635, 660 (2012).

263. *See* CONG. BUDGET OFFICE, LOGISTICS SUPPORT FOR DEPLOYED MILITARY FORCES 3–4 (2005), <http://www.cbo.gov/ftpdocs/67xx/doc6794/10-20-MilitaryLogisticsSupport.pdf>.

264. *See id.*; *see also* MOSHE SCHWARTZ & JENNIFER CHURCH, CONG. RESEARCH SERV., R43074, DEP'T OF DEF.'S USE OF CONTRACTORS TO SUPPORT MILITARY OPERATIONS: BACKGROUND, ANALYSIS, AND ISSUES FOR CONGRESS 1 (2013).

265. *See* Tom Gjelten, *Ratio of Contractors to Troops at War? 1 to 1*, NPR (Dec. 18, 2009, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=121590071>.

266. *See* MOSHE SCHWARTZ, ET AL., CONG. RESEARCH SERV., R44010, DEFENSE ACQUISITIONS: HOW AND WHERE DOD SPENDS ITS CONTRACTING DOLLARS 13–14 (2015) [hereinafter HOW AND WHERE DOD SPENDS ITS CONTRACTING DOLLARS]. For FY 2015, of the DOD's total contract expenditures, forty-four percent were for contracts for services, forty-seven percent were for goods, and nine percent on research and development. *Id.* at 5. Of this amount, ninety-two percent of contract obligations were for work performed in the United States. *Id.* at 14. This amount accounts for approximately twelve percent of the DOD's total FY 2015 budget. *Id.* at 3. This was the highest percentage of domestic obligations since 2003. Domestic obligations have increased since the drawdown in Iraq and Afghanistan. *Id.*

267. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-83, DEPOT MAINTENANCE: ACTIONS NEEDED TO IDENTIFY AND ESTABLISH CORE CAPABILITY AT MILITARY DEPOTS 2, 6 (2009).

268. HOW AND WHERE DOD SPENDS ITS CONTRACTING DOLLARS, *supra* note 266, at 27.

Between FY 2014 and FY 2016, contractors performed about forty percent to fifty percent of military depot maintenance.<sup>269</sup> Working in tandem with military personnel, they provide technical expertise and training to DOD personnel and continuity to the program when military personnel deploy or change duty stations.<sup>270</sup> Though contractors do not fall under the military chain of command, they often report to a DOD supervisor who is responsible for the overall operation of the depot.

The DOD coined the term “total force” to conceptualize the integration of all military personnel components.<sup>271</sup> Much more than a signal of inclusiveness, total force is a military strategy that recognizes the nature of modern warfare.<sup>272</sup>

## 2. *The Strategic Importance of Diversity in the Military*

The second attribute of the military that helps form the bedrock for the diversity rationale is that the military embraces diversity as a strategic goal.<sup>273</sup> Diversity has become a top priority for the military in the last decade, as seen in 2009 when President Barack Obama established the congressional Military Leadership Diversity Commission (MLDC),<sup>274</sup> a commission tasked with evaluating and assessing DOD policies that “provide opportunities for the promotion and advancement of minority members of the Armed Forces.”<sup>275</sup>

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269. See DEP’T OF DEF., OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION, TECHNOLOGY, AND LOGISTICS, REPORT TO CONGRESS ON DISTRIBUTION OF DEPARTMENT OF DEFENSE DEPOT MAINTENANCE WORKLOADS FOR FISCAL YEARS 2014 THROUGH 2016, 4-5 (2015). In 1984, Congress enacted legislation requiring the DOD to maintain a core logistics capability to ensure a “ready and controlled source of technical competence.” 10 U.S.C. § 2464(a)(1) (1984). Congress later limited the DOD’s use of contractors for depot-level maintenance to no more than fifty percent. 10 U.S.C. § 2466(a) (2012).

270. See Andrew Tilghman, *PCS Costs Rising Across the Force, Even as Moves Decline*, MILITARY TIMES (Sep. 17, 2015). Continuity is important to the DOD because military personnel change duty stations every two to three years. *Id.*

271. See DIVERSITY MANAGEMENT AND EQUAL OPPORTUNITY IN THE DOD, *supra* note 235, at 1, 13.

272. Cf. Fred W. Baker III, *Army Personnel Official Calls Diversity a National Security Issue*, DOD NEWS (July 25, 2008), <http://archive.defense.gov/news/newsarticle.aspx?id=50604>; Michael J. Carden, *Mullen Discusses Importance of Integrated Force*, DOD NEWS (July 31, 2008), <http://archive.defense.gov/news/NewsArticle.aspx?ID=50659>.

273. See UNITED STATES ARMY DIVERSITY ROADMAP, *supra* note 241, at 8–10.

274. See Duncan Hunter Nat’l. Def. Authorization Act for Fiscal Year 2009 § 596, Pub. L. 110-417, 122 Stat. 4356, 4476 (2008).

275. *Id.* at § 596, 122 Stat. 4477. Other presidential commissions tasked to evaluate and assess diversity in the military since WWII include President Truman’s Fahy Committee and President Kennedy’s Gesell Committee. See MILITARY LEADERSHIP DIVERSITY COMM’N, FROM REPRESENTATION TO INCLUSION: DIVERSITY LEADERSHIP FOR THE 21ST-CENTURY MILITARY xix (2011) [hereinafter MILITARY LEADERSHIP DIVERSITY COMM’N].

According to the commission, the DOD policies aimed at achieving diversity have had a positive impact on the racial makeup of the military.<sup>276</sup>

Approximately 32.9 percent of enlisted members and 22.5 percent of officers identify themselves as a minority, or about 31.1 percent of all active duty members.<sup>277</sup> An additional twelve percent of active duty members identify themselves as Hispanic, which the DOD does not consider a minority race designation and tracks separately as an ethnicity.<sup>278</sup> Compared to 1995, the military has seen an increase in racial diversity, up from 28.2 percent of enlisted members and 10.5 percent of officers.<sup>279</sup> The reserve component has seen a decrease in the diversity of enlisted personnel but an increase in officers: approximately 26.6 percent of enlisted reserve members and 20.3 percent of officers identify themselves as a minority, up from 29.5 percent of enlisted reserve members and 14.6 percent of officers in 1995.<sup>280</sup> In the active duty component, the ratio of officers to enlisted is about one to 6.8,<sup>281</sup> and about one to 7.1 in the reserves.<sup>282</sup>

Recently, the DOD has broadened its definition of diversity, garnering a more inclusive military culture.<sup>283</sup> Since 2011, the DOD has overseen the rescission of the “combat exclusion policy” for women,<sup>284</sup> the “Don’t Ask Don’t Tell” policy for gay men and women,<sup>285</sup> and the Navy’s prohibition on women serving on submarines.<sup>286</sup> The service branches have adopted more expansive definitions of diversity that cover language abilities, geographic backgrounds, personal life experiences, and socioeconomic backgrounds, in addition to race.<sup>287</sup>

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276. See MILITARY LEADERSHIP DIVERSITY COMM’N, *supra* note 275, at 44.

277. See DEP’T OF DEF., OFFICE OF THE DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR MILITARY COMMUNITY AND FAMILY POLICY, 2014 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 26, 28 (2014).

278. *Id.* at iii–iv.

279. *Id.* at iii.

280. *Id.* at 82.

281. *Id.* at iii.

282. *Id.* at v.

283. See Christina L. Stevens, *Diversity Policies Across the Department of Defense, in* MANAGING DIVERSITY IN THE MILITARY: THE VALUE OF INCLUSION IN A CULTURE OF UNIFORMITY 33, 38 (Daniel P. McDonald & Kizzy M. Parks eds., Routledge 2012).

284. See Richard A. Opiel & Dave Philipps, *Two Women Set to Graduate From Grueling Ranger School Are Experienced Officers*, N.Y. TIMES (Aug. 20, 2015) <https://www.nytimes.com/2015/08/20/us/women-army-ranger-school-kristen-griest-shaye-haver.html>. Two women, Captain Kristen Griest, a former military police platoon leader, and First Lieutenant Shaye Haver, an Apache helicopter pilot, are the first women to graduate from the Army’s elite Ranger school. *Id.*

285. See Don’t Ask, Don’t Tell Repeal Act of 2010 § 2(f)(1)(A), Pub. L. 111-321, 124 Stat. 3515, 3516 (2010).

286. See Stevens, *supra* note 283, at 43.

287. See *id.* at 38.

The recognition of diversity as a military strategy has roots that predate the equal opportunity policies for minorities in the 50's and 60's. As early as 1948, President Truman stated that desegregation in the military was not only fair, but that it was also necessary to maintain a more effective fighting force.<sup>288</sup> In the last decade, the military has been more deliberate about linking diversity policy goals with strategic objectives.<sup>289</sup> Not surprisingly, diversity has emerged as an important concept in operational adaptability, as the military seeks to capitalize on the rapidly changing American demographic and the specialized skills and competencies that troops require in overseas operations.<sup>290</sup>

The military services have more recently sought to articulate the diversity strategy in policy documents. The Army identified six diversity strategic outcomes that are key to its success. They are 1) leader commitment; 2) high quality diverse talent; 3) integrated diversity and leader development; 4) enhanced cultural competency; 5) expanded human dimension of leadership skills; and 6) Army-wide inclusive culture.<sup>291</sup>

The outcomes are primarily based on three observations about military diversity. First, diversity plays a critical role in recruitment and retention.<sup>292</sup> A multicultural military that reflects the demographics of the country is perceived to be fair. The recruitment and retention of talented leaders is dependent on the citizenry's perception that the military is representative of the people it defends.<sup>293</sup> Further, the current workforce expects and desires an inclusive environment, and may seek employment elsewhere if the military lags behind contemporary employers.<sup>294</sup> Finally, diversity allows the military to recruit as many talented candidates from the largest possible pool, thus ensuring the solidity of the all-volunteer force.<sup>295</sup>

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288. *See id.* at 33–34. President Truman established the Committee on Equality of Treatment and Opportunity (the “Fahy Committee”), a group tasked with effectuating the desegregation of the military. *Id.* The Committee facilitated the desegregation of the military, but it also identified the nexus between policies of inclusion and maintaining an effective fighting force. *Id.*

289. *See* DEP'T OF DEF., D36908, DIVERSITY AND INCLUSION STRATEGIC PLAN 2012–2017 3 (2012). The plan states, “Diversity is a strategic imperative, critical to mission readiness and accomplishment, and a leadership requirement. As the global threat environment continues to evolve, the DOD Total Force will confront complex, asymmetric operational environments, and unconventional tactics, necessitating full employment of all department assets – foremost our people.” *Id.*

290. *See* Stevens, *supra* note 283, at 35.

291. *See* UNITED STATES ARMY DIVERSITY ROADMAP, *supra* note 241, at 7.

292. *Id.* at 3.

293. *See* Stevens, *supra* note 283, at 35.

294. *See id.* at 35.

295. *See id.*

Second, a commander's ability to maintain unit cohesion, or what the military calls "good order and discipline," is dependent on a racially diverse military.<sup>296</sup> In *Grutter v. Bollinger*,<sup>297</sup> twenty-nine high-ranking military veterans, including 4-star generals, former military-academy superintendents, Secretaries of Defense, and members of the U.S. Senate filed an amicus brief describing the breakdown of unit cohesion and the chain of command during the Vietnam War.<sup>298</sup> These leaders directly attributed the collapse in unit cohesion to the racial disparities in military units and acknowledged the impact of the breakdown of good order and discipline on the overall mission in Vietnam.<sup>299</sup>

The brief cited a Washington Post article featuring Lieutenant General Frank Petersen, the first African-American Marine pilot and squadron commander in Vietnam. As Lt. Gen. Petersen recalled,

In Vietnam, racial tensions reach[ed] a point where there was an inability to fight. . . . We were pulling aircraft carriers off line because there was so much internal fighting. There were murders, blacks banding in power groups. The leader of the Mau-Maus was in my squadron. Platoons that were [eighty] percent minority were being led by lieutenants from Yale who had never dealt with ghetto blacks. Soldiers were angry. Martin Luther King was killed. It all came together. It was a mess.<sup>300</sup>

Recent data on Air Force promotion rates suggests that racial tension in the military is still an issue. In a 2016 interview, former Air Force Vice Chief of Staff, Larry Spencer, an African-American, revealed that every African-American senior leader from whom he sought career advice said that they "had to work harder than their peers to get to the same point."<sup>301</sup> Minority promotion rates in the Air Force reflect that sentiment. Data show that white airmen in all

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296. See Brief of Lt. Gen. Julius W. Becton et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516), 2003 U.S. S. Ct. Briefs LEXIS 532, at \*10 & n.3 [hereinafter Amicus Brief of Lt. Gen. Becton].

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

298. See Amicus Brief of Lt. Gen. Becton, *supra* note 296, at \*11 (stating that military leaders in the 1970s "recognized that [the military's] racial problem was so critical that it was on the verge of self-destruction").

299. See *id.* at \*11-12. Moreover, they recognized the association between diversity in education and diversity in the military, stating that "[b]road access to the education that leads to leadership roles is essential to public confidence in the fairness and integrity of public institutions, and their ability to perform their vital functions and missions." *Id.* at \*8.

300. David Maraniss, *U.S. Military Struggles to Make Equality Work*, WASH. POST (March 6, 1990), <https://www.washingtonpost.com/archive/politics/1990/03/06/us-military-struggles-to-make-equality-work/e43bfbf9-e170-4f3f-b6c5-ff74cade07f4/>. The Mau-Maus were a Brooklyn Puerto Rican gang in the 1950's. See *Mau Maus and Sand Street Angels, 1959*, NEW YORK CITY FIGHTING GANGS, [http://newyorkcitygangs.com/?page\\_id=965](http://newyorkcitygangs.com/?page_id=965) (last visited Apr. 26, 2017).

301. See Steven Losey, *Race and the Air Force: The Truth About How Minorities Get Promoted*, AIR FORCE TIMES (Mar. 1, 2016), <http://www.airforcetimes.com/story/military/2016/03/01/race-and-air-force-truth-how-minorities-get-promoted/80944562/>.



grades have enjoyed higher promotion rates than minority airmen.<sup>302</sup> Experts attribute this statistic to an overrepresentation of minorities in administrative and support assignments, which do not fare as well as more competitive positions—such as pilot assignments—at promotion boards.<sup>303</sup>

Despite an overall increase in minority representation in the military in the last couple of decades, the services have experienced a recent decline in African-American representation.<sup>304</sup> Today, about twenty percent of Army soldiers are African-American, compared to about twenty-seven percent in 1995.<sup>305</sup> In the Navy, about seventeen percent of enlisted sailors are African-American, compared to twenty-one percent in 2005.<sup>306</sup> And about ten percent of Marines are African-American, compared to twenty percent in 1985.<sup>307</sup> Only one percent, or about eight of 753 Navy SEALs officers, are African-American.<sup>308</sup> The reason for the decline is not clear, but recent Army studies showed that African-American political leaders, teachers, and parents had expressed decreased support for military service.<sup>309</sup> Other officials cited increased opportunities in the private sector as a reasons for the decrease in African-American enlistment.<sup>310</sup>

The third observation supporting the Army's strategic outcomes is that the nature of modern warfare, and the specialized skills required to conduct operations around the world, are dependent on diversity.<sup>311</sup> Global operations depend not only on people with specialized skills, such as linguists, but more broadly on the entire military's ability to foster cross-cultural relationships. A diverse military has great utility in conducting counter-terrorism operations, but is also better equipped to train foreign security forces, establish local rules, build courts, schools, hospitals, and engage in infrastructure stabilization.<sup>312</sup> The military currently supports operations in the Middle-East, but its footprint is global with more than 800 bases in seventy countries and territories.<sup>313</sup>

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302. *See id.*

303. *See id.*

304. *See* Gregg Zoroya, *Military Backslides on Ethnic Diversity*, USA TODAY (Feb. 17, 2014, 7:37 PM ET), <http://www.usatoday.com/story/news/nation/2014/02/17/black-history-month-military-diversity/5564363/>.

305. *See id.*

306. *See id.*

307. *See id.*

308. *See* Tom Vanden Brook, *Pentagon's Elite Forces Lack Diversity*, USA TODAY (Aug. 6, 2015, 8:00 AM ET), <http://www.usatoday.com/story/news/nation/2015/08/05/diversity-seals-green-berets/31122851/>.

309. *See* Zoroya, *supra* note 304.

310. *See id.*

311. *See* Stevens, *supra* note 283, at 35.

312. *See id.*

313. *See* David Vine, *Where in the World is the U.S. Military?*, POLITICO (July/August 2015), <http://www.politico.com/magazine/story/2015/06/us-military-bases-around-the-world-119321>.

The military defense contracting community has recognized the critical role diversity plays within the DOD, and has called for change within its industry. During the opening plenary session of the American Institute of Aeronautics and Astronautics Science and Technology Forum, held on January 8, 2015, Massachusetts Institute of Technology Professor Wesley Harris told the audience that “[i]mproving diversity in the aerospace community, and closing the existing educational achievement gap between whites and minorities would boost the American economy by \$2.3 trillion dollars by 2050.”<sup>314</sup> Noting that Latinos and African-Americans comprise twenty-seven percent of the U.S. population, but account for only nine percent of the STEM labor force, another leader argued that rectifying that discrepancy would “increase the power needed to promote economic growth.”<sup>315</sup>

Although the military defense industry has made commitments to diversity and inclusion in the form of speeches and messages on corporate webpages, it is unclear whether the rhetoric has increased diversity representation.<sup>316</sup> The industry does not publish annual diversity statistics or make any such studies readily available to the public. Under federal law, individual firms are required to submit affirmative action plans to the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP).<sup>317</sup> However, the plans are not published.<sup>318</sup> This lack of transparency makes it difficult to gauge the severity of the problem or to track industry progress in this area.

### 3. Diversity in Military Contracting is a Compelling Interest

The Supreme Court has held that diversity in higher education is a compelling interest, in part, because of its First Amendment implications.<sup>319</sup> In *Bakke*, the Court found that Academic Freedom had long been viewed as a “special

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314. See Duane Hyland, *Diversity: It’s What Will Drive Aerospace Forward*, THE AMERICAN INSTITUTE OF AERONAUTICS AND ASTRONAUTICS (Jan. 8, 2015, 12:45 PM), <http://www.aiaa-scitech.org/Forum.aspx?id=26555>.

315. See *id.*

316. See, e.g., *Global Diversity & Inclusion*, LOCKHEED MARTIN, <http://www.lockheedmartin.com/us/who-we-are/diversity.html> (last visited Feb. 25, 2017) (indicating that women and minorities in the company occupying a percentage of executive positions that is smaller than the percentage of the company workforce they comprise); *Diversity & Inclusion*, BOEING, <http://www.boeing.com/principles/diversity.page> (last visited Mar. 7, 2017) (touting accolades the company has received for its inclusion of women and minorities).

317. See 41 C.F.R. § 60-1.7(b)(1) (2016).

318. The OFCCP publishes redacted conciliatory agreements with noncompliant firms, but the agreements only summarize violations by a limited number of firms and do not provide any insight into company demographics. See, e.g., *Conciliation Agreement Between the U.S. Department of Labor Office of Federal Contract Compliance Programs and Reynolds Consumer Products, LLC*, DEP’T OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS 3 (Jan. 29, 2016), [https://www.dol.gov/ofccp/foia/files/Reynolds\\_Redacted.pdf](https://www.dol.gov/ofccp/foia/files/Reynolds_Redacted.pdf).

319. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312–14 (1978).

concern” of the First Amendment, and therefore universities could make their own judgments as to the selection of their students.<sup>320</sup> Scholars have criticized Justice Powell’s “loose invocation of academic freedom as a basis for” diversity as a compelling interest.<sup>321</sup> However, the Court has recognized two other rationales justifying affirmative action under Equal Protection, including national security and remediation of past discrimination.<sup>322</sup>

In *Haig v. Agee*, the Supreme Court held that the U.S. Secretary of State could revoke the passport of a former Central Intelligence Agency employee because he exposed agents’ identities while abroad.<sup>323</sup> Weighing Agee’s First Amendment claims against the government’s national security interests, the Court emphatically stated that “[i]t is obvious and unarguable that no governmental interest is more compelling than the security of the Nation.”<sup>324</sup> The Court has generally not expanded the national security rationale for Equal Protection, though on numerous occasions the Court has recognized that the military context is unique.

For example, in *Grutter*, former DOD officials convincingly argued that diversity in the military is a matter of national security.<sup>325</sup> Labeling the benefits of diversity in the military “not theoretical but real,” the Court cited to the former military leaders’ amici briefs, highlighting the importance of diversity in lessening racial tension and eliminating stereotypes that inhibit mission effectiveness.<sup>326</sup>

In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*,<sup>327</sup> the Court examined the constitutionality of the Solomon Amendment, an Act that required the government to deny federal funding to institutions of higher education that refused to allow military recruiters on campus.<sup>328</sup> The Roberts Court upheld the law, and recognized the authority of Congress “to provide for the common Defence, to raise and support Armies, and to provide and maintain a Navy.”<sup>329</sup> Noting that “Congress’ power in this area is broad and sweeping,”<sup>330</sup> Justice

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320. *See id.* at 312.

321. *See Smolla, supra* note 185, at 31, 56 (2013) (arguing that Justice Powell muddled the diversity analysis and failed to consider whether academic freedom is an institutional right or an individual right).

322. *See Grutter v. Bollinger*, 539 U.S. 306, 351–52 (2003) (Thomas, J., concurring in part and dissenting in part).

323. *See Haig v. Agee*, 453 U.S. 280, 286, 310 (1981).

324. *Id.* at 307.

325. *See Grutter*, 539 U.S. at 331.

326. *Id.* at 330–31.

327. *Feres v. United States*, 547 U.S. 47 (2006).

328. *See id.* at 51.

329. *Id.* at 58.

330. *See id.*

Roberts found that the incidental burden on speech was justified by the government's interest in raising and supporting the Armed Forces.<sup>331</sup>

Of course, the DOD cannot simply claim that a race-conscious contracting program impacts national security without offering a "reasoned, principled explanation."<sup>332</sup> There are several points to consider when linking contracting with national security. First, the diversity justification applies only to defense contracting. Contracts outside of the military context have no direct impact on national security. Second, the 8(a) program unquestionably increases diversity across the defense contracting community. The latest Small Business Goaling Report showed that 8(a) procurements accounted for \$9.3 billion of DOD procurements.<sup>333</sup> Third, the new war-labor scheme puts defense contractors and military personnel on the same operational battlefield. Defense contractors augment military units, sometimes outnumbering them, and are often under the control of military commanders.<sup>334</sup> If the DOD cannot increase diversity in the defense contracting community, their overall military objectives are at risk.

Importantly, some amount of deference is owed to the DOD's determination that diversity in military contracting is a compelling government interest. In *Grutter*, the Court held that a university's educational judgment that diversity is essential to its educational mission is one to which courts will defer.<sup>335</sup> *Fisher II* did not abdicate this deference.<sup>336</sup> Rather, it defined the parameters of deference by holding that universities should be granted "some, but not complete" judicial deference on issues that are integral to their mission.<sup>337</sup> While the Court shifted away from the broad deference it afforded in *Grutter*, the *Fisher II* Court focused its attention on the narrow tailoring prong of the strict scrutiny analysis.<sup>338</sup> The Court stressed that no deference should be given to a university's good-faith consideration of workable race-neutral alternatives, a construct that has nothing to do with diversity as a compelling interest.<sup>339</sup>

It follows that the military should be afforded some deference regarding its conclusion that diversity in defense contracting is critical to national defense. There is some precedent for this deference in Supreme Court jurisprudence. For more than a half-century, the Court has applied a military deference doctrine.<sup>340</sup> This doctrine requires that a court considering a constitutional question

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331. *See id.* at 67.

332. *See Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2208 (2016).

333. *See SMALL BUSINESS GOALING REPORT*, *supra* note 15.

334. *See LeRoy*, *supra* note 21, at 218.

335. *See Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

336. *See Smolla*, *supra* note 188, at 52.

337. *See Fisher II*, 136 S. Ct. at 2208.

338. *See Smolla*, *supra* note 188, at 53.

339. *See id.*

340. *See John F. O'Connor, The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 164 (2000) [hereinafter O'Connor, *Origins and Application*].

involving military rules or regulations provide a more lenient standard of review than would be appropriate if the challenged legislation did not involve members of the military.<sup>341</sup> The doctrine is potent but limited, applying only when there is a constitutional challenge to a military regulation that requires a weighing of the government's interests.<sup>342</sup>

Prior to the 1950's, during its "noninterference" period, the Court's practice was to deny jurisdiction in military cases, leaving such cases to the political branches.<sup>343</sup> The Court altered its jurisprudence in the 1950's, shortly after Congress enacted the Uniform Code of Military Justice (UCMJ), a uniform set of regulations governing the military branches.<sup>344</sup> The Court was skeptical of the UCMJ, and ruled against the DOD in a number of cases involving the constitutionality of courts-martial practices involving civilians and non-service-connected crimes.<sup>345</sup> By the 1970's, congressional amendments to the UCMJ had relieved the Court's skepticism, and the Court began deferring to Congress and the President on military issues.<sup>346</sup>

The Roberts Court continues to apply the military deference doctrine. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, a case involving military recruiting on college campuses, the Court rejected a challenge to the Solomon Amendment, stating that "judicial deference . . . is at its apogee" when Congress legislates under its authority to raise and support armies.<sup>347</sup> The trend suggests that the Court is willing to defer to the political branches' estimation of the needs of the armed forces.<sup>348</sup> If the Court was to decide the issue, it would likely have to consider the proper amount of deference it should afford to the DOD's determination that diversity in military contracting is a compelling interest.

#### 4. Narrow Tailoring for Affirmative Action Contracting Programs

Once the government has demonstrated that its purpose or interest is constitutionally permissible and substantial, it must further demonstrate that its race-conscious measures are narrowly tailored.<sup>349</sup> In *DynaLantic*, the court considered six narrow tailoring factors: 1) race-neutral means; 2) flexibility; 3)

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341. See *id.* at 161.

342. See John. F. O'Connor, *Statistics and the Military Deference Doctrine: A Response to Professor Lichtman*, 66 MD. L. REV. 668, 672 (2007) [hereinafter O'Connor, *Statistics and the Military Deference Doctrine*].

343. See *id.* at 685 n.78.

344. See *id.* at 690.

345. See *id.* at 690-94.

346. See *id.* at 695; see also Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968) (codified as amended in scattered section of 10 U.S.C.).

347. See *Rumsfeld v. Forum for Academic & Instit. Rights, Inc.*, 547 U.S. 47, 58 (2006).

348. See O'Connor, *Origins and Application*, *supra* note 340, at 219.

349. See *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2208 (2016).

over- and under-inclusiveness; 4) duration; 5) numerical proportionality; and 6) burden on third parties.<sup>350</sup> This section will examine the applicability of these factors to the 8(a) program.

Contracting officials accomplished much of the narrow tailoring for the 8(a) program by reviewing the aftermath of *Adarand*.<sup>351</sup> Not surprisingly, the defining feature of the program is its flexibility. The 8(a) program contains no quotas and imposes no penalties for failing to meet the program's aspirational goals.<sup>352</sup> Participants must complete a certification process prior to participating in the program.<sup>353</sup> A contractor's race is considered if he or she seeks eligibility in the program based on race.<sup>354</sup> Alternatively, an applicant can demonstrate social disadvantage by a preponderance of the evidence.<sup>355</sup> Applicants must also show economic disadvantage to be eligible for the program.<sup>356</sup>

The program has multiple features that limit the duration for individual participants. Participation in the program is limited to nine years.<sup>357</sup> Participants must annually submit a certification of eligibility, and the SBA must verify the participants' eligibility on a continuing basis.<sup>358</sup> Businesses that meet or exceed their business goals graduate early from the program.<sup>359</sup> Once a business exits the program, whether through termination, graduation, or by some other means, that business and its owner or owners are no longer eligible to participate.<sup>360</sup>

Notably, courts reviewing the 8(a) program have found that it is narrowly tailored on its face.<sup>361</sup> However, no court has considered whether the program is narrowly tailored as applied to a specific industry because the program has not

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350. See *DynaLantic Corp. v. U.S. Dep't of Def.*, 885 F. Supp. 2d 237, 283 (D.D.C. 2012).

351. See *CIBINIC ET AL.*, *supra* note 3, at 1600.

352. See *DynaLantic*, 885 F. Supp. 2d at 285.

353. See *id.* at 287. Unlike the HUBZone, SDVOSB, and WOSB programs, the 8(a) program requires the SBA to certify that each 8(a) applicant meets program requirements. See FAR 19.703 (2016).

354. See 13 C.F.R. § 124.101, .103(a) (2016). The program's race-conscious presumptions are rebuttable. Thus, any contractor may rebut the presumption that a minority applicant is socially disadvantaged with credible evidence to the contrary. *Id.* § 124.103(b).

355. See *id.* § 124.103(c).

356. See *id.* § 124.101, .104. The economic disadvantage co-requirement for all applicants puts the burden of proving individualized financial hardship on the contractors. See *id.* § 124.104(b). Each applicant must submit a narrative statement describing their economic disadvantage, and must also submit personal financial information. *Id.*

357. See *id.* § 124.2.

358. See *id.* § 124.112(b), .509(c), .601.

359. See *id.* § 124.302(a). Of the 7,814 firms in the program in 2011, 151 were terminated, 160 withdrew, three were suspended, 705 completed nine years in the program, thirteen graduated early, and 6,782 remained in the program. See FY 2012 408 REPORT TO THE CONGRESS, *supra* note 62, at 17.

360. See 13 C.F.R. § 124.108(b) (2016).

361. See *e.g.*, *Rothe Dev., Inc. v. U.S. Dep't of Def.*, 107 F. Supp. 3d 183, 208 (D.D.C. 2015); *Cortez III Serv. Corp. v. NASA*, 950 F. Supp. 357, 361 (D.D.C. 1996).

survived scrutiny under the compelling interest prong in as-applied challenges.<sup>362</sup>

Ultimately, the factors a court applies under narrow tailoring are dependent on the issues raised by the program. In *Grutter*, Justice O'Connor stated: "[w]e have had no occasion to define the contours of the narrow tailoring inquiry with respect to race-conscious university admissions programs. That inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education."<sup>363</sup>

If the government articulated a diversity justification for 8(a), the narrow tailoring analysis would look similar to the analysis in *DynaLantic*, with the exception of the numerical proportionality factor. In *DynaLantic*, the court compared the aspirational goal of the 8(a) program (i.e., three percent of prime and subcontract awards) to the pool of available minority businesses.<sup>364</sup> It found that the program on its face was narrowly tailored because the percentage of eligible minority businesses was "not necessarily an absolute cap on the percentage that a remedial program . . . might legitimately seek to achieve."<sup>365</sup>

In the context of a non-remedial contracting program, numerical proportionality is not relevant. In *Fisher II*, the Court stated that the "consideration of race in college admissions is not an interest in enrolling a certain number of minority students," but an interest in "obtaining the educational benefits that flow from student body diversity."<sup>366</sup> Thus, the court did not require the university to specify a particular level of enrollment at which this objective would be achieved.<sup>367</sup> Likewise, the consideration of race in government contracting is not an interest in awarding a certain number of contracts to minority-owned businesses, but an interest in obtaining the military benefits that flow from diversity in defense contracting.

Narrow tailoring under *Fisher II* and *Grutter II* also considered whether the government engaged in a "serious, good faith consideration of workable race-neutral alternatives."<sup>368</sup> In *Fisher II*, the Court examined historical data of racial diversity at the university to the extent it was relevant in revealing the success or failure of race-neutral alternatives.<sup>369</sup> The 8(a) program has an exhaustive

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362. See *DynaLantic Corp. v. U.S. Dep't of Def.*, 885 F. Supp. 2d 237, 283 (D.D.C. 2012); *Cortez III*, 950 F. Supp. at 362–63.

363. See *Grutter v. Bollinger*, 539 U.S. 306, 333–34 (2003).

364. See *DynaLantic*, 885 F. Supp. 2d at 288.

365. See *id.* at 289.

366. See *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2210 (2016) (citing *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2419 (2013)).

367. See *id.*

368. *Fisher I*, 133 S. Ct. at 2420; *Grutter*, 539 U.S. at 339.

369. See *Fisher II*, 136 S. Ct. at 2212.

record of failed race-neutral alternatives.<sup>370</sup> Congress engaged in extensive studies examining the need for an affirmative action program prior to codifying the 8(a) program in 1978.<sup>371</sup> This record is relevant to any as-applied analysis.

Narrow tailoring depends on the facts and legal issues raised in each case. However, after *Fisher II*, the analysis is somewhat more predictable. If the government raised the justification, and the 8(a) program survived the compelling interest prong, the program's careful crafting and exhaustive legislative history would favor its survival under the narrow tailoring prong.

##### 5. Challenges for the 8(a) Program

The diversity rationale as it applies to higher education has garnered some criticism. Critics argue that the rationale fails to “advance racial justice” and “legitimizes admissions policies that favor the privileged.”<sup>372</sup> For example, critics argue that the diversity rationale ignores the underlying issues of racial hostility and bias.<sup>373</sup> Whereas evidence-based studies and data that support remedial action shine a light on discrimination, the diversity justification glosses over the real problems and allows institutions to increase minority representation without addressing systemic racial issues.<sup>374</sup>

This criticism ignores affirmative action jurisprudence that requires program officials to monitor the need for race-conscious programs. Under *Grutter*, programs must be monitored and reviewed to ensure they are necessary.<sup>375</sup> Such monitoring requires an awareness of discriminatory practices and their effects on institutions employing affirmative action programs. If systemic issues are ignored, the need for the program cannot be established. The criticism also ignores the challenges some institutions face in justifying remedial affirmative action programs with evidence-based studies. Discrimination can be difficult to prove, even in populations with racial disparities.<sup>376</sup> Institutions with limited resources may have difficulty conducting extensive race studies to support remedial programs, or may not have the expertise to conduct empirical race studies.

In any case, statistical studies alone do not alleviate discrimination. History has shown that such an undertaking requires the support of empowered community leaders in prominent positions, leaders that are produced by the

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370. See, e.g., *DynaLantic*, 885 F. Supp. 2d at 253 (citing congressional studies on discrimination in government contracting).

371. See, e.g., *id.* at 253–54.

372. See Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 450 (2014).

373. See *id.*

374. See Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1627 (2003).

375. See *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).

376. See, e.g., *City of Richmond v. J.A. Croson Co. (Croson)*, 488 U.S. 469, 497–98 (1989).



affirmative action programs at issue in this article.<sup>377</sup> Programs like 8(a) and Texas's Top Ten Program help create a diverse group of leaders that is capable and motivated to challenge systemic bias and that can make deep and impactful policy changes.

The government contracting context offers some unique challenges to the application of the diversity justification. For example, a number of contracts do not require military personnel and contractors to work in close proximity. For example, a contract for radiology services may permit a doctor to review radiographs remotely without interacting with military personnel. Contracts for goods, such as military uniforms, may require very little interaction between the manufacturer and military units.<sup>378</sup> In these examples, military members and contractors work independently, so the diversity rationale carries less weight.

But while contractors can sometimes support troops from afar, there is no doubt that the DOD often demands their physical presence. The military requires a significant number of on-site service contractors to support operations in Iraq, Afghanistan, and at other bases and ports around the world.<sup>379</sup> In fact, the DOD provides contract support to six unified combatant commands, including U.S. Northern Command (NORTHCOM), U.S. African Command (AFRICOM), U.S. Central Command (CENTCOM), U.S. European Command (EUCOM), U.S. Pacific Command (PACOM), and U.S. Southern Command (SOUTHCOM).<sup>380</sup> The distribution of work performed under the DOD contracts in these locations differs from year to year.<sup>381</sup> And, while not all goods and service contracts support the military on location, many of the military's unique functions cannot be performed without close, on-site interaction.<sup>382</sup>

It can be argued that the 8(a) program does not fulfill its minority business development objectives because the program only requires a showing that business owners are disadvantaged, not the firm's employees.<sup>383</sup> In other words, 8(a) firms have little or no impact on diversity in the defense community because only the owners are minorities, not the employees. This is essentially a critique of the narrow tailoring requirement for affirmative action programs.

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377. See *Grutter*, 539 U.S. at 330–32 (discussing the importance of racial diversity among leaders in the military and in the business sector).

378. The military acquires many commercially available goods with commercial off-the-shelf purchases, or COTS contracts. See 41 U.S.C. § 104 (2012). COTS contracts are used to purchase standardized commercial products that do not require military customization, and that do not designate a place of contract performance. See *id.*

379. Cf. HOW AND WHERE DOD SPENDS ITS CONTRACTING DOLLARS, *supra* note 266, at 13.

380. See *id.* at 12.

381. See, e.g., *id.* at 13–14.

382. See, e.g., *id.* at 14 (describing the significant presence of overseas contracts that remain despite the U.S. drawdown in Iraq and Afghanistan).

383. See 13 C.F.R. § 124.101 (2016).

As the Court stated in *Fisher II*, the relatively minor impact of the program is “a hallmark of narrow tailoring, not evidence of unconstitutionality.”<sup>384</sup> The 8(a) program accounted for less than five percent of DOD contracts for fiscal year 2015.<sup>385</sup> Though relatively small, the program adds to the diversity of the defense contracting community. That the program relies on the diversity of business owners rather than their employees does not make the program ineffective. Though the program is small, there are opportunities for 8(a) firms to multiply their footprint. For example, minority-owned firms may be more likely to hire minority employees due to the absence of discriminatory hiring practices.<sup>386</sup> Also, contracting regulations provide that 8(a) firms may be owned by groups of minorities rather than single owners.<sup>387</sup> Group ownership can increase minority participation without necessarily expanding the program. Finally, mentor-protégé programs allow 8(a) firms to partner with larger established firms to obtain management and technical assistance, investment and loan opportunities, and to cooperate in joint venture projects including subcontracts awarded by the mentor.<sup>388</sup> These relationships expand the reach of minority firms by allowing them to participate in markets that they could not otherwise participate in as individuals.

#### IV. CONCLUSION

The 8(a) program is a multi-billion dollar industry that offers tremendous benefits to minority businesses, from contracting to training opportunities. Most importantly, the program leverages the diversity of our communities to augment our military forces.

Critics argue that the program violates Equal Protection under the Due Process Clause of the Fifth Amendment.<sup>389</sup> Courts have denied facial challenges to the program, but have sustained challenges to the program as it applies to individual markets.<sup>390</sup> As contractors continue to bring challenges against the program, its effectiveness will be significantly diminished. Thus far, the courts have focused on whether the 8(a) program remedies past discrimination. However, this is not

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384. See *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2212 (2016).

385. See SMALL BUSINESS GOALING REPORT, *supra* note 15.

386. See generally Brett Arends, *In Hiring, Racial Bias Is Still a Problem. But Not Always for Reasons You Think*, FORTUNE (Nov. 4, 2014), <http://fortune.com/2014/11/04/hiring-racial-bias/> (discussing discriminatory practices by companies who think their clients have racial biases).

387. See 13 C.F.R. § 124.101 (2016). Likely to prevent 8(a) firms from acting as pass-through entities by winning contracts for work that is ultimately performed by non-minority firms, Congress amended the 8(a) program to require 8(a) firms to perform at least fifty percent of the work. See *id.* § 125.6(a).

388. See *id.* § 124.520.

389. See U.S. CONST. amend. V.

390. See *Rothe Dev., Inc. v. U.S. Dep't of Def.*, 107 F. Supp. 3d 183, 208 (D.D.C. 2015); *DynaLantic Corp. v. U.S. Dep't of Def.*, 885 F. Supp. 2d 237, 283 (D.D.C. 2012); *Cortez III Serv. Corp. v. NASA*, 950 F. Supp. 357, 361 (D.D.C. 1996).

the only justification for affirmative action. To the contrary, this year the Supreme Court reaffirmed that diversity is a lawful objective for affirmative action programs.

The military has made the case that diversity is critical to our national security. Diversity offers tangible strategic outcomes, including attracting and retaining talent, developing a multi-skilled force capable of performing global operations, maintaining good order and discipline, and fostering cultural competency in the leadership ranks. In *Grutter*, the Supreme Court recognized diversity outcomes in the military and business communities as “not theoretical but real.”<sup>391</sup> It is a small step to imagine that diversity in the military contracting community offers the same real benefits.

The new war-labor paradigm demands an equally diverse contracting workforce. Today, contractors and military personnel share the battlespace. The military’s strategic outcomes cannot be achieved without diversity across the total force. By fostering diversity in the defense community, the 8(a) program helps maintain a level of private sector heterogeneity that advances the military’s strategic outcomes. The benefits that flow from diversity in defense contracting are directly related to our national security posture. Going forward, the government should advocate for the diversity rationale in justifying the 8(a) program. Under this rationale, the 8(a) program achieves goals that are constitutionally permissible and unquestionably compelling.

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391. See *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003).

