COMMENTS

FEEBLE IN FACT: HOW UNDERENFORCEMENT, DEFERENCE, AND INDEPENDENCE SHAPE THE SUPREME COURT'S AFFIRMATIVE ACTION DOCTRINE

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INTRODUCTION

Almost twenty years ago, the Supreme Court apologetically applied strict scrutiny for the first time to an affirmative action program, assuring us that this new turn would not be "strict in theory, but fatal in fact."[1] As it turns out, the Supreme Court has been true to its word. Eighteen years after pronouncing non-fatal strict scrutiny as the standard governing all affirmative action programs, the Court reaffirmed the standard in *Fisher v. Texas*[2]—once again apologetically. But this time the Court assured that the standard is not "strict in theory but feeble in fact."[3]

Prior to applying strict scrutiny, the Court's affirmative action jurisprudence remained undeveloped and at best unclear.[4] The Court intentionally marginalized its own opinion, instead relying on the other, more competent branches of government to determine the existence and extent of affirmative action programs.[5] In the Court's words, its decision in *Adarand Constructors, Inc. v. Pena*, "alter[ed] the

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1 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995).

2 133 S. Ct. 2411 (2013).

3 *Id.* at 2421 (citing *Adarand*, 515 U.S. at 237).

4 *See infra* Part II.A.

5 *See* Fullilove v. Klutznick, 448 U.S. 448, 490 (1980) (upholding a federal minority set-aside statute, the Court stated that "courts must be satisfied that the legislative objective and projected administration give reasonable assurance that the program will function within constitutional limitations").

playing field"[6] for assessing the vitality of affirmative action programs by, for the first time in its developing affirmative action jurisprudence, analyzing a congressionally approved affirmative action program through the lens of strict scrutiny while simultaneously declining to uphold the plan.[7] However, the Court also declined to strike it down. Instead, the decision left the question of the constitutionality of the affirmative action program untouched, punting the question down to the lower courts for resolution.[8] The next year Neal Devins predicted that the Court's ambiguous holding would not be satisfactorily settled by the courts, but by elected political actors.[9] Subsequent events have proven Devins's prescience: declining to uphold turned out to be a far cry from striking down.

A brief look away from *Adarand* to the Court's most recent decision in *Fisher* demonstrates the Court's continuing ambiguity as well as the viability of Devins's prediction. *Fisher* involved a challenge to the race-conscious admissions procedures at the University of Texas.[10] Rather than ruling on the merits of the affirmative action program, the Court applied the exact same methodology of *Adarand*: articulating the strict scrutiny standard and remanding to the lower courts to determine the constitutionality of the program.[11] In the meantime, the seven-to-one decision left the program untouched and intact (Justice Elena Kagan recused herself from considering the case).[12] The decision has left many doubting affirmative action's future.[13]

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6 *Adarand*, 515 U.S. at 237.

7 *Id.* at 256 (Stevens, J., dissenting) (noting that the majority's decision not to uphold the federal affirmative action program departs from all previous federal affirmative action cases).

8 *Id.* at 238–39 ("The question whether any of the ways in which the Government uses [affirmative action programs] can survive strict scrutiny . . . should be addressed . . . by the lower courts.").

9 Neil Devins, Adarand Constructors, Inc. v. Pena *and the Continuing Irrelevance of Supreme Court Affirmative Action Decisions*, 37 WM. & MARY L. REV. 673, 680 (1996) (arguing that the Supreme Court's ambiguous opinion in *Adarand* intentionally avoided the constitutional merits of the affirmative action program, reflecting its preference to defer judgment on this issue to elected government).

10 Fisher v. Texas 133 S. Ct. 2411, 2415 (2013).

11 *Id.* at 2421 ("[F]airness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis.").

12 *Id.* at 2422.

13 To be sure, many interpret the *Fisher* decision as establishing a more stringent strict scrutiny analysis than what existed previously and setting the stage for a multitude of challenges to affirmative action programs across the country. *See* Adam Liptak, *Judges Step Up Scrutiny of Race in College Entry*, N.Y. TIMES, June 25, 2013, at A1; *see also* Scott Warner et al., *The U.S. Supreme Court's Decision in* Fisher v. University of Texas at Austin: *What it Tells Us (and Doesn't Tell Us) About the Consideration of Race in College and University Admissions and*

Following *Fisher*, the Obama administration issued guidance characterizing the Court's decision as an affirmative approval of the compelling interest of achieving racial diversity among students.[14] The administration explicitly sanctioned the continued use of race-conscious admissions programs and instructed school officials to rely on guidance flowing from the Department of Education and Department of Justice, rather than the Court's opinion, to determine the permissibility of their admissions criteria.[15]

Fisher is paradigmatic of the general forces shaping affirmative action in government procurement of contracts. The need for and implementation of affirmative action in government contracts is largely left to legislative and agency determination. Courts do not have a loud voice in shaping the government's affirmative action practice, and when they do speak, their words tend to be feeble. With opinions that are ambiguous at best, other government actors are, and ought to be, left to determine the need for and permissive scope of affirmative action.

This Comment will argue that the Court's role in determining the constitutionality of affirmative action programs is limited. Specifically, the need for and permissive scope of government affirmative action programs ought to be left to legislative and executive branch determinations. Further, this Comment will argue that when a court does declare a congressionally authorized affirmative action program unconstitutional, the other branches are justified to interpret any ambiguity in the Court's decision narrowly.

Part I will examine the development of affirmative action doctrine outside of the courts. Even when the Court expresses a strict standard to judge affirmative action programs, it leaves the standard largely underenforced. The Court's underenforcement translates into

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Other Contexts, THE FED. LAWYER, Aug. 2013, at 48 (arguing that the unresolved questions of *Fisher* could lend itself to heightened legal challenges and judicial review of affirmative action programs).

14 *See* Letter from U.S. Dep't of Justice and U.S. Dep't of Educ. to Coll. or Univ. Presidents on *Fisher v. Univ. of Tex. at Austin* (Sept. 27, 2013), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201309.pdf. The Department of Education and Department of Justice issued the guidance in the form of a letter to college and university presidents. *Id.* In the letter, the agencies expressed their continued commitment to racial diversity among college and university students. *Id.*

15 *See Questions and Answers About* Fisher v Univ. of Tex. at Austin, U.S. DEP'T OF JUSTICE AND U.S. DEP'T OF EDUC. (Dec. 3, 2013), http://www2.ed.gov/about/offices/list/ocr/docs/dcl-qa-201309.html. The Department of Education and Department of Justice affirmatively stated that the Court's decision does not prohibit schools from taking steps to achieve a diverse student body, invalidate the use of race, change the strict scrutiny standard, or affect current race-conscious admissions practices at schools. *Id.*

recognition that the other branches are better positioned to make interpretive judgments on the constitutionality of affirmative action programs. When the Court does exercise its interpretive power, the Executive regularly and justifiably exercises its interpretive independence from the judgment outside the facts of the decided case.

Part II will take a closer look at the history surrounding *Adarand* and the limited implications of the Court's opinion, particularly on the continued role of race-conscious procurement of government contracts. Part III will apply Part II's analysis to a recent case, *DynaLantic Corp. v. U.S. Department of Defense*,[16] where the constitutionality of Section 8(a) of the Small Business Act[17] was at issue. Section 8(a) permits the federal government to reserve the issuance of certain contracts to socially and economically disadvantaged businesses. Prevailing on its as-applied challenge only, the District Court for the District of Columbia maintained that Section 8(a) facially survived strict scrutiny. However, the effects of the *DynaLantic* decision have been limited. Rather than examine the constitutionality of Section 8(a) in other contexts, the Department of Defense ("DOD") has thus far declined to give the decision any broader application than the specific scope of *DynaLantic*.

I. AFFIRMATIVE ACTION OUTSIDE THE COURTS

A. Judicial Underenforcement of Affirmative Action

Lawrence Sager points out that there are instances of marked disparity between the Constitution and constitutional law as developed by the courts, producing what he calls a thin constitution.[18] The so-called thin constitution is particularly salient in "redressing the entrenched consequences of institutional racism that was once supported by law."[19] Sager contends that there are limited circumstances, such as reparation of past racial injustice, where the Court should engage in selective underenforcement; that is, it should "stay its hand

16 DynaLantic Corp. v. U.S. Dep't of Def. (*DynaLantic IV*), 885 F. Supp. 2d 237 (D.D.C. 2012) (upholding Section 8(a) as facially constitutional, but finding its application to mobile flight simulator contracts unconstitutional).

17 15 U.S.C. § 637(a) (2012).

18 Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 410 (1993) ("[T]he range of those matters that are plausible candidates for judicial engagement and enforcement in the name of the Constitution is considerably smaller than the range of those matters that are plausibly understood to implicate the serious questions of political justice.").

19 *Id.* at 411.

and leave the enforcement" of such rights to the executive and legislative branches.[20]

Under Sager's selective underenforcement view, the question of whether federal affirmative action programs are constitutionally viable is an "immensely complex question[] of social strategy and social responsibility . . . far better addressed by the legislative and executive branches of government, [a] question[] that seem[s] virtually out of the reach of the judiciary absent special circumstances."[21] Cornelia T.L. Pillard reinforces the view that the Court's tendency to selectively underenforce certain constitutional guarantees leaves the other branches in a position to ambitiously engage in racial reparation efforts like affirmative action.[22]

B. Explicit and Ambiguous Deference to the Political Branches

Prior to *Adarand*, the Court was explicit in its deferential stance to the political branches when it came to affirmative action determinations. Writing the year before *Adarand*, Christopher L. Eisgruber offered affirmative action as a paradigmatic example of an instance where the Court restrains from embracing judicial supremacy.[23] In *Metro Broadcasting, Inc. v. FCC*,[24] the Court rested its approval of the federal affirmative action program on the "overriding significance . . . that the [affirmative action programs] have been specifically approved—indeed, mandated—by Congress."[25] The Court bound its decision in deference to Congress's "power [as a co-equal branch] to provide for the . . . general Welfare of the United States and to en-

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20 *Id.* at 419.

21 *Id.* at 420.

22 Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 695 (2005). Pillard points to the scholarly consensus that in such areas "the political branches are primarily responsible for fulfilling" the constitutional enforcement role. *Id.* at 695–96, 696 n.59 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1336, 1337) (2d ed. 1988)) ("To say this is not to deny that government has affirmative duties to its citizens arising out of the basic necessities of bodily survival, but only to deny that all such duties are perfectly enforceable in the courts of law." (quoting TRIBE, *supra*)).

23 Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 347, 355 (1994) ("One example [of the Court's occasional recognition of the interpretive superiority of the other branches on specific issues] is the Court's willingness to defer to Congress . . . with respect to questions about when affirmative action is consistent with the Constitution's equality principle.").

24 497 U.S. 547 (1990) (upholding as constitutional a federal program enhancing minority ownership in broadcasting).

25 *Id.* at 563.

force, by appropriate legislation, the equal protection guarantees of the Fourteenth Amendment."[26]

True, the Court signaled a shift away from explicit deference in *Adarand*.[27] Rather than extend deference to congressional determinations as it had previously done when evaluating federal affirmative action programs, the Court purported to subject all racial classifications to the strictest judicial scrutiny.[28] Merely declaring a new standard, however, the Court declined to *apply* the standard, content to continue to leave "unresolved questions remain[ing] concerning the details"[29] of its decision and "whether [the federal affirmative action program] can survive strict scrutiny"[30] to the lower courts. But lower courts do not retain sole proprietorship on the claim to settle the Court's ambiguity. Rather, unresolved questions of the constitutionality of federal affirmative action coupled with the Court's ambiguity leave affirmative action decisions "so indeterminate that they essentially are nonbinding"[31] on political actors. Thus, the Court's insistence on ambiguity and avoidance of the constitutionality of federal affirmative action programs has translated into indirect deference to the political branches.[32]

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26 *Id.* (citations omitted) (internal quotation marks omitted). The Court articulated its deferential stance in terms of Congress's "institutional competence as the National Legislature." *Id.*

27 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226–27 (1995) (stating that the Court should view all racial classifications with skepticism). Indeed, only the dissenting Justices mention the Court's prior explicit deference to Congress in affirmative action decisions. *See id.* at 249–52 (Stevens, J., dissenting) (recalling that deference to congressional judgments regarding affirmative actions has been a hallmark of all prior affirmative action decisions and stating that "[f]ederal affirmative-action programs represent the will of our entire Nation's elected representatives"); *id.* at 271 (Ginsburg, J., dissenting) ("[I]n this area, large deference is owed by the Judiciary to Congress' institutional competence and constitutional authority to overcome historic racial subjugation." (internal quotation marks omitted)).

28 *Id.* at 227 (majority opinion) ("[A]ll racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny.").

29 *Id.* at 238.

30 *Id.* at 238–39.

31 Devins, *supra* note 9, at 679.

32 Of course, courts do not always take a deferential stance toward affirmative action determinations. For an example of the court striking down an agency's affirmative action practice see Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 875–80 (2010) (discussing the D.C. Circuit's determination that the FCC's race-conscious hiring practices were unconstitutional).

C. Executive Independence of Judicial Determinations

Following the *Adarand* decision, Devins found that the Court's ambiguity translated to malleability, leaving the other branches with a large degree of autonomy to interpret the decision as they wished.[33] Furthermore, the Court's approach to affirmative action was largely fact-specific rather than far-reaching, giving the other branches significant leeway to interpret the Court's decision narrowly or broadly according to their policies.[34]

To be sure, there are limits to the Executive's interpretive independence. It is widely accepted that an executive actor cannot refuse to comply with direct judicial orders.[35] Further, whatever degree of interpretive independence an executive actor may possess in a given situation, most scholars agree that executive actors have the freedom to interpret the Constitution differently than the courts, but should rarely, if ever, directly defy the court's rulings.[36] However, the executive branch's practice when interpreting the court's affirmative action amounts to neither complete deference nor defiance.

Instead, executive actors exert their interpretive independence in the gaps of the Court's affirmative action doctrine—in the *feebleness* of its doctrine. Sophia Z. Lee found that a pattern of "creatively narrowing" judicial doctrine can occur when courts decline to issue clear, judicially defined rules.[37] Though the Court may persist in declaring its strict scrutiny standard when evaluating affirmative action programs, if it also declines to apply the standard, as in *Fisher* and *Adarand*, the contours of strict scrutiny remain largely ambiguous—free to be narrowed by the Executive.

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33 Devins, *supra* note 9, at 719 (emphasizing that the Court's decision did not give guidance to Congress or the White House).

34 *Id.* at 679 (noting that the meaning of narrow judicial holdings is typically defined by social and political forces).

35 Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 112 (2004) (discussing that few scholars, whether "self-described departmentalists" or "judicial supremacists," would go so far to say that the President is neither authorized to refuse to comply with judicial decisions nor bound to always defer to the Supreme Court with which he disagrees).

36 *Id.*

37 Lee, *supra* note 32, at 844, 857. Furthermore, agencies may creatively interpret by "narrowly reading court precedents . . . to reach entirely different constitutional conclusions." *Id.* at 852.

II. THE FEEBLENESS OF *ADARAND* IN AFFECTING AGENCY HIRING PRACTICES

A. Leading to Adarand

The first time the Supreme Court considered the constitutionality of a congressionally approved, federal set-aside program was in *Fullilove v. Klutznick*.[38] In 1977, Congress enacted the Public Works Employment Act ("the Act"), including a "minority business enterprise" provision that required "at least 10 per centum of the amount of each [public works] grant shall be expended for minority business enterprises."[39] To qualify as a minority business enterprise, half of the business must be owned by minority group members: "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."[40]

The *Fullilove* plurality, applying "a most searching examination" to Congress's set-aside program, rejected every constitutional challenge to the Act and concluded that the best resolution to the affirmative action question was deference.[41] The plurality specifically found that with respect to affirmative action programs, Congress had the "necessary latitude" to implement federal affirmative action programs to accomplish remedial objectives.[42] Following *Fullilove*, Congress proceeded with confidence to further implement minority set-aside proprograms, "frequently fail[ing] even to pay lip service to *Fullilove*'s 'most searching examination' standard, perceiving that these set-asides were immunized from constitutional attack."[43] Indeed, just two years after the *Fullilove* decision, Congress enacted the Surface Transportation and Uniform Relocation Assistance Act ("STURAA") at issue in *Adarand*.[44]

Though the *Fullilove* decision was limited to federal programs, state and local officials also read the decision to green-light their own affirmative action programs.[45] Indeed, by the time the Court recon-

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38 448 U.S. 448 (1980).

39 42 U.S.C. § 6705 (1980).

40 *Id.*

41 *Fullilove*, 448 U.S. at 490, 491 (noting that Congress, "after due consideration," perceived the need for the affirmative action program).

42 *Id.*

43 Devins, *supra* note 9, at 703 (quoting *Fullilove*, 448 U.S. at 491).

44 *Id.* Devins notes that throughout the debate surrounding the adoption of the provision, a single Congressman made a single statement referring to the Court's decision in *Fullilove*. *Id.*

45 Devins, *supra* note 9, at 703 (discussing the effects of *Fullilove* on state and local governments' minority set-aside programs).

sidered affirmative action in *Richmond v. J.A. Croson*,[46] states and localities had copycatted Congress's affirmative action plan, with over 234 various minority set-aside programs across the country.[47]

In *Croson*, the Court eliminated any doubts about whether its deferential stance toward congressional affirmative action determinations translated into deference to state and local determinations. The decision signaled that the "*appropriate* deference to . . . Congress, a co-equal branch,"[48] did not mirror the deference the Court would grant to similarly crafted affirmative action programs produced by state and local lawmakers.[49] Striking down the local set-aside program, the Court reinforced the deference it extends to Congress to find "that past discrimination would cause federal funds to be distributed in a manner which reinforced prior patterns of discrimination," thereby necessitating the need for federal affirmative action programs.[50] Applying strict scrutiny to the local set-aside program, however, the Court found that the city failed to meet its evidentiary burden showing the affirmative action program was necessary to achieve a compelling government interest.[51] Thus, after *Fullilove* and *Croson*, a federal affirmative action program was upheld under a deferential standard while a local affirmative action program was struck down under strict scrutiny.

Metro Broadcasting further solidified the notion that Congress deserves greater deference when it, "as the National Legislature," crafts an affirmative action program.[52] Furthermore, the decision also pointed to the proposition that when a federal agency develops an affirmative action program under the authority of Congress, it should be afforded significant deference. At issue in *Metro Broadcasting* were two affirmative action programs adopted by the Federal Communica-

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46 488 U.S. 469, 486 (1989) (striking down a local affirmative action set-aside program under strict scrutiny).

47 Devins, *supra* note 9, at 703. Devins discusses the widespread belief within Congress as well as state and local governments that *Fullilove* was properly understood as approving affirmative action. *Id.*

48 *Fullilove*, 448 U.S. at 472 (emphasis added).

49 *See Croson*, 488 U.S. at 504 (discussing that the city must make findings outside of those made by Congress to justify the local set-aside program).

50 *Id.* The Court found that Congress could make national findings of discrimination and take remedial action, such as affirmative action, through the Enabling Clause of the Fourteenth Amendment. *Id.* On the other hand, the Equal Protection Clause inhibits state and local lawmakers from importing Congress's national findings to support their local set-asides. *Id.*

51 *Id.* at 505 ("We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race.").

52 Metro Broad., Inc. v. FCC, 497 U.S. 547, 563 (1990) ("[D]eference was appropriate in light of Congress' institutional competence as the National Legislature . . . .").

tions Commission ("FCC").[53] While the FCC had crafted the disputed programs, rather than Congress, the agency grounded its authority to create such programs in federal legislation.[54]

The Communications Act of 1934 repeatedly affirmed the FCC's exclusive authority to establish radio and television broadcast stations based on broad notions of "public convenience, interest, or necessity."[55] Under its broad mandate, the agency took notice of the significant disparity that existed between the amount of minorities in the general population and the amount of minorities that owned radio or television broadcast networks.[56] Concluding that such a disparity harmed the general public,[57] the FCC developed two policies aimed at encouraging and facilitating minority ownership of broadcast stations: (1) that minorities applying to own a broadcast station would receive a "plus" to their application,[58] and (2) that minorities would have the exclusive opportunity to receive reassigned and transferred licenses through an alternative practice called a "distress sale."[59] Though the policies were shaped by the FCC, Congress "expressed emphatic support" for the FCC's policies and ultimately codified an appropriations act that required the agency to maintain these policies.[60]

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53 *Metro Broad.*, 497 U.S. at 552.

54 *Id.*

55 *See* 47 U.S.C. § 307 (1982) ("The Commission, if public convenience, interest, or necessity will be served thereby . . . shall grant to any applicant therefor a station license provided for by this chapter.").

56 *Metro Broad*, 497 U.S. at 553–54 (discussing the underrepresentation of minorities in broadcast ownership).

57 *Id.* ("Unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial portion of our citizenry will remain undeserved and the larger, non-minority audience will be deprived of the views of minorities." (quoting FCC Minority Ownership Task Force, Report on Minority Ownership in Broadcasting 1 (1978)).

58 *Id.* at 557 ("[T]he FCC announced that minority ownership and participation in management would be considered . . . a 'plus' to be weighed together with all other relevant factors."); s*ee also In re* Applications of WPIX, 68 F.C.C.2d 381, 411 (1978) ("[M]inority ownership and participation is also an affirmative factor enhancing the applicant's proposal and raising its level in the comparative evaluation . . . .").

59 *Metro Broad.*, 497 U.S. at 557. Typically, when "a licensee whose qualifications to hold a broadcast license come into question may not assign or transfer that license until the FCC has resolved its doubts in a noncomparative hearing." *Id.* A licensee could, however, avoid the hearing if it sold "their station to a minority-owned or controlled entity, at a price 'substantially' below its fair market value." *In re* Comm'n Policy Regarding Advancement of Minority Ownership in Broad., 92 F.C.C.2d 849, 851 (1982).

60 *Metro Broad.*, 497 U.S. at 572–79 (discussing both Congress's appropriations Acts requiring the FCC to maintain its affirmative action policies and "the long history of congressional support for those policies prior to the passage of the appropriations Acts . . . ." (internal quotation marks omitted)). In relevant part, an appropriations Act provided

Beginning its analysis of the agency's affirmative action program, the Court assuaged any doubts about its validity, emphasizing the "overriding significance in these cases that the FCC's minority ownership programs [had] been specifically approved—indeed, mandated—by Congress."[61] The Court found no inconsistency with *Croson*, emphasizing that the difference between the cases was the difference between Congress and state or local lawmakers.[62] Thus, the Court expressly indicated that it was separating two lines of jurisprudence regarding affirmative action programs: one for programs approved by Congress and another for programs approved by state and local lawmakers.[63]

B. The Decision: Replacing Perceived Inconsistency with Ambiguity

Adarand is most noted for establishing strict scrutiny as the standard to test *all* affirmative action programs. Rather than adhere to the bifurcation that had developed in the Court's prior decisions, the Court instead declared *Metro Broadcasting* an outlier that undermined the Court's affirmative action doctrine up to that point and deserved to be overruled.[64] The Court distanced itself from the position that *Metro Broadcasting* was fully consistent with the decisions in *Fullilove* and *Croson*, instead characterizing the case as a departure "from the fabric of the law."[65] In other words, the Court found inconsistency where none had existed before.

"[t]hat none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission . . . to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities . . . ." Pub. L. No. 100-202, 101 Stat. 1329–31 (1987).

61 *Metro Broad.*, 497 U.S. at 563.

62 *Id.* at 565 (noting that *Croson* is distinguishable on the basis that "the question of congressional action was not before the Court").

63 *Id.* (indicating that *Croson* and *Fullilove* are consistent because *Fullilove* considered a congressionally approved affirmative action program, whereas *Croson* did not). The Court found that *Croson* expressly "reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are *subject to a different standard* than such classifications prescribed by state and local governments." *Id.* (emphasis added).

64 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). The Court outlined three propositions of all racial classifications that lead to the conclusion that *Metro Broadcasting* should be overruled: (1) skepticism of all racial classifications, (2) consistency of treatment of people irrespective of race, and (3) congruence between standards governing federal and state racial classifications. *Id.* at 223–27. The Court found that *Metro Broadcasting* "squarely rejected" congruence, while undermining the other two propositions. *Id.* at 226–27.

65 *Id.* at 233–34.

Though *Adarand* appeared to do much in terms of altering the landscape of federal affirmative action doctrine, it did little regarding the actual program at issue. *Adarand* centered on the constitutionality of a Department of Transportation minority set-aside program, STURAA, which provided that "not less than 10 percent" of the appropriated funds "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals."[66] The STURAA's definition of "socially and economically disadvantaged individuals" adopted the Small Business Act's race-based presumptions.[67] Instead of deciding the question of whether the STURAA program was constitutionally permissible, the Court merely declared strict scrutiny the proper standard to judge all affirmative action programs, refusing to touch the lingering question of the program's constitutionality—thus, leaving the actual implications of the standard to be "addressed in the first instance by the lower courts."[68]

C. The Feebleness of Adarand

Given that *Adarand* simultaneously heightened judicial scrutiny of congressionally approved affirmative action programs while declining to decide whether the STURAA program passed muster, the decision's "mixed message makes it a rather slippery precedent."[69] Following *Adarand*, Devins predicted that the Court's refusal to apply its own standard would render the decision "a limited and disingenuous precedent."[70] The lingering ambiguity surrounding what effect strict scrutiny might actually have on federal affirmative action programs cabined the Court's role in affirmative action determinations.[71] Instead of being defined by lower courts as *Adarand* purportedly designed, Devins contended that the decision is better understood as "the culmination of two decades of issue avoidance,"[72] and that "the Court's refusal to provide any guidance about the application of strict

66 *Id.* at 208 (internal quotation marks omitted) (citing Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 106(c)(1), 101 Stat. 145).

67 Surface Transportation and Uniform Relocation Assistance Act of 1987 § 106(c)(2)(B). The Small Business Act provides a presumption that "[s]ocially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group . . . ." 15 U.S.C. § 637(a)(5) (1987).

68 *Adarand*, 515 U.S. at 238–39.

69 Devins, *supra* note 9, at 677.

70 *Id.* at 701.

71 *Id.* ("[*Adarand*] further reveals the Court's limited role in defining the affirmative action debate.").

72 *Id.* at 700.

review gives Congress, the White House, and lower courts a free hand to apply *Adarand* as they see fit."[73]

Within a month of *Adarand*, through an Office of Legal Counsel ("OLC") opinion, the Department of Justice issued guidance to the executive branch's interpretation and implementation of the decision.[74] The memo acknowledged both the strict scrutiny standard that would now apply to all federal affirmative action programs and the gaping holes in the Court's decision concerning the application of that standard.[75] The OLC emphasized that the Court did not declare the STURAA program, or any other federal affirmative action program, unconstitutional.[76] The memo further declared the possibility, even likelihood, that Congress's affirmative action programs were "entitled to greater deference than programs adopted by state and local governments."[77] Overall, the OLC memo did not provide any clearer picture of whether federal affirmative action programs are constitutionally permissible under the Court's new standard, but stopped far short of casting doubt on any program whatsoever; rather, the memo concluded decisively that "[n]o affirmative action program should be suspended prior to such an evaluation."[78]

The following year, the Department of Justice issued another memorandum to guide agencies in their procurement practices to ensure compliance with *Adarand*.[79] Introducing the memo with a nod to the Court's extension of strict scrutiny to federal affirmative action programs, the memo proceeded to emphasize the "credible and constitutionally defensible" judgment of Congress "that race-conscious federal procurement programs are needed to remedy the effects" of

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73 *Id.* at 701.

74 Legal Guidance on the Implications of the Supreme Court's Decision in Adarand Constructors, Inc. v. Pena, 19 Op. O.L.C. 171 (1995) [hereinafter Adarand Memo] (issuing preliminary legal guidance on the implications of *Adarand* and the new standard for assessing the constitutionality of federal affirmative action programs). The OLC issues legal advice to the executive branch regarding constitutional judgments and is charged with resolving interagency disputes about a particular point of law. Pillard, *supra* note 22, at 710–12. The OLC issues opinions or advice when the executive seeks it, but the executive is under no obligation to request advice from the OLC, nor is it obligated to follow the advice once it is given. *Id.* at 710–12, 714.

75 Adarand Memo, *supra* note 74, at 172 ("The Court did not discuss in detail the . . . requirements of strict scrutiny . . . .").

76 *Id.*

77 *Id.* at 171 (pointing out that the Court articulated a deferential disposition towards Congress in past affirmative action rulings).

78 *Id.* at 202–03.

79 Prop. Reforms to Affirmative Action in Fed. Procurement, 61 Fed. Reg. 26042 (May 23, 1996) [hereinafter Proposed Reforms].

past discrimination that have produced barriers to minority procurement contracts.[80]

The memo further recognized the important role that agencies play in framing constitutionally permissible affirmative action programs.[81] While Congress determines the need for federal affirmative action programs, it delegates the "determination of how to achieve the remedial goals" it has established to the agencies.[82]

The memo pays particular attention to the Section 8(a) Program of the Small Business Act ("Section 8(a)" or "Program").[83] Section 8(a) permits agencies to reserve certain procurement contracts to socially and economically disadvantaged businesses.[84] The Program establishes race-based presumptions that categorize members of certain racial and ethnic minority groups as "socially disadvantaged."[85] The Department of Justice concluded that Section 8(a) is constitutional and that race may be relied upon as the agency determines, while also urging agencies to "use race-neutral alternatives to the maximum extent possible."[86]

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80 *Id.*

81 *Id.* Though Congress established goals for the participation of Small Disadvantaged Businesses in agency procurement, it largely delegated the authority to pursue those goals to agencies. *See id.* (explaining that the Court left the remedial goals of affirmative action progams to agencies to determine); *see also* 15 U.S.C. § 644(g) (2012) (establishing goals for agencies and delegating authority to agencies to achieve those goals).

82 Proposed Reforms, *supra* note 79, at 26042.

83 Section 8(a) is codified in 15 U.S.C. § 637(a) (1996).

84 *See* 15 U.S.C. § 637(a)(1)(B) (1996) ("It shall be the duty of the Administration and it is hereby empowered, whenever it determines such action is necessary or appropriate . . . to arrange for the performance of such procurement contracts . . . to socially and economically disadvantaged small business concerns . . . .").

85 *See id.* § 637(a)(5) ("Socially disadvantaged individuals are 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."). Congress found that the presumption extended generally to all minority groups including, but not limited to, "Black Americans, Hispanic Americans, Native Americans, Indian Tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities." *Id.* § 631(f)(1)(C). However, there are no presumptions automatically qualifying individuals as economically disadvantaged. *See Id.* § 637(a)(6)(A) (stating that the government shall consider economic measures as part of its determination of social disadvantaged individuals).

86 Proposed Reforms, *supra* note 79, at 26049. To determine whether Section 8(a) satisfied the "narrowly tailored" requirement of *Adarand*, the DOJ considered six factors: (1) whether race-neutral alternatives were first considered and determined to be insufficient solutions; (2) the scope of the program and whether it is flexible; (3) whether race is the sole factor in eligibility or one factor among others; (4) whether any numerical target is reasonably related to the number of qualified minorities in the applicant pool; (5) whether the duration of the program is limited and subject to periodic review; and (6) the extent of the burden imposed on nonbeneficiaries of the program. *Id.* at 26042.

Following *Adarand*, the executive branch undoubtedly recognized strict scrutiny as the new standard, but exercised interpretive independence within the many gaps of the decision. Rather than find any federal affirmative action program unconstitutional, or even questionable, the Executive proceeded on the assumption that affirmative action determinations would continue to be shaped by Congress and the agencies, not the courts. Unsurprisingly, a decade after *Adarand*, the U.S. Commission on Civil Rights found agency procurement practices largely unaffected by the decision.[87] The Commission focused on the Department of Justice's command to maximize race-neutral alternatives to comport with *Adarand*, concluding that agencies by-and-large disregard such alternatives and persist in race-conscious procurement.[88] The report found that one of the primary mechanisms agencies use to justify race-conscious programs is reliance on Section 8(a) of the Small Business Act.[89] Rather than search the Court's affirmative action doctrine for guidance on whether an affirmative action program is permissible, the report found that agencies instead look to Congress and the executive branch to find justification for their programs.[90] Thus, a decade after penning his prediction, Devins's assessment proves prescient: "[w]hen it comes to affirmative action . . . the Court has failed to speak in a way that alters the political forces."[91]

III. FEEBLENESS CONTINUED: THE RESILIENCE OF SECTION 8(A) IN *DYNALANTIC*

Though in 2005 the Commission on Civil Rights all but declared Section 8(a) at odds with the Supreme Court's decision in *Adarand*, the Program has proven resilient to constitutional challenge. In

87 U.S. Comm. on Civil Rights, Federal Procurement After Adarand (2005) [hereinafter USCCR Report].

88 *Id.* at 76. The report analyzed the procurement practices of six agencies: the Department of Defense, the Department of Housing and Urban Development, the Department of Education, the Department of State, the Department of Energy, and the Department of Transportation. *Id.* The report concluded that while agencies do engage in some race-neutral strategies, "no agency reviewed in this report engages in serious consideration of race-neutral alternatives." *Id.*

89 *Id.* at 70. Chairman Reynolds, who authored the report, expressly pointed to Section 8(a) as a mechanism agencies use to achieve diversity in contract awards that "does not meet the Supreme Court's standard for strict scrutiny." Report Finds that Agencies Fail to Implement Race-Neutral Alternatives, 2005 EMP. PRAC. 771 (CCH) No. 1430 (Sept. 7, 2005), *available at* 2009 WL 4372983.

90 USCCR Report, *supra* note 87, at 67 ("Instead, agencies rely upon congressional analysis, legislation, and regulation to justify the existence of race-conscious programs.").

91 Devins, *supra* note 9, at 720.

2012, the District Court for the District of Columbia upheld the constitutionality of Section 8(a), but declared the application of the Program to military simulator and training contracts unconstitutional in *DynaLantic Corp. v. U.S. Department of Defense (DynaLantic IV)*.[92] In its analysis of the Program, the District Court emphasized the limited application of Section 8(a), that it should be applied only in contexts where the government is able to produce evidence of past discrimination—a prerequisite to meeting "its burden to show a compelling interest" in utilizing the program in a specific industry.[93] Following the decision, the government has complied with the court's injunction against awarding military simulator contracts under Section 8(a),[94] but continues to use to Section 8(a) to award government contracts, specifically in the context of military procurement.[95]

A. Procedural History of DynaLantic

In December 1995, the same year that *Adarand* was decided, DynaLantic sued the DOD because it was excluded from bidding on a multimillion dollar contract to provide the Navy with a helicopter flight simulator.[96] Pursuant to an agreement with the Small Business Administration ("SBA"), the DOD limited competition for the contract to Section 8(a) participants, which did not include DynaLantic, a small company that had designed and manufactured similar simulators for the military in the past.[97] By virtue of being excluded from competing on the contract, DynaLantic challenged the constitutionality of Section 8(a) of the Small Business Act, both facially and as-applied to mobile flight simulator contracts, and sought to enjoin the DOD from using the Program for procurement.[98] Because DynaLantic had never applied to participate in the Program, the dis-

92 885 F. Supp. 2d 237, 243 (2012).

93 *Id.* at 283.

94 Memorandum from Richard Ginman, Director, Defense Procurement and Acquisition Policy, on Immediate Cessation of Small Business Development Program (8(a) Program) to Secretaries of the Military Departments (Aug. 22, 2012) [hereinafter DOD Memo].

95 Partnership Agreement Between The U.S. Small Business Administration and the U.S. Department of Defense (Oct. 28, 2012) [hereinafter Partnership Agreement]. The partnership agreement is a contract, dated months after *DynaLantic*, between the DOD and the SBA to continue awarding procurement contracts through Section 8(a). *Id.*

96 DynaLantic Corp. v. U.S. Dep't of Def. (*DynaLantic I*), 937 F. Supp. 1, 2 (D.D.C. 1996).

97 *Id.*; *see also* DynaLantic Corp. v. Dep't of Def. (*DynaLantic II*), 115 F.3d 1012, 1014 (D.C. Cir. 1997) (describing DynaLantic's history with military contacts and its statutory status as "small" under the Small Business Act).

98 *DynaLantic I*, 937 F. Supp. at 2.

trict court initially held that the company lacked standing to challenge the constitutionality of Section 8(a).[99]

On appeal, the D.C. Circuit disagreed, finding that DynaLantic did in fact have standing to challenge the Program.[100] However, standing was not the only barrier that DynaLantic faced in pursuing its appeal. Shortly after DynaLantic filed its initial appellate brief, the Navy canceled the contract at issue.[101] Rather than finding DynaLantic's claim moot, the circuit court allowed the company to "amend its pleadings to raise a general challenge to the 8(a) program as administered by the SBA and participated in by the Defense Department."[102]

On remand, the district court narrowly construed DynaLantic's constitutional claim as merely challenging the DOD's usage of Section 8(a), rather than requesting wholesale invalidity of Section 8(a).[103] The DOD awards procurement under Section 8(a) pursuant to statutory goals, outlined in 10 U.S.C. § 2323, also referred to as Section 1207.[104] The court concluded that the record was insufficient to review the race-based preferences of the statute and Program under strict scrutiny, as required by *Adarand*.[105] The district court's decision in this case, as well as the case's future proceedings, was informed in large part by another affirmative action case being litigated

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99 *Id.* at 3–5. In making its determination, the district dourt relied on the only appellate precedent on the books at time, originating from the Fifth Circuit, addressing the issue of standing of a party to challenge the constitutionality of Section 8(a). *Id.* at 5. In *Ray Baillie Trash Hauling, Inc. v. Kleppe*, the Fifth Circuit held that a company who "did not even apply for participation in the program" lacked standing. 477 F.2d 696, 710 (5th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974).

100 *DynaLantic II*, 115 F.3d at 1018. The Circuit Court found that despite DynaLantic's lack of desire to participate in Section 8(a), it is nonetheless injured because it simply lacks the opportunity to compete for a contract the DOD reserves for Section 8(a) contractors. *Id.* at 1016.

101 *Id.* at 1014 ("Only a few weeks later, after DynaLantic had filed its initial appellate brief, the Navy canceled the proposed solicitation for the APT procurement.").

102 *Id.* at 1015. In his dissent, Chief Judge Harry Edwards of the D.C. Circuit rebutted the claim that Section 8(a) was a race-based set aside and emphasized the viability of Program as authorized by Congress. *Id.* at 1018–19 (Edwards, C.J., dissenting).

103 DynaLantic Corp. v. U.S. Dep't of Def., (*DynaLantic. III*), 503 F. Supp. 2d 262, 266 (D.D.C. 2007).

104 *Id.* ("Therefore, plaintiff's second amended complaint must be read to only raise claims against the DoD policy in 10 U.S.C. § 2323 and the 8(a) program to the extent employed by section 2323.").

105 *Id.* at 266–67 (stating that the claim "must be reviewed using strict scrutiny" but ordering the parties to supplement the record so that the court may "resolve the fundamental issues raised" by the parties).

at the time against the DOD, *Rothe Development Corp. v. Department of Defense*,[106] challenging the constitutionality of Section 1207.

B. DynaLantic *Follows* Rothe*'s Lead*

The *DynaLantic* court's decision to require the parties to further supplement the record mirrored developments in *Rothe* decided by the Federal Circuit two years earlier, requiring the government to develop the record to sufficiently respond to the constitutional challenges facing Section 1207.[107] Section 1207 sets the DOD's contracting goals in terms of "small disadvantaged business" procurement.[108] Section 1207 is a congressionally approved set-aside program that sets a goal that 5% of the DOD's defense contracting would be awarded to various specified entities, including small businesses owned and operated by "socially and economically disadvantaged individuals."[109] The statute incorporates the same presumption as the Small Business Act that members of specific minorities groups are socially disadvantaged.[110]

On remand from the Federal Circuit, the *Rothe* district court ruled that Section 1207 satisfied strict scrutiny.[111] Two weeks after the deci-

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106 *See* Rothe Dev. Corp. v. Dep't of Def. (*Rothe I*), 49 F. Supp. 2d 937 (W.D. Tex. 1999) (upholding the constitutionality of Section 1207). Around 1998, Rothe Development Corporation lost a bid for procurement with the DOD despite being the lowest bidder. *Id.* at 941. No one contested the reason Rothe lost the contract to a business owned by a Korean-American, for "Rothe lost the bid for the contract *solely* as a result of the . . . preference designed to favor 'socially and economically disadvantaged persons'" under Section 1207. *Id.* (emphasis added). What Rothe did contest, however, was the constitutionality of Section 1207 as a violation of equal protection under the Fifth Amendment. *Id.*

107 Rothe Dev. Corp. v. U.S. Dep't of Def. (*Rothe V*), 413 F.3d 1327, 1329 (Fed. Cir. 2005) (holding that Rothe could maintain its constitutional challenge but requiring the parties to further develop the record).

108 *See* Rothe Dev. Corp. v. U.S. Dep't of Def. (*Rothe VII*), 545 F.3d 1023, 1026 (Fed. Cir. 2008) (holding that Section 1207 is facially unconstitutional); *see also* 10 U.S.C. § 2323 (2012) (outlining the Department of Defense's contract goals "for small disadvantaged businesses and certain institutions of higher education").

109 10 U.S.C § 2323(a)(1)(A). Congress initially enacted Section 1207 in 1986 to set the "Contract Goals for Minorities" for National Defense Authorization Act. *Rothe VII*, 545 F.3d at 1028; *see* Pub. L. No. 99-661, § 1207, 100 Stat. 3816, 3973 (1986). Though the statute has always contained an expiration date, Congress reenacted the set-aside in 1989, 1992, 1999, 2002, and 2006. *Rothe VII*, 545 F.3d at 1027–28. At the time *Rothe* was decided, the statute was set to expire in 2009. *Id.* at 1028; *see also* 10 U.S.C § 2323(k)(1) ("This section applies in the Department of Defense to each of the fiscal years 1987 through 2009.").

110 *See* USCCR Report, *supra* note 87.

111 Rothe Dev. Corp. v. U.S. Dep't of Def. (*Rothe VI*), 499 F. Supp. 2d 775, 777 (W.D. Tex. 2007) ("The Court finds that the 2006 Reauthorization of the 1207 Program satisfies the requirements of strict scrutiny."). On remand, the government presented six disparity

sion, the *DynaLantic* court followed *Rothe*'s lead, indicating that the decision made "clear that most of [the] evidence [was] not currently before the Court."[112] In order to properly evaluate the constitutionality of Section 8(a) under strict scrutiny, the court needed—like the Federal Circuit in *Rothe*—"the evidence that Congress considered . . . to ensure that it had a strong basis in evidence for its conclusion that remedial action was necessary."[113]

The *DynaLantic* court signaled approval of *Rothe*'s determination that Section 1207 is a constitutionally permissible set-aside program.[114] However, while the parties in *DynaLantic* were supplementing their records, the Federal Circuit reversed the district court in *Rothe*, finding Section 1207 unconstitutional.[115] Unlike the district court, the Federal Circuit found that the race-based preference found in Section 1207 failed strict scrutiny.[116] Though the government had complied with the circuit court's prior request to supplement the record to establish Congress's strong basis in evidence of a compelling interest, the circuit was unconvinced, finding the government's evidence representative of only a "few isolated instances of discrimination" that were "insufficient to uphold the nationwide program."[117]

Striking down Section 1207 infused uncertainty into the continuing viability of race-based preferences in government contracting.[118] As the *DynaLantic* court reconsidered the constitutionality of Section 8(a), it now had to measure the implications of the fresh unconstitutional status of Section 1207.

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studies from various states that were before Congress as it considered reauthorizing Section 1207 in 2006. *Id.* at 835–36.

112 DynaLantic Corp. v. Dep't of Def. (*DynaLantic III*), 503 F. Supp. 2d 262, 267 (D.D.C 2007).

113 *Id.* at 265 (citations omitted) (internal quotation marks omitted).

114 *See id.* (accepting the holding in *Rothe*).

115 Rothe Dev. Corp. v. U.S. Dep't of Def. (*Rothe VII*), 545 F.3d 1023, 1050 (Fed. Cir. 2008) ("[W]e hold that Section 1207, on its face . . . violates the equal protection component of the Fifth Amendment right to due process.").

116 *Id.* ("And because Congress did not have a 'strong basis in evidence' . . . the statute fails strict scrutiny.").

117 *Id.* at 1045.

118 *See* Subash S. Iyer, *Resolving Constitutional Uncertainty in Affirmative Action Through Constrained Constitutional Experimentation*, 87 N.Y.U. L. REV. 1060, 1070 (2012) (noting that *Rothe* is inconsistent with other affirmative action decisions); *see also* Trent Taylor, *The End of an Era? How Affirmative Action in Government Contracting Can Survive After* Rothe, 39 PUB. CONT. L.J. 853, 866–67 (discussing the possibility that *Rothe* "demonstrates that affirmative action in contracting is longer needed or otherwise relevant to government procurement policy").

C. DynaLantic *Reconsidered*

Five years after the record was reopened, and four years after Section 1207 was found unconstitutional by the Federal Circuit, the District Court for the District of Columbia returned to *DynaLantic* and Section 8(a) to determine whether the federal affirmative action program passed constitutional muster.[119] Rather than finding the case moot due to the fate of Section 1207, the court determined that the case remained a live controversy "because DoD continues to participate in [the Section 8(a)] program under the statutory authority of the Small Business Act, independent of [Section 1207]."[120]

Examining whether Congress met its burden of presenting a strong basis in evidence to support its compelling interest, the court briefly touched on the level of deference it would afford Congress.[121] Citing *Rothe*, the court stated that "although Congress is entitled to *no* deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review."[122]

Despite what may first appear to be a threatening stance toward Section 8(a), the court's "no deference" policy only adversely affected the Program where Congress was completely silent. The district court readily found that the evidence before Congress when enacting Section 8(a) was sufficient to demonstrate a compelling interest in "breaking down barriers to minority business development created by discrimination and its lingering effects, including exclusion from contracting with the federal government."[123] The court differed from

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119 *See* DynaLantic Corp. v. Dep't of Def. (*DynaLantic IV*), 885 F. Supp. 2d 237, 242 (D.D.C. 2012).

120 *Id.* at 248 (citations omitted).

121 *Id.* at 251.

122 *Id.* (emphasis added); *see* Rothe Dev. Corp. v. U.S. Dep't of Def. (*Rothe III*), 262 F.3d 1306, 1321 n.14 (Fed. Cir. 2001) ("That Congress is entitled to no deference in its ultimate conclusion that race-based relief is necessary does not mean that Congress is entitled to no deference in its factfinding."). The *Rothe* court apparently grounded its assertion in *Richmond v. J.A. Croson*, 488 U.S. 469 (1989), discussed in Part II, *supra*, when the Court stated that "[t]he factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary." *Croson*, 488 U.S. at 500. However, the affirmative action program in *Croson* did not originate from Congress, and the level of deference owed to Congress was not at issue in that case. *See supra* Part II.

123 *DynaLantic IV*, 885 F. Supp. 2d at 251 (citing Defs.' Mot. Summ. J. at 27, 29). The court relied on a variety of evidence in finding a compelling interest including legislative history of the Section 8(a) Program, post-enactment evidence of discrimination, and state and local disparity studies.

the *Rothe* court by examining post-enactment evidence[124] to assess both the "inception" and the "continuing compelling need" for Section 8(a) and relying on state and local disparity studies[125] to find a compelling interest. Though purporting to limit the deference it afforded Congress, the court relied heavily on Congress's factfinding to ultimately uphold Section 8(a) against the facial challenge.[126]

Though rejecting the facial challenge to Section 8(a), the court was unable to afford such deference to DOD's application of Section 8(a) to military simulation and training procurements.[127] The difference in the court's conclusions between the two challenges lies not in the sufficiency of evidence, but in the mere *existence* of evidence.[128] The court emphasizes that it is undisputed between the parties that no evidence was offered of past discrimination specific to the simulator and training industry—no reports, hearings, discussions, anecdotes, or citation to a single instance of "past or present discrimination in the simulation and training industry."[129] Though the court does not specify how much evidence is sufficient to justify applying Section 8(a) to a particular industry, it is clear that zero evidence is not enough. Finding Section 8(a) unconstitutionally applied, the court hinted at its willingness to uphold other applications, as long as some evidence was present.[130] Thus, poised to take a deferential

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124 There is a split among circuits on the proper role of post-enactment evidence in determining whether an affirmative action program satisfies strict scrutiny, with many circuits utilizing post-enactment evidence in their analyses. *Compare* Rothe Dev. Corp. v. U.S. Dep't of Def. (*Rothe VI*), 499 F. Supp. 2d 775, 1327–28 (W.D. Tex. 2007) (finding that it was impermissible for the district court to rely on post-enactment evidence to find a compelling interest in reauthorizing Section 1207, but that it would be permissible to rely on post-enactment evidence when making an as-applied determination), *with* Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1166–68 (10th Cir. 2000) (examining post-enactment evidence when determining whether a compelling interest existed), *and* Contractors Ass'n of E. Pa., Inc. v. City of Phila., 6 F.3d 990, 1003 (3d Cir. 1993) (relying on post-enactment evidence to find a compelling interest).

125 The court notes that "hundreds of disparity studies" had been placed before Congress. *DynaLantic IV*, 885 F. Supp. 2d at 265. Though the *Rothe* court found the disparity studies presented to it insufficient, the *DynaLantic* court gave them some weight, even though the government had "not relied heavily on those studies." *Id.*; *see* Rothe Dev. Corp. v. U.S. Dep't of Def. (*Rothe VII*), 545 F.3d 1023, 1047 (Fed. Cir. 2008) (holding that the disparity studies were "insufficient to form the statistical core of the 'strong basis in evidence' required to uphold the statute").

126 *DynaLantic IV*, 885 F. Supp. 2d at 293 ("For the foregoing reasons, the Court concludes that the Section 8(a) program, 15 U.S.C. § 637(a)(1), is constitutional on its face.").

127 *Id.* at 283 (holding that DynaLantic prevailed on its as-applied challenge).

128 *Id.* at 280 ("Defendants concede that they do not have evidence of discrimination in this industry.").

129 *Id.*

130 *Id.* at 283 ("Without question, there is a compelling government interest in combating [] discrimination where it exists." (alteration in original)) (quoting Cortez III Serv. Corp. v.

stance to Congress and the DOD's determination that affirmative action was constitutionally permissible, the court found nothing that it could defer to.

D. The Feebleness of DynaLantic

Following *DynaLantic*, the DOD exercised its interpretive independence to narrow the effects of the holding to the specific facts of the case.[131] Following the opinion, Richard Ginman, Director of DOD's Procurement and Acquisition Policy, issued a statement that suspended the use of Section 8(a) to all future "contracts for procurement of military simulators or any services in the military simulator industry."[132] The memo specifically refused to give any guidance on Section 8(a) awards awarded in other industries.[133] Rather than advising the agency on the scope or application of the court's holding, Ginman was silent on the issue, leaving all Section 8(a) procurement outside the narrow context of simulators untouched.[134] A few months after *DynaLantic*, the DOD renewed its longstanding commitment to the SBA to continue awarding procurement through Section 8(a).[135]

CONCLUSION

The D.C. District Court's recent decision in *DynaLantic* illustrates the continuing force congressional authorization of affirmative action bears on the judiciary's analysis of these programs, while highlighting the deference that courts continue to afford the legislature and the degree of independence the executive retains in interpreting judicial decisions. Though the district court found the DOD's specific application of Section 8(a) to mobile flight simulators unconstitutional, the agency has not suspended any Section 8(a) procurement except for those directly enjoined by the district court.

Adarand purported to replace deference to congressionally approved and agency implemented federal affirmative action programs

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Nat'l Aeronautics & Space Admin., 950 F. Supp. 357, 361 (D.D.C. 1996)). The court also signals the possibility of applying Section 8(a) to the simulator and training procurement if it was able to articulate "a strong basis in evidence for doing so." *Id.* at 293.

131 *See* DOD Memo, *supra* note 94; *see also* District Court Decision Sparks DOD Contracting Change, 54 NO. 33 GOV'T CONTRACTOR ¶ 277 (2012).

132 *See* DOD Memo, *supra* note 94.

133 *Id.* ("[I]t is not possible to give general guidance that would apply to all situations . . . .").

134 *Id.*

135 *See* Partnership Agreement, *supra* note 95.

with strict scrutiny. Though strict in theory, these programs continue to be largely determined and crafted by the federal government's political actors, not the judiciary. When the judiciary attempts to analyze an affirmative action program, its decisions tend to be ambiguous, leaving significant uncertainty surrounding the application of strict scrutiny. Over time, the sustained ambiguity in the courts' affirmative action decisions has translated into feebleness—deference to legislative and agency determinations while giving the Executive significant leeway to offer independent interpretations of the judicial doctrine.