Minority Enterprise, Federal Contracting, and the SBA's 8 (a) Program: A New Approach to an Old Problem

Michigan Law Review

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Administrative Law Commons, Business Organizations Law Commons, Government Contracts Commons, and the Law and Race Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol71/iss2/4

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
NOTES

Minority Enterprise, Federal Contracting, and the SBA’s 8(a) Program: A New Approach to an Old Problem

More and more thoughtful students of the race problem are beginning to see that business and industry constitute what we may call the strategic point in its solution . . . . [F]rom [these professions] we shall gradually advance to all the rights and privileges which any class of citizens enjoy. It is in business and industry that I see the brightest and most hopeful phases of the race situation today.—Booker T. Washington (1907)†

It is distressing to realize that the hope embodied in these apparently timely sentiments was expressed sixty-five years ago, yet even today racial and ethnic minority group members are virtually excluded from the world of business and commerce. Although the past two decades witnessed major strides toward equal opportunity in employment, education, housing, and voting, no program was initiated to aid minority business until the late 1960’s.¹ Now that the federal government is mounting the first coordinated effort to supplement the opportunity for minority group members to participate as entrepreneurs in the American economy, it faces two fundamental problems. An obvious problem is the immense technical difficulty of interjecting these disadvantaged individuals into an already highly developed and competitive economy. A more subtle concern is the “reverse discrimination”² aspect of the minority enterprise effort and the spectre of unconstitutionality that confronts this effort because of traditional equal protection doctrines.

In partial response to the problems of the minority businessman, the Small Business Administration (SBA) has developed the 8(a) Program³ to channel government contracts to businesses owned by

† The Negro in Business 19-20.

¹ In fact, there is substantial evidence that the massive desegregation begun in the mid-1950’s actually led to a decline in the number of minority businesses. Deprived of their long-protected consumer markets by the dropping of color barriers, small minority businesses could not compete with larger, more efficient nonminority businesses. See The American Negro Reference Book 292 (1966). See also Brimmer, Desegregation and Negro Leadership, in Business Leadership and the Negro Crisis 34-38 (E. Ginzberg ed. 1968); T. Cross, Black Capitalism 61-64 (1969).

² The expression “reverse discrimination” is used here generally to denote a state action that distinguishes between individuals on the basis of race or ethnic origin to the benefit of those who have traditionally been oppressed—for example, American Indians, blacks, Puerto Ricans, and Mexican-Americans.

³ The Program was so named because it was developed pursuant to section 8(a) of the Small Business Act of 1958, 15 U.S.C. § 637(a) (1970), which provides: It shall be the duty of the Administration and it is empowered, whenever it determines such action is necessary—

(1) to enter into contracts with the United States Government and any de-
disadvantaged persons. This is accomplished through a procedure whereby the SBA contracts with another federal agency to provide that agency with goods or services, and then subcontracts that obligation to a qualified small business on a noncompetitive basis. The withdrawal of these contracts from competitive bidding has recently resulted in the institution of a number of federal court suits alleging

A synopsis of the district court suits is presented below:

A. Cases Closed
1. Big Four Mechanical Contractors, Inc. v. SBA, Civil No. 70-312 (W.D. Okla.). Case dismissed without prejudice by agreement of the parties.
4. Kleen-Rite Janitorial Servs., Inc. v. Laird, Civil No. 71-1988-W (D. Mass., Sept. 21, 1971). Judge Wyzanski dismissed plaintiff's claim, holding that the Department of Defense had no duty to offer the contract for competitive bidding and that the fifth amendment was not violated since there was no racial classification.
6. Space Servs., Inc. v. SBA (D. Ariz.). Case dismissed when the Air Force withdrew the contract from the 8(a) Program because of an allegation that the contract constituted a "significant" part of plaintiff's business.
7. Space Servs., Inc. v. Laird, Civil No. 15,170 (D. Conn., Aug. 18, 1972). Case dismissed for failure to state a claim. The court upheld the 8(a) Program against charges that it exceeded the congressional authorization and held plaintiff lacked standing to charge that minorities were being favored in an unconstitutional manner.
8. Fortec Constructors v. Kleppe, 41 U.S.L.W. 2195 (D.D.C., Oct. 1, 1972). The court held that there was proper authorization for the 8(a) Program and that plaintiff lacked standing to charge that minorities were being unconstitutionally favored.

B. Active Cases
1. Pacific Coast Util. Serv., Inc. v. Laird, Civil No. C-71-1085 LHB (N.D. Cal. 1971). A preliminary injunction was issued against the Government, and on appeal the Ninth Circuit remanded the case for a trial on the merits, which is still pending.
2. Ray Baillie Trash Hauling, Inc. v. Kleppe, 334 F. Supp. 194 (S.D. Fla. 1971). Holding that the subcontracts awarded by the SBA were unauthorized and unconstitutional, the court entered a judgment in favor of plaintiff. On January 5, 1973, the Fifth Circuit reversed the district court's judgment, No. 72-1165.
inter alia that the 8(a) Program denies to whites the equal protection of the laws guaranteed by the Constitution. After reviewing the considerations that led to the development of the 8(a) Program, this Note will examine the statutory and constitutional challenges to the Program. Finally, the potential impact of the 8(a) litigation on other federal minority enterprise programs will be considered.

I. **The Need To Stimulate Expansion of Minority Business Ventures and the SBA's Response**

The Report of the President's Advisory Council on Minority Business Enterprise culminated a growing list of works documenting the degree and consequences of excluding minorities from the business world. It is now known that blacks, American Indians, and Spanish-speaking Americans, who comprise one sixth of our population, own less than three per cent of all businesses, and hold less than one half of one per cent of the nation's capital. If this staggering disparity alone was not enough to motivate a national effort on behalf of minority enterprise, there are indications that increased minority participation in business would also contribute to the solution of noncommercial aspects of the race problem.

The establishment of a new class of successful businessmen would aid in providing forceful, responsible leadership in the ghetto. These entrepreneurs and their businesses would bolster ghetto-area

---


5. Massey Serv., Inc. v. Kleppe, Civil No. 72-356 WTS (N.D. Cal., complaint filed March 18, 1972). No decision has yet been reached on whether to issue a preliminary injunction.

5. Although the fourteenth amendment applies only to the states, its equal protection concepts have been extended to the federal government through the due process clause of the fifth amendment. Richardson v. Belcher, 404 U.S. 78 (1971); Bolling v. Sharpe, 347 U.S. 497 (1954).


8. **COUNCIL REPORT, supra** note 6, at 5.


employment. Perhaps more important, their growing economic power would undoubtedly foster a corresponding growth in political power. Ultimately, expansion of minority enterprise would increase interaction in the commercial sphere among the different racial and ethnic groups, and such interaction would provide a foundation for mutual respect based upon ability. These unspoken factors as well as the goal of economic parity undoubtedly prompted the President's Council to designate the minority enterprise movement a national priority for the 1970's.\(^\text{11}\)

It is perhaps not obvious why the federal government must engineer this problem's solution. It is clear that the normal operation of our economic system cannot result in significant growth of minority enterprise in the foreseeable future. Even if minorities could increase the success rate of their enterprises to the present national average and initiate twice the number of new businesses per capita as the rest of the population, it would take until 1990 for the sparse number of minority businesses to double.\(^\text{12}\) Moreover, there is little hope that such campaigns as "buy black" will benefit minority businesses because minority consumers, more than anyone else, cannot afford the higher prices usually charged by small minority concerns.\(^\text{13}\) Self-help remedies alone cannot significantly increase the minority share of commercial revenues; some additional factor is necessary to precipitate change.

Although there are high hopes for the private sector's eventual involvement in the effort, established firms may be unable to cope with the problem alone. The fact that private aid comes from many diverse sources precludes effective coordination. Furthermore, private institutions are, by their nature, responsive to the short-run economic climate, which makes vital long-term commitments extremely speculative. Perhaps the most basic reason that private sources are inadequate is the magnitude of the task.\(^\text{14}\) The federal government alone has the resources and technology to lead a coordinated attack on this problem, and in a larger sense it is a problem that any government professing equality has a moral obligation to address.

A review of basic business statistics illustrates the difficulties

---

\(^{11}\) COUNCIL REPORT, supra note 6, at 2.

\(^{12}\) M. STANS, supra note 9, Foreword, at 6-7.

\(^{13}\) There are at least four reasons why minority group members do not attempt to buy exclusively or primarily from their own group. Three are economic—lower prices prevail at chain stores; many minority group members need to buy on credit, which small ghetto stores cannot extend; and smaller stores may often give less service. Drake & Cayton, Negro Business: Myth and Fact, in BLACK BUSINESS ENTERPRISE 67 (R. Bailey ed. 1971). The fourth reason is that status may be derived from buying in white stores. COUNCIL REPORT, supra note 6, at 9.

\(^{14}\) For an authoritative discussion of the weaknesses of private efforts and the reasons for the federal government assuming the role of leadership, see M. STANS, supra note 9, pt. I, at 15-16; pt. II, at 1-2.
inherent in a federal minority enterprise effort. It is axiomatic that the casualty rate for small businesses is highest in the first three years of operation. Dun and Bradstreet reports that as of 1968 more than twenty-five per cent of all businesses failed in their first three years. Three-year failure rates for retail sales and service establishments, the types of businesses in which minority entrepreneurs most often engage, were 38.3 per cent and 28.7 per cent, respectively. The fundamental reasons for minority group members’ entry into these high-risk businesses are apparent: such businesses require little capital and few technical skills.

While it is clear that the immediate success of a national minority enterprise effort will be roughly in inverse proportion to the failure rates of new businesses, a low success rate will also jeopardize the community’s future receptiveness to minority enterprise. Each minority business failure drains scarce, perhaps irreplaceable capital. Lending institutions willing to finance minority businessmen will be deterred from future financing if they experience high failure rates. Even more devastating is the psychological impact on minority groups from witnessing the failures of some of their most highly motivated and adventuresome individuals. Certainly this will discourage others from entering business and cause further disillusionment with the present system. Lest the minority enterprise effort be brought to a halt, or even become counterproductive, those few minority businesses that are initiated must be given the maximum possible chance for success.

The federal government’s sheer size and power do not ensure that efforts to stimulate minority enterprise will be successful. The unique problems of the minority entrepreneur require imaginative solutions. Federal agencies must first ascertain the precise causes of minority business failures and then tailor their programs to eliminate those causes. After the threshold hurdle of acquiring sufficient equity capital, the businessman’s immediate difficulty is to sustain his enterprise while he gains experience. Indeed, a Dun and Bradstreet’s report indicates that simple lack of experience accounts for almost ninety per cent of business failures in the retail sales and service sectors and somewhat less in the remaining areas. This problem

16. An unpublished SBA survey in 1969 showed that personal service and retail sales businesses comprised over 60 per cent of all minority-owned enterprises but only about 40 per cent of nonminority enterprises. Doctors & Lockwood, New Directions for Minority Enterprise, 36 Law & Contemp. Probs. 51, 53 (1971) (table I).
18. The belief that there are few opportunities in business for minorities has contributed significantly to the present problem because ambitious minority group members have historically chosen the professions as a more viable means of attaining success. Doctors & Lockwood, supra note 16, at 55-56.
is especially acute for minority entrepreneurs who, because of a history of discrimination and resultant cultural and educational disadvantages, have been deprived of the requisite commercial experience. Thus, a primary goal of the federal minority enterprise effort must be to provide businessmen an opportunity to accumulate experience during a protected incubation period. Compounding the lack of experience is the chronic undercapitalization of fledgling minority firms. These dual handicaps accentuate what Louis Allen has called "the largest disadvantage of small size in business . . . the inability to absorb error."

In response to these imperatives the SBA utilized its broad statutory grant of power in section 8(a) of the Small Business Act to promulgate the regulations that are the basis of the present 8(a) Program. Essentially, the 8(a) Program utilizes government con-

---

20. An excellent study conducted by the Bureau of Business Research Services at the University of Wisconsin confirms that a critical factor that may determine whether minority businesses succeed or fail is experience in the particular line of business. Strang, Minority Economic Development: The Problem of Business Failures, 26 Law & Contemp. Probs. 119, 127 (1971) (table IV).


23. The regulations promulgated by the SBA, 13 C.F.R. §§ 124.8-1 to -2 (1972) provide as follows:

§ 124.8-1 Introduction. (a) General. Section 8(a) of the Small Business Act authorizes SBA to enter into all types of contracts (including supply, services, construction, research and development) with other Government departments and agencies and sub-contract the performance of such contracts. (b) Purpose. It is the policy of SBA to use such authority to assist small concerns owned by disadvantaged persons to become self-sufficient, viable businesses capable of competing effectively in the marketplace. (c) Eligibility. To be eligible for an 8(a) subcontract, a concern must be owned or destined to be owned by socially or economically disadvantaged persons. This category often includes, but is not restricted to, Black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos and Aleuts. If a concern is not presently controlled by such persons, the firm having such control must execute a divestiture agreement providing for divestiture of control by the divesting company over the concern within a reasonable period of time. The existence of control is a question of fact for administrative determination under the circumstances of each case. Divestiture of at least 51 per cent of the stock will create a rebuttable presumption of divestiture of control. (d) Procurement selection criteria. Procurements will be selected which are determined suitable for performance by an SBA subcontractor. However, procurements will not be considered where: (1) Public solicitation has been issued; (2) There is a reasonable possibility of an award being made to disadvantaged contractors under normal competitive procedures; or (3) Where small business concerns are dependent in whole or in significant part on recurring Government contracts.

§ 124.8-2 Procedures. (a) Concerns may submit applications for consideration under this program to SBA regional or district offices. Applications will include complete information regarding the concern’s qualifications and capabilities to perform a contract. (b) SBA will review procurement programs of other Government departments and agencies and identify proposed procurements suitable for performance by potential subcontractors.
tracting to provide firms "owned by socially or economically disadvantaged persons" with an incubation period during which they can obtain critical experience while minimizing the risk of failure. As noted above, the SBA accomplishes this by executing a prime contract with another federal agency, and then subcontracting that requirement to a qualified 8(a) firm. The subcontract price routinely exceeds that of the prime contract—thus ensuring that the subcontracting firm receives a fair profit—and the SBA supplies that cost differential. Since the total amount of all SBA subcontracts comprises merely one tenth of one per cent of the government's huge 45 billion dollar annual procurement budget, the additional cost to the government for the 8(a) Program—the amount by which total subcontract prices exceed total prime contract prices—causes only a small increase in aggregate federal contracting expenditures. \(25\)

The 8(a) Program is a promising approach, theoretically well suited to the needs of inexperienced minority firms. But its laudatory objectives should not obscure a problem that can result from unchecked dependency upon government contracts: young firms receiving substantial government contracts may be unable to make an abrupt and total transition to the private market at the end of the three-year incubation period. \(26\) Two factors contribute to this problem. First, minority enterprises will generally lack the capital to finance a complete changeover from government to private sector

\(\text{(c)}\) SBA will determine if a potential subcontractor is competent to perform a specific contract and will conduct appropriate negotiations with the other agency or department for the proposed procurement contract. Upon the request of the other agency or department, SBA will certify that the Administration is competent to perform the contract. Upon agreement as to terms, including price, SBA and the agency will enter into a prime contract using forms and provisions prescribed by statute and regulations applicable to the other Government agency. Thereafter, SBA will enter into appropriate subcontracts with the subcontractors for the performance of the prime contract.

\(\text{(d)}\) SBA may provide technical and management assistance to assist in the performance of the subcontracts.

24. 13 C.F.R. § 124.8-1(c), set out in note 23 supra.

25. This 45 billion dollar figure reflects the total contract awards made by the federal government in fiscal 1971. Civilian agencies executed contracts equalling 13.95 billion dollars (Office of Finance, General Services Administration, Procurement by Civilian Executive Agencies (1971) [hereinafter Civilian Procurement]), and the Defense Department's contracting totalled 31 billion dollars (Office of the Secretary of Defense, Military Prime Contract Awards and Subcontract Payments or Commitments 8 (1971) [hereinafter Military Procurement]). In fiscal 1971, the 8(a) contracts reached 66 million dollars and total federal contracting to minority enterprises was 144 million dollars, or roughly 0.15 and 0.3 per cent, respectively, of total procurement. U.S. DEPT. OF COMMERCE, PROGRESS OF THE MINORITY BUSINESS ENTERPRISE PROGRAM 15 (1972). The cost differentials between what the minority subcontractors are paid by the SBA and what the SBA received from the contracting agency were expected to be approximately 12 million dollars in fiscal 1973. U.S. BUREAU OF THE BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1975, Appendix, at 933, 935, 937 (1972).

26. Although not bound by statute or regulations, it has been the SBA's avowed policy to limit the period of 8(a) aid to three years.
product lines. After two or three years of operation most 8(a) firms will not yet have ready access to large amounts of equity or debt financing. Consequently, they will be unable to invest heavily in new capital equipment. The subsequent transition from government to private sector markets can succeed only if it makes minimal capital demands on the young enterprise. In service and retail businesses the transition may be relatively painless, but manufacturing firms are likely to experience a severe capital shortage unless a simple precaution is taken: an 8(a) subcontract should not be made to a manufacturing concern for a product that has little or no private sector demand. Should this precaution be ignored, some manufacturing firms are certain to face the choice of clinging to a specific government requirement as a matter of survival after it is reopened for competitive bidding or scrapping otherwise useless capital equipment and buying wholly different equipment suitable for producing private sector goods. Neither, obviously, is a very attractive alternative.27

The second factor, of more general application, is the lack of incentive for any 8(a) subcontractor to develop a marketing system and private clientele. With the many production and financial problems that beset a new enterprise, marketing may be downgraded if the government guarantees three years of substantial demand. When the government contract finally expires, the enterprise may have developed few private customers and, moreover, may lack the marketing system requisite to build a private clientele fast enough to survive this transition. Although the SBA presently exhorts its 8(a) subcontractors to cultivate their own clientele, a close check should be kept on the subcontractors in their critical fourth year to determine whether marketing has been properly developed. If, as seems likely, marketing proves deficient and some enterprises fail because of an abrupt decline in sales volume, one possible solution would be to amend the SBA's regulations to require that government contracts to an 8(a) firm comprise no more than prescribed and declining percentages of the firm's total sales. For example, a firm might be required to show that at least twenty per cent of total sales in its first year were to the private sector as a condition for renewal of the subcontract for the second year. Likewise, the subcontractor could be required to show that at least thirty-five per cent of total sales accrued to the private sector in the second year in order to qualify for the third. While these conditions are harsh, they would ensure that firms do not emerge from their incubation periods with fatally inadequate marketing systems.

A different sort of problem—solely of administrative origin—stems

27. Admittedly, there are few minority-owned manufacturing concerns at this time. But these problems will arise as efforts to encourage minority manufacturing meet success.
from the possibility that subcontract prices that are inadvertently set too high may provide an 8(a) firm with excess profits that would enable it to underbid competitors on other commercial accounts. Although there is some evidence of such error, it is apparently not widespread. Should the problem increase and administrative controls fail, limited competitive bidding among certified contractors should return profits to more reasonable levels.

II. STATUTORY AND CONSTITUTIONAL CHALLENGES TO THE 8(a) PROGRAM

Owners of small businesses protesting the withdrawal of government contracts from competitive bidding for eventual 8(a) subcontracting have instituted suit against the SBA challenging the validity of the Program on the following three grounds:

1. that the 8(a) Program is subject to the government's general procurement procedures that require the SBA to submit 8(a) subcontracts for unrestrained competitive bidding;
2. that the SBA is not authorized by section 8(a) of the Small Business Act or otherwise to promulgate the regulations establishing a subcontracting program to aid businesses owned by "socially or economically disadvantaged persons";
3. that the eligibility requirements for the 8(a) Program are based upon race or ethnic origin and therefore invidiously discriminate against whites in violation of their right to receive equal protection of the laws pursuant to the fifth amendment.

A. Noncompetitive Letting of Subcontracts

A fundamental objective of the 8(a) Program is to assist non-competitive businesses to become competitive. The SBA does not submit the 8(a) subcontracts for competitive bidding, for to do so would obviously channel the subcontracts to those firms already in a strong competitive position. Instead, the SBA certifies small businesses as qualified 8(a) firms and then negotiates subcontracts with those firms on a noncompetitive basis. This negotiated subcontracting procedure has been challenged by small businesses on the grounds that the federal competitive bidding statutes require the

--
29. See note 5 supra.
30. 13 C.F.R. § 124.8-1(b) (1972), set out in note 23 supra.
32. The two provisions governing procurement are 10 U.S.C. § 2304(a) (1976) (military) and 41 U.S.C. § 252(a) (1970) (civilian). They require that contracting be accomplished through formal advertising and competitive bidding unless it falls within one of nearly 20 exceptions.
SBA to open 8(a) subcontracting to competitive bidding even among small businesses that do not otherwise qualify for the 8(a) Program.\textsuperscript{33}

To support this contention, it is possible to muster impressive congressional declarations of a federal policy that procurement procedures should “promote economy, efficiency, and effectiveness . . . by . . . utilizing competitive bidding to the maximum extent practicable . . . .”\textsuperscript{34} Nevertheless, Congress has often devalued this policy of efficiency in favor of utilizing federal procurement procedures to achieve overriding social policy goals.\textsuperscript{35} The SBA itself was established not to promote the efficiency-related goals of federal contracting but in spite of them; the declaration of policy in the Small Business Act makes it clear that the goals of preservation and expansion of the American economy prompted Congress to forgo unlimited competition in government contracting in order to ensure that small businesses receive a “fair proportion” of government contracts.\textsuperscript{36} Even the competitive bidding statutes enumerate nearly twenty exceptions to unlimited competition,\textsuperscript{37} which accounted for the major portion of federal procurement in fiscal 1971.\textsuperscript{38} Significantly, the federal government in the Philadelphia Plan utilized its contracting procedures to implement the decidedly social goal of increasing the number of Philadelphia-area minority tradesmen.\textsuperscript{39}

Congress can and does override efficiency-oriented goals in order to effectuate other policies, but the question remains whether Congress intended to relieve 8(a) subcontracting from the competitive bidding requirements of the federal procurement statutes. In support of its current procedures, the SBA can assert that section 8(a) provides independent authority for the negotiated noncompetitive subcontracting since it empowers the SBA “to enter into contracts with the United States Government and any department, agency, or
officer thereof...[and] to arrange for the performance of such contracts by negotiating or otherwise letting subcontracts..."\(^{40}\)
Contrarily, those who object to the 8(a) Program cite the fact that as section 714(b) of the Defense Production Act of 1950\(^{41}\) evolved to become section 8(a) of the Small Business Act, Congress deleted a phrase providing that the subcontracting power may be exercised "[w]ithout regard to any other provision of law except the regulations prescribed under section 201 of the First War Powers Act, as amended."\(^{42}\) It is argued that this deletion manifests a congressional intention that subsequent utilization of the section 8(a) subcontracting power be subject to "other provisions of law," more particularly those requiring competitive bidding.\(^{43}\) However, this argument ignores the fact that the subcontracting provision was significantly rewritten at the same time as the deletion in a manner that indicates no substantial change of intent. While the predecessor statute authorized the agency "to arrange for the performance of such contracts by letting subcontracts,"\(^{44}\) the wording was revised to authorize the agency "to arrange for the performance of such contracts by negotiating or otherwise letting subcontracts."\(^{45}\) Since this new language suggests that the SBA's subcontracting power is exempt from normal competitive bidding requirements, a more plausible explanation for the deletion of the explicit exemption contained in section 714(b) is that Congress found that the substituted wording was appropriate to reflect the shift from the defense-related aims of the Defense Production Act to the peacetime purposes of the newborn SBA.

Further support for the SBA's position is derived from an examination of the entire Small Business Act. If 8(a) subcontracting required competitive bidding among small businesses generally, it would have precisely the same effect as another of the SBA's powers: the small business "set-aside," which withdraws federal contracts from unlimited competitive bidding and offers them for bidding


\(^{44}\) Defense Production Act Amendments of 1951, ch. 275, § 110(a), 65 Stat. 140 (emphasis added).

\(^{45}\) Small Business Act of 1953, ch. 282, § 207(d), 67 Stat. 236 (emphasis added).
only among small businesses. It is doubtful that Congress meant section 8(a) to be construed in a manner that renders it superfluous.

A final challenge to the SBA's system of subcontracting is that "negotiation" as used in federal contracting is a term of art requiring competition "to the maximum practicable extent." Initially, this argument ignores the statutory wording that authorizes SBA to subcontract by "negotiating or otherwise letting." The fact that Congress eschewed using the single word "negotiating" and added the words "or otherwise letting" is strong evidence that it did not intend that 8(a) subcontracting be confined to "negotiation" procedures. Even if we were to assume that "negotiation" procedures were applicable, a court should not find it "practicable" to allow well-established small businesses to compete for subcontracts in the context of a program designed to help firms that are not yet competitive if the 8(a) Program is otherwise valid.

B. Authority for the 8(a) Program

A second challenge to the 8(a) Program is that section 8(a) of the Small Business Act does not provide the SBA with adequate statutory authority to promulgate regulations establishing a program designed to assist small businesses owned by "socially or economically disadvantaged" persons. Two lines of reasoning can be offered in support of the 8(a) Program. The most obvious justification is simply to rely on the express wording of the 8(a) statute. A more involved route is based upon executive orders and congressional ratification.

The first step in determining whether the 8(a) statute alone is authority for the 8(a) Program is to consider the precise wording of the statute. While section 8(a) contains no mention of disadvantaged persons, that provision makes it the SBA's "duty" to exercise the 8(a) contracting-subcontracting power "whenever it determines such action is necessary." Read literally, this language gives the SBA broad discretion. Thus, as one court stressed, the language of the statute does not prevent the SBA from singling out for noncompetitive subcontracting only those small businesses owned by disadvantaged persons. However, it has been contended that the legislative history of section 8(a) reveals a congressional intention that the SBA utilize the 8(a) power only in emergency situations. In particular,

those challenging the 8(a) Program have relied upon two reports\textsuperscript{51} that accompanied the Small Business Acts of 1953 and 1958, respectively. Although one report clearly recognized that the SBA as an agency could provide substantial services during periods of emergency,\textsuperscript{52} neither report, by its terms, purported to limit the SBA's 8(a) power to emergency situations. An initial interpretation by the SBA suggesting that the use of section 8(a) be limited to periods of emergency was qualified by a recognition that the 8(a) power was being held "on a standby basis and will be activated as required to protect the interests of small business."\textsuperscript{53} Rather than precluding future use of section 8(a) in nonemergency situations, this language specifically acknowledges that the SBA intended to use section 8(a) in nonemergencies when it determined that such use would promote the interests of small business. Indeed, in the years between 1958 and 1968 the 8(a) power went unexercised, and the SBA drew a sharp rebuke from Congress in 1960 for so narrowly construing its power.\textsuperscript{54} Finally, a program designed "to assist small concerns owned by disadvantaged persons to become self-sufficient, viable businesses capable of competing effectively in the marketplace"\textsuperscript{55} seems to be consistent with the declared congressional policy that encouraging and developing the "actual and potential capacity of small business" is necessary to preserve "full and free competition."\textsuperscript{56}

Although reliance solely upon the wording and history of the statute may satisfy many tribunals, others may feel that the 8(a) Program is "an attempt at legislation and usurps the power residing solely in Congress."\textsuperscript{57} For these courts, it will be necessary to unravel the SBA's second line of authority, which involves several executive orders and subsequent congressional actions that arguably amount to a ratification of SBA's actions. Perhaps such added evidence of authority should be required when there exists a substantial possibility that the administrative agency's actions balance competing policies in a manner different than would Congress were it to face the question.

\textsuperscript{54} H.R. Rep. No. 2235, 86th Cong., 2d Sess. 81 (1960): It is the conclusion of the [House Select Committee on Small Business] that the interpretation of [section 8(a)] by SBA is too narrow and limited; that it was the intention of Congress that it would be used whenever necessary to assure that small business receives its fair share of Government procurement and not just in a "national emergency."
\textsuperscript{55} 13 C.F.R. § 124.8-1(b) (1972), set out in note 23 \textit{supra}.
Accepting as an initial matter that the class of disadvantaged persons—who are the intended beneficiaries of the 8(a) Program—is largely populated by members of racial and ethnic minority groups, recent executive orders aimed at increasing minority businesses may lend support to the 8(a) Program. The SBA has asserted that these executive orders, numbers 11458, 11518, and 11625, authorize the 8(a) Program. Some doubt, however, is cast upon the validity of this assertion by the fact that the Program appears to have been operated on a limited basis before any of these orders were issued, although Executive Orders 11458 and 11518 did precede the amendment by the SBA of its 8(a) regulations. A second problem is that while both of these orders exhibit a presidential concern for small businesses owned by minority group members, and portions of 11518 direct the SBA to be sensitive to the interests of those businesses, neither directs the establishment of the 8(a) Program. The third executive order, number 11625, however, supersedes 11458.

58. See text accompanying notes 94-95 infra.

59. This order, entitled “Prescribing Arrangements for Developing and Coordinating a National Program for Minority Enterprise,” was issued on March 5, 1969 (34 Fed. Reg. 4937) and has been superseded by Exec. Order No. 11625, 3 C.F.R. 218 (Comp. 1971).

60. 3 C.F.R. 530 (1972). Entitled “Providing for the Increased Representation of the Interests of Small Business Concerns before Departments and Agencies of the United States Government,” the order directs the SBA to act as a spokesman for the small business community before other agencies. Section 4 provides that “[i]n performing the responsibilities and duties placed on it by this order, the Small Business Administration shall particularly consider the needs and interests of minority-owned small business concerns and of members of minority groups seeking entry into the business community.” 3 C.F.R. 531 (1972).

61. 3 C.F.R. 218 (Comp. 1971). Issued in October of 1971, the order was entitled “Prescribing Additional Arrangements for Developing and Coordinating a National Program for Minority Business Enterprise.”


Two court of appeals decisions have stated that executive orders in the area of federal contracting have “the force and effect of law” when proceeding within a delegation from Congress. Farmer v. Philadelphia Elec. Co., 329 F.2d 3, 7 (3d Cir. 1964); Farkas v. Texas Instrument Co., 375 F.2d 623, 629 & n.1 (5th Cir. 1967). However, this statement has been dismissed as irrelevant in the case where there is no specific statutory authorization. Contractors Assn. v. Secretary of Labor, 442 F.2d 159, 167 (3rd Cir.), cert. denied, 404 U.S. 854 (1971). In this situation, Contractors Association employed the analysis suggested by Justice Jackson in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-38 (1952) (concurring opinion). Given the history of section 8(a) (text accompanying notes 48-56 supra) and the congressional response to the 8(a) Program (text accompanying notes 67-73 infra), it is possible that this analysis would uphold the Program as a valid use of executive authority even if section 8(a) does not authorize the Program. See 442 F.2d at 166-71.

63. It appears from one case that the 8(a) Program was operated in 1968, prior to the earliest Executive Order, No. 11458, which was issued in 1969. Ray Baillie Trash Hauling, Inc. v. Kleppe, 384 F. Supp. 194, 198 (S.D. Fla. 1971), rev’d., No. 72-1163 (5th Cir., Jan. 5, 1975); note 59 supra. However, the 8(a) regulations were implemented after Executive Orders 11458 and 11518, in November 1970. 35 Fed. Reg. 17833; notes 59-60 supra.

64. See note 60 supra.
and orders all federal agencies to "continue all current efforts to foster and promote minority business enterprises."Executive Order 11625 further defines a minority business enterprise as one "owned or controlled by one or more socially or economically disadvantaged persons." Significantly, at the time of this order's issuance the 8(a) Program appears to have been the sole federal program for businesses owned by "socially or economically disadvantaged persons." Thus, the 8(a) Program was not established at the direct order of the President, but it apparently does proceed at his express command. Insofar as a court recognizes the power of the President as Chief Executive to control the discretion of his administrators in the execution of their statutory powers, these executive orders do contribute to the authority for the 8(a) Program.

Congress has also left little doubt that it too supports the manner in which the SBA has used its 8(a) power. The 8(a) Program's operation has been explained in detail in a number of House and Senate Committee hearings, two of which were primarily devoted to reviewing the 8(a) Program. When Congress has had ample opportunity to revise a regulation through amendment or repeal of the authorizing statute, the refusal to do so is at least some evidence of congressional approval of the administrative interpretation. Moreover, having learned of the 8(a) Program, Congress authorized the expenditure of 8 and 12 million dollars in fiscal 1972 and fiscal 1973, respectively, for the purpose of supplying the aggregate cost

65. 3 C.F.R. 216 (Comp. 1971).
66. 3 C.F.R. 217 (Comp. 1971).
68. 1971 Hearings, supra note 67; 1970 Hearings, supra note 67.
differential between prime contract prices and 8(a) subcontract prices. Congressional appropriation has recently been accepted as evidence of authority in such diverse instances as the Vietnam War and the Philadelphia Plan. In this manner, it is submitted, Congress has ratified the 8(a) Program's focus on "socially or economically disadvantaged persons."

C. Equal Protection

The fundamental legal obstacle to developing programs of remedial aid for racial or ethnic minorities has been the courts' inability to devise a decorous retreat from the stringent doctrines developed to prohibit discrimination against such minorities. While the Supreme Court has never adopted the view expressed by the elder Justice Harlan, in his dissent in Plessy v. Ferguson, that "[o]ur Constitution is color-blind . . . ." or held that racial discriminations are unconstitutional per se, racial classification has evoked the most demanding standards of judicial review imposed by the Court. It is in this context that the 8(a) Program and its eligibility standard of "socially or economically disadvantaged persons" must be considered.

There are two possible grounds for claiming that the 8(a) Program embodies a racial classification. The first is that the regulations governing the Program are discriminatory as written. Alter-


74. 163 U.S. 537, 559 (1895).


76. In reviewing classifications based upon race or ethnic origin, the Court has required that the state show a compelling governmental interest, Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

natively, it may be alleged that while the regulation is superficially neutral with respect to race, the SBA has discriminatorily applied the standard. Ultimately, however, resolution of either ground will turn upon the judiciary's sophistication in dealing with the emerging legal term of art that is the basis of the 8(a) eligibility classification: "socially or economically disadvantaged persons."

The question whether the 8(a) eligibility regulation is discriminatory on its face arises from the extraordinary specification of ethnic and racial minority groups in that regulation. After establishing that the eligibility criterion is "social or economic disadvantage" the regulation continues, "This category often includes, but is not restricted to, Black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos and Aleuts." Clearly, this language does not literally mandate racial or ethnic classification. Indeed, the express mention that the "disadvantaged" category is not restricted to the named minority groups is a disclaimer of discrimination on the face of the regulation. It might be suggested that the mere naming of minority groups within the regulation is so conducive to discriminatory administration that on this ground alone the regulation should be treated as discriminatory on its face. However, in addition to the absence of authority for such a position, sound historical reasons exist for the enumeration of specific minority groups. While most SBA financing is designed to aid small businesses considered marginal by other lending institutions, its credit standards have traditionally been too high for minority businessmen. Consequently, minority communities became disenchanted with the SBA and were convinced that it was not a viable source for business assistance. Specific mention of certain minorities in the 8(a) eligibility regulation might have been motivated by a belief that affirmative steps were necessary to convince members of these minorities that the SBA has finally developed a program capable of aiding the relatively high risk enterprises that they are likely to start. Indeed, one authoritative figure in the SBA intimated just such a motive. Thus, as two courts have held, there is no tenable ground to hold the regulation discriminatory on its face.

A remaining issue is whether a classification defined in terms of "social or economic disadvantage" is itself vulnerable to constitu-

77. 13 C.F.R. § 124.3-1(c) (1972), set out in note 23 supra.
78. T. Cross, supra note 1, at 97-102.
79. Knebel, Legal Basis for SBA’s Minority Enterprise Program, 30 Fed. B.J. 270, 275-76 (1971). (Mr. Knebel is General Counsel of the SBA.) See also Kaplan, supra note 76, at 386-87, which suggests that advertising directed at blacks could achieve the goal of increased black employment without discriminating against whites in hiring.
tional challenge. It seems clear that absent a racially discriminatory application of such a standard, it is a social welfare classification easily sustained under relaxed standards of judicial review.\textsuperscript{81}

The second question is whether the regulation, though literally neutral, is discriminatorily applied by the SBA. Before reaching the merits of this allegation, however, a court must first decide whether a plaintiff has standing to argue discriminatory application. While recent Supreme Court cases have relaxed traditional standing requirements, a remaining prerequisite for standing is that the plaintiff allege and demonstrate an “injury in fact” resulting from the challenged agency action.\textsuperscript{82} This would presumably necessitate a showing that the plaintiff firm is owned by “socially or economically disadvantaged persons” and that it would have benefited from the 8(a) Program had it been properly administered. Because only those firms that apply for 8(a) benefits can receive them, the plaintiff firm should also be required to apply for an 8(a) subcontract before alleging that the SBA is discriminating against it. Two courts that have considered this standing issue have denied standing to plaintiff firms that failed to fulfill these requirements.\textsuperscript{83}

Once a court is satisfied that a plaintiff has standing to raise the claim that the SBA has racially discriminated in applying its regulations, the merits of that allegation are controlled by the doctrines that have developed from the historic case of \textit{Yick Wo v. Hopkins}.\textsuperscript{84} It was in \textit{Yick Wo} that the Supreme Court first recognized the proposition that a neutrally worded statute may be discriminatorily applied resulting in a constitutional violation. From \textit{Yick Wo} has arisen a long line of Supreme Court cases\textsuperscript{85} firmly establishing and refining the use of statistics to prove discrimination when, as in the 8(a) litigation, no alternative proof of discrimination is offered by complainants. The standards for such proof have been understandably very demanding. If a plaintiff can show, however, that not a single member of a group putatively entitled to benefit under a statute or regulation did in fact so benefit, then he may utilize this total exclusion to establish a prima facie case of discrimination. The burden of going forward is thus shifted to the defendant, who must produce evidence showing that prohibited criteria were not em-

\textsuperscript{81} E.g., Dandridge v. Williams, 397 U.S. 471 (1970).
\textsuperscript{83} Fortec Constructors v. Kleppe, 41 U.S.L.W. 2195 (D.D.C., Oct. 1, 1972); Space Servs., Inc. v. Laird, Civil No. 15,170 (D. Conn., Aug. 18, 1972). Note that application for 8(a) benefits may be necessary only for the purpose of challenging the 8(a) regulations on equal protection grounds. Thus, in \textit{Fortec Constructors} the court held that a nonapplicant could challenge the SBA’s statutorily authority for the Program.
\textsuperscript{84} 118 U.S. 356 (1886).
ployed. However, because unofficial data establishes that there has not been a total exclusion of disadvantaged whites, it is doubtful that any S(a) plaintiff could successfully utilize this argument.

When there is neither total exclusion nor other suspicious factors, a court may test plaintiff's allegations by an alternative method. The plaintiff must first characterize the existence of a class theoretically covered by the statute or regulation if the law does not purport to be applicable to the entire population. The racial proportions of the theoretical class must then be proved or estimated. Next, the plaintiff must document the racial proportions of the individuals actually affected by the law and, finally, these two proportions—the theoretical and the actual—must be compared to see if the deviation is sufficient to establish a prima facie case of discrimination. A case that illustrates each step to perfection is Cassel v. Texas, where the Court rejected a black defendant's claim that because the black proportion of grand jurors was less than the black proportion of the county's population, Texas had discriminated against blacks in the selection of grand jurors. The plurality opinion of Justice Reed established the class theoretically capable of serving on juries, defined by statute to be those literate citizen freeholders qualified to vote. Then Justice Reed found the black component of that theoretical class to be 6.5 per cent, notwithstanding the fact that the general population of Dallas County was 15.5 per cent black. Finally, Justice Reed found the actual percentage of black jurors to be 6.7 per cent. A comparison of the actual representation of blacks on grand juries with the theoretical proportion could not establish a prima facie case.

The Cassel approach provides an analytic framework that can be used to test claims that the SBA has discriminatorily applied its S(a) regulations. As one court has observed, the fact that the racial

---

87. See note 98 infra.
88. Statistics showing a smaller percentage of black jurors than blacks in the population, when combined with evidence that jury commissioners knew the racial identities of potential jurors, has been held to make a prima facie case of discrimination. Alexander v. Louisiana, 405 U.S. 625 (1972); White v. Georgia, 385 U.S. 545 (1967).
90. The plurality opinion of Justice Reed, in which three other justices concurred, clearly stated that disparity between the racial proportions of the population and the class of potential jurors did not prove discrimination, 339 U.S. at 284-86. Justice Frankfurter, with whom two justices concurred, implied this when he stated that a state could define qualifications for grand jury service that were relevant to performance, 339 U.S. at 291. Both Justice Reed and Justice Frankfurter went on to reverse the judgment on other grounds.
91. 339 U.S. at 284 n.4.
94. Responding to plaintiff's contention that the SBA is discriminatory in the ad-
proportion of 8(a) subcontractors differs significantly from that of the population at large may not be sufficient to establish a prima facie case of discrimination because the theoretical class eligible for 8(a) is not the population at large but a subclass within it, the disadvantaged, that has markedly different racial characteristics. Indeed, there can be little doubt that the class of people most disadvantaged with respect to entry into the business world contains many members of minority races. The relevant question is whether the individual's background demonstrates a consistent deprivation of the opportunity to acquire the prerequisites of business success: education, related employment experience, and access to financing. Such deprivations are, of course, not limited to minority groups, but are shared by other segments of society. For example, the SBA has asserted that white individuals in Appalachia qualify as disadvantaged. But, in the final analysis, it would not seem unreasonable to find that a high percentage of those who suffer substantial disadvantages in the business sphere are members of minority racial or ethnic groups.

The final consideration in characterizing the racial proportions of the theoretical class is that only those firms that apply to the SBA under the 8(a) Program can conceivably receive 8(a) subcontracts. Whereas officials such as jury commissioners must choose jurymen from some pre-existing pool of names, such as the voter registration rolls, the SBA has no comparable list of firms theoretically eligible for 8(a) benefits and must rely upon those who apply to the Program. Illustratively, assume that a court determined that approximately twenty-five per cent of the disadvantaged were American Indians, and, therefore, ideally twenty-five per cent of the 8(a) subcontractors

ministration of 8(a), as evidenced by a letter from an SBA attorney advising that 1381 of the 1708 subcontracts were awarded to firms owned by blacks, 33 to Asians, 16 to whites, 15 to Puerto Ricans, 207 to Spanish-Americans, and 56 to American Indians, Judge Newman offered the following:

Plaintiff contends these figures establish at least a prima facie case of discrimination. While such figures would serve that purpose in a claim of discrimination in jury selection, where all adults are eligible, and perhaps in some employment cases, where it can be assumed a cross-section of the population was eligible, it is highly doubtful whether the figures will suffice here to establish discrimination in a specialized program of limited eligibility. This program is open only to small concerns owned by disadvantaged persons. There is no basis for assuming that the ratio of such firms owned by Caucasians and, more significantly, the percentage of those who apply for this program, are anything like the proportion of Caucasians in the population generally. In a case like this, a prima facie showing of discrimination would require some evidence that eligible Caucasian firms who applied for this special program were being accepted and awarded subcontracts at a significantly lower rate than firms owned by non-Caucasians.


should also be American Indians. Assume further that so few Indian-owned firms applied to 8(a) that even if the SBA had accepted every American Indian applicant, they would still comprise only ten per cent of the beneficiaries of the 8(a) Program. It could hardly be argued that the theoretical class is all disadvantaged persons since this characterization would result in a finding that there is a wide disparity between the theoretical and actual percentages of American Indians benefited by 8(a) and that a prima facie case of discrimination against Indians has therefore been established, a nonsensical result in this situation. Since the SBA can grant benefits only to firms that apply for aid, the theoretical class must be composed of only those firms, minority- and nonminority-owned, that apply for aid. Assuming that tightly knit minority communities tend readily to transmit information, it is likely that a higher proportion of disadvantaged minority businessmen have learned of and applied to the relatively new 8(a) Program than disadvantaged nonminorities.

Once the theoretical percentage of racial subclasses has been determined within the class eligible and applying for benefits, there is yet a further consideration. Perhaps because statistics at best demonstrate a tendency that may or may not reflect intentional discrimination, the Supreme Court has tolerated substantial deviations between the theoretical and actual classes. In one instance, the theoretical percentage of blacks eligible to serve as grand jurors was roughly double that of the actual percentage of blacks chosen and yet there was no finding of prima facie discrimination. 96 There is no reason to believe that more demanding standards would be imposed in the case of a statistical showing of discrimination in favor of blacks and other minority groups. Indeed, while the courts have not accepted a relaxed standard of review for “benign discrimination,” 97 it is possible that they might more readily tolerate statistical deviation favoring minorities.

For all of these reasons, it is clear that the infrequent granting of 8(a) benefits to whites under a classification of “socially and economically disadvantaged” would not in itself lead to a finding of prima facie discrimination, even though whites are a majority of the population. Assume, for example, that whites comprise only ten per cent of the theoretical class entitled to benefits—that is, those who are not only disadvantaged but who also apply for 8(a) benefits. Given this assumption, the granting of ten per cent of 8(a) subcontracts to

96. Swain v. Alabama, 380 U.S. 202, 205-09 (1965). The theoretical class was 26 per cent black; blacks constituted 10 to 15 per cent of the grand and petit jury panels. It is possible to read the Court's opinion as concentrating on the absolute percentage difference of about 10 per cent rather than the relative difference between 26 and 15 per cent, 380 U.S. at 208-09.

97. See note 76 supra.
whites would be perfectly appropriate, and a court might well toler­
ate the deviation existing if the subclass of whites receiving benefits
were only five per cent. But, holding the actual percentage at five
per cent, if we assume the theoretical class of eligible white appli­
cants is thirty per cent, the deviation would then suggest a prima
facie case of discrimination.

It is readily observable that a court's estimation of the theoret­
ical percentage of eligible white applicants may be dispositive of
the issue whether prima facie discrimination has been established.
The Supreme Court's willingness to tolerate substantial deviation
may prove of little help to the SBA in light of unofficial figures re­
garding administration of the program. If, as appears, approximat­
y one per cent of 8(a) subcontracts have actually been awarded to
predominantly white-owned firms, then a court must conclude
whether virtually all of the disadvantaged applicants to 8(a) were
minority group members or that a prima facie case of discrimination
has been established.

To this point, the analysis has considered only whether a prima
facie case of discrimination can be established against the SBA.
Assuming that plaintiff succeeds in establishing such a case, the SBA
can still present proof that nonminority applicants were not rejected
on racial or ethnic grounds and thus overcome the prima facie case.
If the SBA's evidence of nondiscrimination is insufficient, a finding
of discrimination would not necessarily vitiate the 8(a) Program.
Rather, it would suggest only that administration resulting in merely
one per cent of benefits to whites is not justifiable. But significantly,
the analysis further suggests that if five to ten per cent of subcontracts
were awarded to whites, the Program might be immune from a statis­
tical demonstration of discrimination.

Courts have generally not utilized a statistical discrimination
analysis to evaluate the discrimination charges in the 8(a) litigation.
A number of explanations can be offered for this failure. Statistics
regarding the beneficiaries of the 8(a) Program may not always have
been available or may not have been presented by the litigants. In
addition, courts may be unwilling to weigh and measure the racial
proportions of the beneficiaries of the 8(a) Program for fear that it
will open the door to an attack on any federal activity that dispro­
portionately benefits any racial or ethnic group, raising the spectre
of quotas. Third, it may be difficult to define the theoretical class
of whites entitled to benefits, absent a relatively precise definition of
what the class of "socially or economically disadvantaged persons"

98. In one area, whites received 3 of 225 8(a) subcontracts. Ray Baillie Trash Haul­
99. In one case the issue of discriminatory granting of benefits apparently was not
embraces; yet, to require the SBA to delineate detailed selection criteria and the proportionate weight given to these criteria would act as a significant constraint on the SBA’s discretion. While these explanations merit attention, it is submitted that the discrimination issue cannot be adequately resolved without a statistical analysis. To focus only on the social welfare aspect of the classification on its face, and to condone it on that basis, ignores the possibility of discriminatory application. On the other hand, to dismiss the benefits granted to white applicants as tokenism and hold the classification an invidious racial discrimination without examining the racial percentages in the theoretical class entitled to benefits is unwarranted both in terms of constitutional theory and public policy.

It might be questioned whether discriminatory administration of the 8(a) Program—favoring minorities while ignoring disadvantaged persons who are not members of minority groups—could be justified on the grounds that it is a benign, remedial discrimination that has a rational basis or, alternatively, that such racial-ethnic discrimination is justified by a compelling state interest. Even if a court were faced with a remedial racial classification expressly and clearly established by Congress, it is uncertain whether such arguments could prevail; but because of several statutory barriers the merits of these constitutional issues should not be reached in the context of 8(a) litigation.

Perhaps an insurmountable difficulty in attempting to justify a remedial racial classification in the 8(a) Program is that the SBA’s own 8(a) regulations declare that eligibility in the Program is not limited to minority racial or ethnic groups. It is well settled that an agency is bound by its own regulations so long as they remain in effect. Thus, to administer the Program in a manner inconsistent with the eligibility regulation is to act without authority. The constitutional issue should not be reached unless a court finds no conflict between the SBA’s actions and its own 8(a) eligibility regulation.

A second difficulty arises from the enactment by Congress of leg-

Sept. 21, 1971). In another the issue was raised, but the judge said that insufficient evidence was presented. See note 94 supra. Finally, in a third case the lower court leaped from the fact that only one per cent of the Program’s beneficiaries were whites to the conclusion that there was discrimination and that any white participation was mere tokenism. Ray Baillie Trash Hauling, Inc. v. Kleppe, 354 F. Supp. 194, 201 (S.D. Fla. 1971), rev’d., No. 72-1163 (5th Cir., Jan. 5, 1973).

100. See note 76 supra.

101. Analogous arguments have been examined in the context of preferential admission to college for minority groups and have been found subject to severe limitations. O’Neill, supra note 76, at 705-18.

islation for another SBA program which sheds substantial light on the congressional interpretation of the meaning of "disadvantaged persons." Congress recently passed the Small Business Investment Act Amendments of 1972,103 which provide statutory benefits for a small business investment company "[whose] investments will be made solely in small business concerns which will contribute to a well-balanced national economy by facilitating ownership in such concerns by persons whose participation in the free enterprise system is hampered because of social or economic disadvantages . . . ."104 Although the statute offers no definition of "persons . . . whose participation in the free enterprise system is hampered by social or economic disadvantages," Congressman Stephens explained to the House of Representatives his subcommittee's interpretation that "the undertaking should extend to all disadvantaged persons, not merely to those who are handicapped because they are members of minority races."105 Likewise, Senator Sparkman, chairman of the Senate Committee on Banking, Housing, and Urban Affairs, explained to the Senate that this program would give statutory recognition to companies that "had been established for the sole purpose of assisting members of minority races and other persons whose participation in our free-enterprise economy has been hampered by social or economic disadvantages."106 The House Report explaining the legislation further supports the conclusion that the beneficiaries of the new program are to be "concerns owned by socially or economically disadvantaged persons without regard to race."107 It is important to remember that this legislative history demonstrates congressional intention and interpretation of "social or economic disadvantage" only as those words are used in the Small Business Investment Act Amendments of 1972 and not in the 8(a) eligibility regulation. Nevertheless, this history is persuasive as to Congress' prior understanding of the meaning of "social or economic disadvantage," and may even represent a congressional view as to how that phrase should henceforth be interpreted. Thus, it may be difficult for the SBA to sustain a racial classification without seriously weakening its statutory authority, insofar as the SBA relies on a congressional ratification theory.108 In addition, even if the SBA could justify a program granting benefits to disadvantaged persons solely by virtue of its discretionary statutory authority, it might be questioned

107. H.R. Rep. No. 92-1428, 92d Cong., 2d Sess. 6 (1972). The House Committee also deleted the phrase "minority enterprise" from the bill. Id. at 4.
108. See text accompanying notes 67-73 supra.
whether the statutory authority could go so far as to permit the discretionary establishment of a racial classification.\footnote{109}

Finally, the impact of section 601\footnote{110} of the 1964 Civil Rights Act should be considered. It provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

But however clear the language of the 1964 Civil Rights Act may appear, the courts have refused to apply the terms literally.\footnote{111} When remedial preferences were at issue, one court justified a program by claiming that the congressional intent was not to freeze the status quo.\footnote{112} Nevertheless, the cumulative effect of the three above-mentioned difficulties suggests that the constitutional issue of reverse discrimination should not be reached in the 8(a) litigation.

D. Policy Considerations

Having delineated the legal issues in the 8(a) litigation, there remain to be explored certain basic policy considerations that may affect the ultimate resolution of the 8(a) litigation. Outstanding among these considerations is the enormous social benefit that could result from the establishment of a viable minority business community and the significant contribution that the 8(a) Program can make toward that goal. Sensitivity to this concern alone should dictate a judicial reluctance to impede the minority enterprise effort.

Another significant factor in the decision-making process may well be the court's understanding of the role that 8(a)’s eligibility standard of social or economic disadvantage can play in solving the problems of minority groups. A principal drawback to granting remedial treatment to minorities has been the reverse discrimination-equal protection problem. As the nation has become increasingly sensitive to the problems of minority groups and more willing to provide them with special benefits, there has not been a corresponding shift in legal doctrine to accommodate benign classifications by scrutinizing them under less stringent standards than those applied to discrimination against racial and ethnic minorities.\footnote{113}

\footnote{109. See text accompanying notes 48-54 supra.}
\footnote{110. 42 U.S.C. § 2000d (1970).}
\footnote{112. Contractors Assn. v. Secretary of Labor, 442 F.2d 159, 173 (3d Cir.), cert. denied, 404 U.S. 854 (1971).}
\footnote{113. See note 76 supra.
Thus, the stage has been set for the appearance of programs that define their beneficiaries in terms of a class largely, but not exclusively, composed of minority group members: "socially or economically disadvantaged persons." Professor Paul Freund early recognized this stratagem when in 1964 he stated:

A head-on clash of principle can be averted, in most cases wisely in my judgement, by framing programs of aid in terms of reaching the most disadvantaged segment of the community, whether economically, educationally, or politically. And if these happen to be in fact predominantly Negroes, no principle of race-creed classification has been violated.\(^{114}\)

The alternatives to accepting such classifications are truly uninviting. As Professor Freund noted, to single out racial and ethnic groups for special treatment is to precipitate a "head-on clash of principle." This would require new constitutional doctrines applying a relaxed standard of review to those discriminations that benefit minorities. Although this possibility has been much discussed, commentators have agreed that this approach has substantial dangers.\(^{115}\) The other alternative is to surrender entirely the idea of remedial treatment for minorities in recognition of the fact that case law developed in a different context requires such strict scrutiny of racial preferences that any remedial treatment of minorities is unlikely to be sustained.\(^{116}\) "Disadvantaged" classifications avoid both these alternatives but have their own costs: they appear to manipulate legal doctrine to achieve a specific social goal. The severity of the alternatives, however, may force many to accept the validity of disadvantaged classifications.

A third consideration that may affect the tenor of the 8(a) litigation is Congress' recent incorporation of the concept of social or economic disadvantage in federal law. Before the passage of the Small Business Investment Act Amendments of 1972 there was room for believing that Congress would not accept the concept of a disadvantaged class. There can be little question now that Congress has expressly endorsed that concept. Moreover, there are indications that Congress is willing to defer to the SBA's standards in defining and implementing the classification. As Congressman Stephens reported to the House, "[The Act] does not contain specific language defining what is meant by 'disadvantaged persons.' The committee


\(^{115}\) See articles cited in note 76 supra.

\(^{116}\) In recent years the Court has sustained only one use of a racial or ethnic classification, the exclusion of Japanese-Americans from the West Coast during World War II. *Korematsu v. United States*, 323 U.S. 214 (1944). The wartime circumstances of *Korematsu* make it shaky precedent. See, e.g., Rostow, *Japanese-American Cases—A Disaster*, 54 YALE L.J. 489 (1945).
believes it is sound policy to leave such details to administrative regulation . . . .”

Another consideration is the courts' estimation of the magnitude of the hardships that the 8(a) Program might cause nonminority government contractors. In assessing this burden it is significant that total 8(a) subcontracting amounts to a fraction of one per cent of all federal procurement, leaving virtually all of the remaining ninety-nine-plus per cent for nonminority enterprises. Furthermore, the SBA has issued regulations prohibiting the withdrawal of contracts for the 8(a) Program “[w]here small business concerns are dependent in whole or in significant part on recurring Government contracts.” Properly administered, this safeguard should ensure that 8(a) subcontracting does not work hardships on isolated small businesses.

The final consideration may be the courts' understanding of the essential motivation for the 8(a) Program. It is easy to misconstrue the Program and assume that the SBA intends to parcel out government contracts and other benefits in direct proportion to the racial percentages of the population, thus initiating a system of quotas. The motivation and objectives of the Program are, however, quite different. In its simplest form, the 8(a) Program is nothing more than a classroom for dispensing invaluable experience to those individuals who have been prevented from obtaining that experience by normal methods.

III. EFFECT OF 8(a) LITIGATION ON FEDERAL PROGRAMS TO AID MINORITY BUSINESSES

A final aspect of the 8(a) litigation that merits consideration is the possible impact of judicial resolution of the equal protection issue on other programs in the federal government's newborn minority enterprise effort. While there are over eighty federal programs that can provide services to minority-owned business, the vast bulk of these programs were designed to aid the general public, and therefore provide only incidental benefit to minority enterprises. In fact, the only assistance designed specifically for the minority entrepreneur and his special problems is provided primarily by two federal agencies—the SBA and the Office of Minority Business Enterprise (OMBE), which was recently established in the Department of Commerce.

117. See note 25 supra and accompanying text.
120. See note 25 supra and accompanying text.
122. OMBE has been operating since the issuance of Exec. Order No. 11458, 34 Fed. Reg. 4937 (1969). It was formally recognized in Exec. Order No. 11625, 3 C.F.R. 213 (Comp. 1971).
There are three federal activities that utilize the eligibility criteria of social or economic disadvantage: the SBA's 8(a) Program, the SBA's new class of small business investment companies created by the Small Business Investment Act Amendments of 1972, and the range of programs administered by OMBE. While the 8(a) Program has been in full operation for over two years, it has been less than a year since OMBE received its first significant appropriation\(^{122}\) and only a few months since the new companies were authorized. All of these activities can derive guidance from the express congressional recognition that social or economic disadvantage is not restricted to minority group members, an advantage that the 8(a) Program did not initially have. 

One immediate direction that the SBA and OMBE can glean from the 8(a) litigation is that both agencies should make increased efforts to publicize their programs in areas where there are disadvantaged nonminorities. If, despite this publicity effort, a high proportion of the applicants for assistance are minority group members, records should be kept to evidence that fact. The agencies should also document and retain the reasons for every rejection to prove that qualified nonminority applicants were not rejected on a racial or ethnic basis. These suggestions presuppose that any quarrel the courts may have with the 8(a) Program and others like it will not be with the "disadvantaged" concept itself but with agencies' implementation of it.

In carving out a "disadvantaged" classification, the SBA has offered an imaginative solution to the long-standing problem of how the government may constitutionally direct significant benefits to minority groups. That Congress recognizes the advantages of this approach can no longer be questioned. Serious constitutional questions may arise, however, if programs based upon such a criterion result in few nonminority beneficiaries, although the precise cause of this underrepresentation may not be intentional discrimination. Rather than endanger the promising "disadvantaged" concept by allowing it to become a euphemism for minority group individuals, it is suggested that federal agencies pursue actively those nonminority individuals who are also disadvantaged. If this course were taken, it is unlikely that the courts would seriously entertain any challenge to these remedial programs.

---

\(^{122}\) OMBE was originally granted 4 million dollars for fiscal 1972. This was subsequently increased to 40 million dollars. For fiscal 1973 OMBE requested 60 million dollars. Stans, *Foreword to U.S. Dept. of Commerce, Progress of the Minority Business Enterprise Program 8* (1972).