Rothe Development v. U.S. Department of Defense: Overcomplicating the Uncomplicated

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INTRODUCTION

For nearly twenty-five years, the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena* has been an easily-understood rule in the world of federal contracting.[1] Certainly some may disagree with its core holding, but relatively few had any doubt to its central meaning. In a nutshell, the Court in *Adarand* held that race-based classifications used in the selection process for federal contractors must pass strict scrutiny to survive.[2] The issue of exactly what "race-based" selection

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[1] *See* 515 U.S. 200, 207, 227 (1995).

[2] *Id.* at 227.

criteria are was not directly addressed in *Adarand*, but the Court assumed—without much discussion—that awarding contracts in a way that favored one race over the other qualified as race-based.[3]

On its face, this seems like an uninteresting and obvious conclusion. If a rule, regulation, statute, or other government action is "based on race," then it is a race-based classification to which courts must apply strict scrutiny when evaluating their constitutionality.[4] While thornier issues arise when other factors are used as a proxy for race or in cases involving disparate impact, it seems unremarkable to conclude that, at a bare minimum, race-based classifications includes those provisions that specifically mention race as a factor for consideration.[5]

Adarand did not exclude race from all consideration in federal contracting. Strict scrutiny should not be fatal in fact.[6] While agencies must meet a significant evidentiary threshold that must be met to justify such race-based programs, it is possible to craft a policy that mitigates the effects of prior race discrimination in the field of federal contracting. Courts have provided a blueprint for federal agencies to justify race-based selection processes: these processes can pass strict scrutiny review if they are narrowly tailored to address established areas of prior discrimination.[7]

Enter *Rothe Development v. United States Department of Defense*.[8] *Rothe* upended nearly twenty-five years of well-established jurisprudence with the proposition that using race as a factor does not make the consideration race-based.[9] The Small Business Act's "8(a) program"—codified at 15 U.S.C. § 637—gives special consideration to socially and economically disadvantaged contractors in the bidding process.[10] Social disadvantage as defined in the act includes individuals

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[3] *Id.* at 213 (accepting without much discussion that some level of heightened scrutiny applied, noting that the classifications in question were "classifications based explicitly on race.").

[4] *Id.* at 227.

[5] *Id.* at 213 (noting that "additional difficulties" arise when laws that appear race-neutral on their face have a disproportionate effect on members of racial minority groups).

[6] *Id.* at 237. *See also* Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 314 (2013); Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

[7] *See generally* Sherbrooke Turf, Inc. v. Minn. Dep't. of Transp., 345 F.3d 964, 971-74 (8th Cir. 2013).

[8] 836 F.3d 57 (D.C. Cir. 2016).

[9] *Id.* at 62 ("the provisions of the Small Business Act that Rothe challenges do not on their face classify individuals by race.").

[10] 15 U.S.C. § 637(a)(1)(B) (2012). The statutory text provides in relevant part:

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 by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns for construction work, services, or the manufacture, supply, assembly of such articles, equipment, supplies, materials, or parts thereof, or servicing or processing in connection therewith, or such management services as may be necessary to enable the Administration to perform such contracts

who have been subjected to racial bias.[11] 8(a)'s definition of social disadvantage is clearly a race-based criterion, and as such the court should have applied strict scrutiny.

Rothe, however, tells us that what we think we see is not what we actually see. The court held that Section 8(a) of the Small Business Act is not a race-based classification and therefore is only subject to rational basis scrutiny.[12] This is a sea change interpretation of *Adarand* that may have wide-ranging impacts on the awarding of federal contracting and frustrate congressional intent. This article neither advocates for or against such a policy change; rather, the thrust of this article is to acknowledge the *Rothe* court's implausible reading of both *Adarand* and the Small Business Act and to recognize that *Rothe* overcomplicated and overanalyzed a straightforward statute.

In order to understand the ramifications of this holding both specifically for the Small Business Act and in general to race-based classifications as a whole, an examination into the Small Business Act and to *Adarand* and its progeny are vitally important. Part I of this article focuses on the Small Business Administration, its mission in the area of federal contracting, and the current need for disparity studies to identify areas of discrimination. Part II examines the reasoning and conclusions in *Rothe*, with particular focus on the deficiencies in the Court's justifications for applying rational basis scrutiny to Section 8(a). Part III explores the impact that applying rational basis scrutiny to Section 8(a) could have on the Small Business Act and how such a test could frustrate Congress's intent to remedy specific race-based discrimination.

I. THE SMALL BUSINESS ADMINISTRATION AND SECTION 8(A)

The Section 8(a) program is a business development program within the Small Business Act. This program affords certain benefits to businesses certified by the program and that are deemed eligible based on meeting a standard of social and economic disadvantage.[13]

Id. To qualify under 8(a), a contractor must be both socially and economically disadvantaged. *Contractors Ass'n of Eastern Pa., Inc. v. City of Philadelphia*, 6 F.3d 990, 999 (3rd Cir. 1993). The definition of "economically disadvantaged" in 15 U.S.C. § 637(a)(6) contains no race-based language or reference to ethnicity, culture, or other forms of personal identity. Instead, economic disadvantage focuses on the inability to compete in the free enterprise system because of diminished capital and credit opportunities. 15 U.S.C. § 637(a)(6) (2012). Thus, the debate about the level of scrutiny that Section 8(a) requires revolves around the term "socially disadvantaged."

[11] 15 U.S.C. § 637(a)(5) (2012).

[12] *Rothe*, 836 F.3d at 63.

[13] *8(a) Business Development Program*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program#section-header-2 [https://perma.cc/PX24-GWTB]

In enacting Section 8(a), Congress established that the federal government has an obligation to foster small business. The statute reads:

> For the purpose of preserving and promoting a competitive free enterprise economic system, Congress hereby declares that it is the continuing policy and responsibility of the Federal Government to use all practical means and to take such actions as are necessary, consistent with its needs and obligations and other essential considerations of national policy, to implement and coordinate all Federal department, agency, and instrumentality policies, programs, and activities in order to: foster the economic interests of small businesses; insure a competitive economic climate conducive to the development, growth and expansion of small businesses; establish incentives to assure that adequate capital and other resources at competitive prices are available to small businesses; reduce the concentration of economic resources and expand competition; and provide an opportunity for entrepreneurship, inventiveness, and the creation and growth of small businesses.[14]

This statute seeks to promote the viability of small businesses by providing financial assistance, including by encouraging investment in small businesses.[15] The Small Business Administration (SBA) was created by 15 U.S.C. § 633 as the agency responsible for these obligations.[16] The stated intent of the program aligns well with popular statistics provided by the SBA: one 2016 report indicates that small businesses with less than 500 employees constitute 99.9 percent of all firms in the United States, 97.7 percent of all U.S exporting firms, and 48 percent of all employees in the private sector.[17] The SBA guarantees

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[14] 15 U.S.C. § 631a(a) (2012).

[15] *See id.* § 631a(b). The statutory text provides:

Congress further declares that the Federal Government is committed to a policy of utilizing all reasonable means, consistent with the overall economic policy goals of the Nation and the preservation of the competitive free enterprise system of the Nation, to establish private sector incentives that will help assure that adequate capital at competitive prices is available to small businesses. To fulfill this policy, departments, agencies, and instrumentalities of the Federal Government shall use all reasonable means to coordinate, create, and sustain policies and programs which promote investment in small businesses, including those investments which expand employment opportunities and which foster the effective and efficient use of human and natural resources in the economy of the Nation.

[16] 15 U.S.C. § 633(a) (2012) ("In order to carry out the policies of this chapter there is created an agency under the name 'Small Business Administration . . . .'").

[17] *See Frequently Asked Questions*, U.S. SMALL BUS. ADMIN. OFF. ADVOC. (June 2016), https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf [https://perma.cc/7XT7-ZVB6]. *See also*

Douglas Martin, *Why Small Business Matters: What Local Government Can Do to Support This Vital Economic Engine*, PUB. MGMT. (Jan. 1, 2017), https://icma.org/articles/pm-magazine/why-small-business-matters [https://perma.cc/W9QB-RTAL]. Standards for firm size are determined through SBA methodology. *See generally* U.S. SMALL BUS. ADMIN., SBA'S SIZE STANDARDS

loans, operates programs intended to increase contracting by small businesses, assists with direct loans to businesses for disaster recovery, and provides technical assistance to small business owners.[18]

The SBA was established in 1953 by the Small Business Act to facilitate enforcement of the act.[19] In FY 2019, the top SBA areas by estimated program cost, listed in descending order of spending, were disaster loans, entrepreneurial development, access to capital, and contracting programs.[20] Among contracting programs, SBA offers the 8(a) Business Development Program, Historically Underutilized Business Zone Program (HUBZone), Service-Disabled Veteran-Owned Small Business Program, Women-Owned Small Business Program, and subcontracting programs targeting disadvantaged businesses.[21] The SBA has a significant reporting responsibility in the federal government's goaling program, through which agencies seek to award prime contracting and subcontracting dollars to eligible businesses.[22]

There is some evidence that shows that increasing access to financing and capital provides small businesses the ability to pursue opportunities they would otherwise not have. Indeed, one recent study found that "greater access to financing may increase financially constrained firms' access to additional productive projects that they may otherwise not be able to take up."[23] Further, rates of Black business ownership have increased where government contracting programs have been implemented; this increase in ownership rates has occurred mostly in industries where preferences were targeted.[24] For public highway

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METHODOLOGY (April 2018), https://www.sba.gov/sites/default/files/2018-04/SBA%27s%20Size%20Standards%20Methodology%20White%20Paper%20%28April%202018%29.pdf [https://perma.cc/8NUE-QL57]. This article does not directly address the question of business *size standards*, except as part of the general discussion of eligibility of firms for certification in government contracting programs. *See generally* Mirit Eyal-Cohen, *Down-Sizing the "Little Guy" Myth in Legal Definitions*, 98 IOWA L. REV. 1041 (2013) (taking up the discussion of small business definitions and their attendant myth).

[18] *See generally Guide to SBA Programs*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/sites/default/files/articles/SBA%20101.pdf [https://perma.cc/332L-PCB2] (last updated Feb. 2013).

[19] *See Organization*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/about-sba/organization [https://perma.cc/R2HQ-HQ6Q].

[20] CONG. RESEARCH SERV., RL33243, SMALL BUSINESS ADMINISTRATION: A PRIMER ON PROGRAMS AND FUNDING 2 (last updated Dec. 3, 2019).

[21] *See* U.S. SMALL BUS. ADMIN., AGENCY FINANCIAL REPORT: FISCAL YEAR 2019 12 (2019).

[22] *Id.* at 96-98. *See generally* U.S. SMALL BUS. ADMIN., FY 2019 GOALING GUIDELINES (August 2018), https://www.sba.gov/sites/default/files/2019-06/FY19%20Small%20Business%20Goaling%20Guidelines_Draft_2018-08_Final%20%281%29.pdf [https://perma.cc/HV5G-XXVJ]. Congress mandates the Federal government to "direct a percentage of spending dollars to small business concerns (SBCs), and certain socioeconomic categories of small businesses. In 1988, Congress first enacted a procurement goal in prime contracting for small businesses. Since then, goals have been increased, extended to include some subcontracting, and applied to certain socioeconomic categories of small businesses, such as socially and economically disadvantaged small businesses . . . ." *Id.* at 2.

[23] Karthik Krishnan, Debarshi K. Nandy & Manju Puri, *Does Financing Spur Small Business Productivity? Evidence from a Natural Experiment*, 28 REV. FIN. STUD. 1768, 1807 (2015).

[24] One study that quantified the outcomes of set-aside programs including Section 8(a) concluded

construction programs, additional support through affirmative action can increase the inclusion of minority businesses in the bidding process—specifically via goal programs—but the evidence of inclusion for women-owned businesses is not strong.[25]

A. The 8(a) program

The 8(a) program "provides participating small businesses with training, technical assistance, and contracting opportunities in the form of set-aside and sole-source awards."[26] The program can be lucrative for eligible business as it allows access to sole-source acquisitions and technical assistance, mentoring, earmarks for award allocations, and General Services Administration contract consideration.[27] 8(a) certification is coveted; otherwise ineligible vendors have been encouraged by the benefits of 8(a) certification to form joint ventures with certified firms so that they can participate in opportunities sheltered within the program.[28] Programs that focus on diverse and disadvantaged small businesses can award more lucrative contracts to those entities.[29]

The potential outcomes of assistance to minority business and job creation has generated interest in the program.[30] For its part, the "8(a) [business development] Program has been essential for helping socially and economically disadvantaged entrepreneurs gain access to the economic mainstream of American society. Ultimately, the program helps thousands of aspiring entrepreneurs gain a foothold in government

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that "set-asides had a large and significant impact on African American business ownership during the 1980s, with the black-white self-employment gap falling by 3 percentage points. These gains were realized entirely in the industries targeted by set-asides and correspond with other information on the growth in, and the set-aside amounts awarded to, black-owned businesses." Aaron Chatterji, Kenneth Y. Chay & Robert W. Fairlie, *The Impact of City Contracting Set-Asides on Black Self-Employment and Employment*, 32 J. LABOR ECON. 507, 553 (2014).

[25] Justin Marion, *Affirmative Action and the Utilization of Minority- and Women-Owned Businesses in Highway Procurement*, 49 ECON. INQUIRY 899, 914 (2011) ("During the mature years of the program, more intensively used affirmative action at the state level significantly increases purchases from firms owned by minorities, yet has little effect on purchases from women-owned firms.").

[26] CONG. RESEARCH SERV., R44844, *in Summary*, SBA'S "8(A) PROGRAM": OVERVIEW, HISTORY, AND CURRENT ISSUES (updated September 20, 2019) [hereinafter "8(A) PROGRAM": OVERVIEW, HISTORY, AND CURRENT ISSUES].

[27] Kenneth Abramowicz & H. Charles Sparks, *The Small Business Administration's 8(a) Business Development Program*, 77 CPA J. 60, 62 (Feb. 2007).

[28] *Id.*

[29] Troy A. Voelker & William C. McDowell, *Performance of Historically Underrepresented Firms in the Public-Private Sector*, 21 J. SMALL BUS. STRATEGY, Jan. 2010, at 18 ("Utilizing a sample of all contracts awarded by the Johnson Space Center, a NASA directorate located in Houston, Texas, which identified 5,676 contracts totaling approximately $157 billion, we found that small businesses received around 63% of all contracts. The results indicate that more diverse firms received higher awards than specialists and that disadvantaged firms received higher dollar awards than general small businesses.").

[30] "8(A) PROGRAM": OVERVIEW, HISTORY, AND CURRENT ISSUES, *supra* note 26, at 1-8.

contracting."[31] Firms can spend nine years in the 8(a) program.[32] Further, "there's also a $100 million (or five times the value of [the] primary [North American Industrial Classification System] NAICS code) limit on the total dollar value of sole-source contracts that [a business] can receive while in the program."[33] This essentially means that while the firms in the 8(a) program are relatively small, the dollar value potential of the 8(a) program is not.

Despite SBA's claims of success, a recent report by the Congressional Research Service—updated for 2019—indicated that membership in the 8(a) program was declining.[34] In the March 2019 data extract of the System for Award Management, 665,281 of 675,950 firms (98.4% of firms) in the publicly-available entity registration data were uncertified. Only 10,668 businesses, about 1.6% of available vendors, were certified as 8(a), 8(a) joint venture, or HUBZone.[35] A small percentage of 8(a) vendors received a contract in FY 2017: 3,421 8(a) firms received $27.1 billion in contracts.[36]

Even though the program has clearly made a major impact on the firms that have received contracts, the 8(a) program has not alleviated the problem of limited contract opportunities available to particularly underserved businesses. The interest in 8(a) certification is not widely apparent; the program's ability to achieve its goal of significantly mainstreaming previously underrepresented businesses in government procurement and in entrepreneurship is perhaps overstated.[37] In 2010, the GAO found problems in the 8(a) program's verification of economic eligibility: firms seemed to have grown beyond eligibility requirements but were allowed to stay in the program,[38] and the SBA had difficulties reviewing eligibility and obtaining documentation to complete the required reviews.[39] As a result, resources provided by 8(a) may be expended on administrative tasks for a business that accomplishes

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[31] Katie Murray, *SBA's 8(a) Certification Program Explained*, U.S. SMALL BUS. ADMIN. (last updated Sep. 2, 2016), https://www.sba.gov/taxonomy/term/15091?page=1 [https://perma.cc/RN6R-Z226].

[32] *Id.*

[33] *Id.*

[34] "8(A) PROGRAM": OVERVIEW, HISTORY, AND CURRENT ISSUE, *supra* note 26, at 34-36.

[35] SYSTEM FOR AWARD MANAGEMENT, Entity Management Extracts Public Data Package https://www.sam.gov/SAM/pages/public/extracts/samPublicAccessData.jsf (last accessed April 16, 2019).

[36] "8(A) PROGRAM": OVERVIEW, HISTORY, AND CURRENT ISSUE, *supra* note 26, at 2.

[37] Major Thomas Jefferson Hasty, III, *Minority Business Enterprise Development and the Small Business Administration's 8(a) Program: Past, present, and (is There a) Future*? 145 MIL. L. REV. 1, 112 (1994) ("It is not apparent that the 8(a) program, as currently administered, does not accomplish its goal of producing self-sufficient viable businesses.").

[38] U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-353. SMALL BUSINESS ADMINISTRATION: STEPS HAVE BEEN TAKEN TO IMPROVE ADMINISTRATION OF THE 8(A) PROGRAM, BUT KEY CONTROLS FOR CONTINUED ELIGIBILITY NEED STRENGTHENING 6-7 (2010).

[39] *Id.* at 7.

relatively little.[40] Indeed, the program may be counterproductive, as it "sometimes hinder[s] the opportunities for the small businesses that really need the assistance."[41]

It is worth asking about the impact of programs intended to serve the development and growth of businesses enterprises because past experiences have not been altogether successful. In 1974, for example, a review of the SBA's 8(a) program did not find a strong indication of success in helping small businesses, despite the design of the program.[42] Moreover, the SBA cannot of its own accord direct contracts to small businesses; instead, it can only act as a facilitator in contracting between small business-eligible vendors and the government agencies that buy products and services.[43]

None of this ignores the precarious position of Black-owned businesses, which have been noted in the literature as evidencing significant disadvantage that may not be addressed through SBA programs in their 'color-blind' perspective.[44] Programs that do not specifically deal with the needs of individual groups may yield more discrimination and disadvantage.[45] Black-owned businesses have shown, and continue to show, serious and systemic struggle with access to larger markets.[46] Congress reiterated—through the Small Business Act of 2010—that its initial intent of "creating opportunities for all qualified small business concerns is intact . . . ."[47] However, there is a clear break between intent and practical reality, creating a clear need for Congress to address the systematic exclusion of minority-owned businesses from federal contracting—a need Congress specifically attempted to address in Section 8(a).

B. The Requirements of *Croson* to Document Compelling Interest

The Supreme Court's landmark case *City of Richmond v. J.A. Croson Company* examined race-based preferences in federal

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[40] Votey Cheav, *Programs of Parity: Current and Historical Understandings of the Small Business Act's Section 8(a) and HUBZone Programs*, 12 DEPAUL BUS. & COMM. J. 477, 488-89 (2014).

[41] *Id.* at 478.

[42] *Id.* at 488.

[43] *Id.* at 489.

[44] Tamara K. Nopper, *Minority, Black, and Non-Black People of Color: 'New' Color-Blind Racism and the US Small Business Administration's Approach to Minority Business Lending in the Post-Civil Rights Era*, 37 CRITICAL SOCIOLOGY 651, 655-58 (2011).

[45] *Id.* at 659.

[46] *See generally* Matthew C. Sonfield, *America's Largest Black-Owned Companies: A 40-Year Longitudinal Analysis*, 21 J. DEVELOPMENTAL ENTREPRENEURSHIP 1, 12-15 (2016).

[47] Votey Cheav, *supra* note 40, at 505.

contracting.[48] In *Croson*, the City of Richmond required all prime contractors with construction contracts awarded by the city to subcontract 30 percent of each contract's dollar amount to minority-owned businesses.[49] A minority-owned business was defined as one in which at least 51 percent of the business was owned by minority group members.[50] J.A. Croson Company brought suit in federal court, arguing that the municipal ordinance was unconstitutional both facially and as applied in that case.[51]

The Court declared that these kinds of race-based preferences must undergo strict scrutiny.[52] The Court noted that racial preferences are narrowly tailored where the state action remedies "identified discrimination."[53] This raises the question as to how exactly a governmental entity should identify discrimination. The Court made it clear that simply comparing the minority population to the number of contracts awarded to minority-owned businesses is insufficient to identify or confirm the presence of past discrimination.[54] The Court noted that the City of Richmond engaged in "sheer speculation" and "conclusionary statements" to justify its 30 percent quota.[55]

The Court gave clues as to how past discrimination could be identified, emphasizing the importance of statistical analysis. First, the Court indicated that "an inference of discriminatory exclusion could arise" upon a showing of a "disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors."[56] Importantly, a comparison of the simple percentages is not sufficient; the difference must be statistically significant.[57] Second, the Court indicated that "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."[58] The Court did not detail the statistics needed to justify remedial action, but left no doubt that conjecture or descriptive percentages would not pass strict scrutiny.[59]

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[48] 488 U.S. 469 (1989).

[49] *Id.* at 477.

[50] *Id.* at 478 (a minority group member was defined as "citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.").

[51] *Id.* at 483.

[52] *Id.* at 493-94.

[53] *Id.* at 509.

[54] *Id.* at 501.

[55] *Id.* at 499-500.

[56] *Id.* at 509.

[57] *Id.* at 501-04.

[58] *Id.* at ,509.

[59] *See id.* at 510-11 ("[I]t is simply impossible to say that the city has demonstrated "a strong basis in evidence for its conclusion that remedial action was necessary. Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure

The *Croson* decision has led to an environment increasingly characterized by quotas and set-asides, which require "that a specific portion of the total dollar amount of each contract be performed by a minority-owned business."[60] A finding of general discrimination in society was not a sufficient basis for a race-conscious set-aside program in a local area.[61] Under *Croson*, local governments must base any program for set-asides addressing race on local conditions, and if a need is evident, the solution must be narrowly tailored to address the identified need.[62] The burden is on the local government intending to implement such measures to show and document the need.[63]

Documentation in the period immediately after *Croson* was a matter of fumbling to meet the new requirements. It increasingly fell to outside consultants to conduct disparity studies to identify the need as required by the Court.[64] In *Croson*, the Court found that, to justify set-asides, "the government had to show . . . that a particular group was, in fact, underrepresented . . . ."[65] Further, "[t]he Court reasoned that a government would show this underrepresentation by commissioning a racial disparity study showing that 'ready, willing and able' firms in particular industries and of particular minority groups were underrepresented in . . . contracting and procurement."[66]

A disparity study is a research product that evaluates "statistical and anecdotal evidence of discrimination . . . to allow state or local policy makers to determine whether there was a 'strong basis in evidence'. . .

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its effects. . . . Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics." (Citations omitted)).

[60] George R. Gray & Barbara L. Peery, *The U.S. Supreme Court's Croson Decision: Effects on Small Businesses Contracting with Non-Federal Public Entities*, 28 J. SMALL BUS. MGMT. 54, 54 (1990).

[61] *City of Richmond,* 488 U.S. at 499 ("While there is no doubt that the sorry history of both private

and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia.").

[62] In *City of Richmond*, the Court clarified that a determination that a defendant city practiced discriminatory exclusion of minority businesses is contextual:

Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.

Id. at 509.

[63] *Id.* at 509-10 (remarking that the city did not point to statistics indicating a strong basis in evidence that remedial action was necessary).

[64] Jessica N. Terman, *What Happens When Rules Stay the Same? Examining Changes in Implementation over Time*, 40 INT'L. J. OF PUB. ADMIN. 36, 44 (2017).

[65] *Id.*

[66] *Id.*

to adopt race conscious remedies."[67] A disparity study "intends to show whether or not past discrimination has occurred in a government's procurement operations; assuming that it has, the study identifies areas where underutilization has occurred and makes recommendations for how the commissioning entity can enact policy or change practices to help resolve the identified disparity."[68] Disparity studies, however, can be expensive and time-consuming.[69] Further, "mislabeling a remedial affirmative action effort as a non-remedial diversity program can and will lead to virtually automatic judicial invalidation of the program, notwithstanding the fact that a compelling interest in remediation might support the program."[70] Thus, it should be clear what purposes the programs serve.

II. *ROTHE V. DEPARTMENT OF DEFENSE*

The D.C. Circuit rendered its decision in *Rothe v. Department of Defense* in September of 2016.[71] The plaintiff in the case, Rothe Development, Inc., filed suit alleging that the statutory basis of the Small Business Act's race-conscious program was facially unconstitutional.[72] The Court, at the outset, noted that Congress crafted the 8(a) program to give additional opportunities to those individuals who experienced racial or cultural bias.[73] While *Adarand* involved subcontracting disputes under 8(d) of the Act, the Court noted that the plaintiff in *Rothe* limited its attack to a separate, "more nuanced" provision of the Small Business Act—Section 8(a).[74] Rothe Development, an entity that did not qualify as one whose members had experienced racial bias and thus was excluded from participation in Section 8(a), facially attacked Section 8(a) on the grounds that it constituted an illegal race-based classification.[75]

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[67] JON WAINWRIGHT & COLLETE HOLT, NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM, GUIDELINES FOR CONDUCTING A DISPARITY AND AVAILABILITY STUDY FOR THE FEDERAL DBE PROGRAM, 11 (2010).

[68] Chris Atkinson, *Disparity in Government Procurement*, *in* GLOBAL ENCYCLOPEDIA OF PUBLIC ADMINISTRATION, PUBLIC POLICY, AND GOVERNANCE, 1438, 1440 (Ali Farazmand ed., 2018).

[69] Heather Martin, et al., *Documenting Disparity in Minority Contracting: Legal Requirements and Recommendations for Policy Makers*. 67 PUB. ADMIN. REV. 511, 512 (2007).

[70] Ronald J Krotoszynski, Jr., *The Argot of Equality: On the Importance of Disentangling "Diversity" and "Remediation" as Justification for Race-Conscious Government Action*, 87 WASH. U. L. REV. 907, 908 (2010).

[71] *Rothe*, 836 F.3d 57.

[72] *Id.* at 62.

[73] *Id.* at 61.

[74] *Id.* at 69.

[75] Importantly, this Court expressly refused to address whether corresponding race-based regulatory classification (that implements the 8(a) program) was constitutional, since Rothe only challenged the statute. *Id.* at 62. *See also* 13 C.F.R. § 124.103(b) (2012) (listing five racial groups that are presumed to be socially disadvantaged).

The Court relied heavily on the wording of Section 8(a)'s definition of social disadvantage and compared it with Section 8(d).[76] Section 8(a) permits "socially and economically disadvantaged" small businesses to participate in the program.[77] Importantly, the statute, codified in Section 637(a)(5), defines socially disadvantaged individuals as, "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities."[78] As opposed to Section 8(d), the statute does not list preferred minorities.[79] Section 8(d), however, presumes that "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to Section 8(a) of the Small Business Act" are socially disadvantaged.[80] The Court in *Rothe* found this drafting decision to be determinative: Section 8(a) is not a racial classification, but the provision in Section 8(d) is.[81]

Interestingly, the court took it upon itself to examine whether Section 8(a) warranted the strict scrutiny required by *Adarand*.[82] No one in the litigation prior to that point had questioned it; indeed, it seems as though all parties simply took it for granted as obvious that Section 8(a) made a racial preference that was subject to strict scrutiny.[83] Section 8(a) seemingly appears to give preference on the basis of race, given its reference to "racial or ethnic prejudice" because of membership "of a group."[84] Rather than taking the straightforward approach that no one had doubted, the Court proceeded to perform mental gymnastics. It found that Section 8(a)'s preference for those experiencing racial bias was not a classification based on race.[85]

A. Statutory Interpretation

The *Rothe* court's conclusion that Section 8(a) envisions a non-race based classification subject only to rational basis scrutiny comes

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[76] *See, e.g.*, *Rothe*, 836 F.3d at 68-70.

[77] 15 U.S.C. § 637(a)(1)(B) (2012).

[78] *Id.* § 637(a)(5).

[79] *Id.*

[80] *Id.* § 637(d)(3)(C)(ii). *See also* William Sharon, *Neutral in Name: Rothe, The Error of Anticlassification, and the State of Race-Neutral Means*, 8 COLUM. J. RACE & L. 175, 194 (2017) (remarking that Section 8(d) relies on the presumption that certain enumerated minority groups are socially disadvantaged—a fact missing in Section 8(a)'s definition).

[81] *Rothe*, 836 F.3d at 69-70.

[82] *Id.* at 63.

[83] *Id.* (noting that "[t]he parties" including the SBA "and the district court seem to think" that Section 8(a) should receive strict scrutiny).

[84] 15 U.S.C. § 637(a)(5) (2012).

[85] *Rothe*, 836 F.3d at 62. (holding as a matter of law that "the provisions of the Small Business Act that Rothe challenges do not on their face classify individuals by their race.").

from its interpretation of the statute itself.[86] The court held that the statute "envisions an individual-based approach that focuses on experience rather than a group characteristic."[87] The court mentions that theoretically any member of any race could be the victim of discrimination and could hypothetically qualify for Section 8(a) coverage.[88] This argument, however, flies in the face of not only the clear reading of the statute, but also logic and prior jurisprudence.

First, the court neglected to emphasize that the statute itself used the word "group" in its definition.[89] It defies logic to argue that a statute that specifically mentions "groups" in its definition does not focus on "group characteristics." The court was forced to reach this conclusion to justify its holding. In *Adarand,* the Court was adamant that the keystone for heightened scrutiny is whether groups were impacted.[90] Groups are protected under the Fourteenth Amendment. Thus the court in *Rothe* was compelled to find that Section 8(a) requires an individualized approach to avoid strict scrutiny.[91] To reach this conclusion, the *Rothe* court found that Section 8(a)'s reference to membership in a group does not mean a group-based approach.

Specifically, the court held, "Congress, in crafting section 8(a), was attentive to form as it sought to pursue plainly permissible ends. The lawmakers chose to advance equality of business opportunity and respond to discrimination by conditioning participation in the program on an individual's experience of racial, ethnic, or cultural bias, rather than racial identity."[92] It strains the imagination, however, to state that 8(a) does not condition participation on racial identity when the statute includes the exact word "identity" immediately after its discussion of race. And, the statute is causal. The racial bias the individual faces must be "because of" their identity as a member of a group.[93]

Further, it seems a bit disingenuous to suggest that Congress intended to create a statutory scheme free from racial classifications when the Small Business Act's implementing regulation makes it absolutely and

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[86] *Id.* at 64.

[87] *Id.*

[88] *Id.*

[89] 15 U.S.C. § 637(a)(5) (2012) (noting that those persons who have suffered bias because of their "identity as a member of a group" are covered).

[90] *Adarand*, 515 U.S. at 227 (holding that "the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups. It follows from that principle that all governmental action based on race—a group classification long recognized as "in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.") (emphasis in original).

[91] *Rothe*, 836 F.3d at 64-65.

[92] *Id.* at 72.

[93] 15 U.S.C. § 637(a)(5) (2012) ("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."(emphasis added)).

undeniably clear that they consider Section 8(a) to be a race-based classification.[94] The court in *Rothe* recognized these regulations "contain a racial classification" because it lists five designated preferred groups.[95] The Court relied on the plaintiff's procedural failure to attack the regulations for its rationale not to consider the regulations' constitutionality.[96] That is a fair point, but Congress is surely aware of the Small Business Act's regulations and how its statute—presumably a race-neutral one—has been transformed by an executive agency into a race-based classification. If Congress's intent was truly to implement a race-neutral 8(a) program, one would think Congress would act to correct the Small Business Act's misstep. However, they have not.

Secondly, had Congress wished to truly make this an individualized, holistic approach without reference to racial groups, it would have done so more clearly. *Rothe*'s reading of the statute simply ignores the fact that Congress makes explicit reference to "racial or ethnic prejudice" and "cultural bias" in the statute.[97] Had Congress intended the result in *Rothe*, it would have made this clear by abstaining from such specific discussion of racial, ethnic, or cultural classifications.[98] Under such a statute, any member of any group, whether it be a racial, religious, associational, family, or corporate group could qualify under the 8(a) plan. The better reading of the statute is that Congress included those words intentionally with an eye on making Section 8(a) a race-based classification—a laudable goal given the history of past discrimination in contracting and *Adarand's* directive that such classifications can pass strict scrutiny given the right facts.[99]

Third, reading 637(a)(5)'s definition as including racial classifications harmonizes it with the rest of the statutory scheme. Section 637(a)(8), also within the overall scheme of Section 8(a), reads: "[a]ll determinations made pursuant to paragraph (5) with respect to whether a group has been subjected to prejudice or bias shall be made by the Administrator after consultation with the Associate Administrator for Minority Small Business and Capital Ownership Development."[100] Here, not only does the statute refer to groups again, but it also specifically

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[94] 13 C.F.R. § 124.103(b) (2012)

[95] *Rothe*, 836 F.3d at 62.

[96] *Id.* (noting that the plaintiff sought only a declaration that Section 637(a)(5) was an illegal race-based classification and did not argue that the statute's implementing regulations were also unconstitutional).

[97] 15 U.S.C. § 637(a)(5) (2012).

[98] Congress could have simply drafted the statute to define socially disadvantaged individuals as, "those who have been subjected to prejudice or bias because of their identity as a member of a group without regard to their individual qualities." *Id.*

[99] *See Adarand*, 515 U.S. at 237 ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.").

[100] 15 U.S.C. § 637(a)(8) (2012).

involves a government agency overseeing minority small businesses.[101]

B. The Declaration of Policy

More importantly, the "Declaration of Policy" statute in the opening section of the Act provides critical evidence that racial classifications were explicitly intended. That statute, which is a part of Section 8(a), states that socially disadvantaged persons are members of groups that "include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities."[102]

On the surface, this appears to torpedo the majority's opinion in *Rothe*. The court shrugs off this section, dismissing it out of hand since it is "in the findings section of the statute, not in the operative provision . . . ."[103] The court then cites to a single D.C. Circuit case—*Costle*—in which the court held that a "preamble" of a statute provides only a "general understanding of a statute."[104] The court fails to consider that the declaration of policy provisions should be read *in pari materia* to explain a possible ambiguity of the statute regarding whether Section 637(a)(5) include a racial classification; instead, it chooses to give the declaration of policy no interpretative effect whatsoever. Any rational reader of Section 631 would conclude that Congress intended Section 637(a)(5) to include a race-based classification, but the court reads *Costle* as a directive that opening preambles or Congressional findings of fact are wholly irrelevant and without any force.[105]

The Supreme Court tangentially addressed the effect of "declaration of purpose" provisions in *Carchman v. Nash*.[106] There, the Court was tasked with interpreting Article III of the Interstate Agreement on Detainers and specifically whether the definition of the word "charge" included probation-violation charges.[107] This specific issue was not addressed in the statute itself.[108] However, the statute's declaration of purpose addressed the topic.[109] Importantly, the Court used the

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[101] *Id.*

[102] 15 U.S.C. § 631(f)(1)(C) (2012).

[103] *Rothe*, 836 F.3d at 66.

[104] *Id.* (citing *Ass'n of Am. R.R.s v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977)).

[105] *Id.*

[106] 473 U.S. 716 (1985).

[107] *Id.* at 719. The Interstate Agreement on Detainers provides speedy trial rights to persons incarcerated in one state but facing charges from another state. *Id.* The Court was tasked to decide if incarcerated individuals are entitled to speedy resolutions of probation-violation charges arising from another state. *Id.*

[108] *Id.* at 726.

[109] *Id.* (citing Interstate Agreement on Detainers Act, 18 U.S.C. app. 2 § 2, art. I ("The party States find that charges outstanding against a prisoner, detainers based on untried indictments,

declaration of policy to aid its ultimate conclusion.[110] The Court held, "[h]owever, when this language which appears in the legislative declaration of purpose, is read in the context of the operative language of Arts. III and V discussed above, it is clear that the drafters meant the term 'charges' to refer to criminal charges."[111]

At a bare minimum, the Court in *Carchman* recognized that declarations of policy have some interpretative value and can be used to illuminate context within a statutory scheme. The *Rothe* Court's refusal to acknowledge the potential interpretative value of Section 631 runs counter to the Supreme Court's view that these provisions can be useful tools for determining legislative intent.[112]

The clearest case discussing the impact of declarations of policy comes from the federal Seventh Circuit. In *Rubin v. Islamic Republic of Iran*, the court directly confronted the issue of the relative weight to assign declarations of policy.[113] *Rubin* addressed the plaintiffs' seizure and attachment of Iranian antiquities on loan to a university, which they sought in an effort to satisfy a prior judgment.[114] The relevant statute permits attachment only when the property is used for a commercial activity,[115] but does not "*unambiguously* abrogat[e] a foreign sovereign's immunity when a third party uses its property for a commercial activity.[116] The declaration of purpose found in another section of the relevant U.S. Code chapter shed light on the issue: it referenced international law and strongly suggested that the country's own commercial activities are required for execution of foreign property.[117]

Predictably, the plaintiffs countered with the same argument as the one used in *Rothe*—that the declaration of policy provisions are not relevant.[118] The court's holding on this issue is instructive:

> The plaintiffs object that the declaration of purpose isn't relevant because resort to legislative history is not necessary when the statutory language is unambiguous. We disagree for

informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation.")).

[110] *See id.*

[111] *Id.*

[112] *See also Ellis v. Gen, Motors Acceptance Corp.*, 160 F.3d 703, 707 (11th Cir. 1998) (relying on congressional findings and a statute's declaration of policy to determine a statute's meaning). *But see State Highway Comm'n of Mo. v. Volpe*, 479 F.2d 1099, 1104 n. 4 (8th Cir. 1973) ("It is now well established that statements of policy do not add to or alter specific operative provisions of a statute.").

[113] *See generally* 830 F.3d 470 (7th Cir. 2016).

[114] *Id.* at 470.

[115] *Id.* at 478; 28 U.S.C. § 1610(a) (2012).

[116] *Rubin*, 830 F.3d at 480.

[117] *Id.* at 479; 28 U.S.C. § 1602 (2012).

[118] *Rubin*, 830 F.3d at 479.

> two reasons. First, § 1602 is legislation, not legislative history. It was written, debated, and enacted by Congress and signed into law by the President—in the same manner and at the same time as § 1610. None of the standard objections to judicial reliance on legislative history inhibit our resort to a statutory declaration of purpose for help in interpreting a part of the statute to which it applies.[119]

This is a key factor to consider: declarations of policy such as Section 631(f)(1)(C) are legislation. They are not guidance, administrative regulations, or transcripts of debate on the Senate floor. They go through the same process of promulgation as any other statute does. Thus, declarations of policy cannot be dismissed as irrelevant, but must be carefully considered to help interpret the statute to which it applies. Given this rule, it is undeniably true that Section 8(a) contains a racial classification. Section 631 expressly enumerates several minority groups as members of socially disadvantaged groups,120 and this provision must be used to interpret Section 637(a)(5).

C. Federal Case Law

To be clear, *Rothe* is alone in declaring that the language in 8(a) does not demand strict scrutiny. Indeed, other cases, which are discussed below in-depth, addressing whether 8(a) contains a race-based classification have done so in a way that presumes strict scrutiny must be applied. Other litigants did not raise the issue of strict scrutiny versus rational basis, and thus other courts spent little time in their opinions on the matter. Moreover, other courts have held that language similar to that in 8(a) constitutes racial classification. The impact of this ruling could be profound in the D.C. Circuit alone, but even more so if other courts adopt the *Rothe* approach.[121]

The Eighth Circuit determined the constitutionality of requiring ten percent of federal highway funds to be paid to socially and economically disadvantaged entities.[122] In *Sherbrooke Turf*, the plaintiffs filed suit claiming that the federal highway program was unconstitutional both facially and as applied to Minnesota and Nebraska unconstitutional under *Adarand*.[123] The threshold question involved the level of

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[119] *Id.* at 479-80.

[120] *See* 15 USC § 631(f)(1)(C) (2012).

[121] *See infra*, Section III. Again, the authors of the present essay make no argument as to whether race-based classifications or proxies for race-based classifications should or should not, as a policy matter, be evaluated at a lower level of scrutiny.

[122] *Sherbrooke Turf, Inc. v. Minn. Dep't of Transp.*, 345 F.3d 964, 967 (8th Cir. 2003).

[123] *Id.* at 969.

scrutiny.[124] The court quoted Section 637(a)(5)'s definition of socially disadvantaged individuals and noted that small businesses owned and controlled by these individuals were able to obtain contracting advantages.[125] The government, realizing that arguments against an application of strict scrutiny were futile, conceded the issue.[126] The court explained:

> Though the DBE [Disadvantaged Business Enterprises] program confers benefits on "socially and economically disadvantaged individuals," a term that is facially race-neutral, the government concedes that the program is subject to strict judicial scrutiny, no doubt because the statute employs a race-based rebuttable presumption to define this class of beneficiaries and authorizes the use of race-conscious remedial measures.[127]

And that was that. The court's entire resolution of the issue takes up all of one sentence. *Sherbrooke Turf* recognized that strict scrutiny applied to the case even though it acknowledged that the definition is facially neutral.[128] The *Rothe* court reached the same initial conclusion of race neutrality but radically departed from *Sherbrooke Turf* in holding that the statute's ultimate thrust was not race-based.

A case similar to *Sherbrooke Turf* arising out of the Fifth Circuit reached the same conclusion.[129] In that case, the plaintiff filed suit alleging that a 15 percent minority-participation goal unconstitutionally deprived it of obtaining public works projects.[130] Just as in *Sherbrooke Turf*, the court cited and quoted Section 8(a)'s definition of socially disadvantaged as a relevant statute.[131] Unlike in *Sherbrooke Turf*, however, respondent did object to the use of strict scrutiny.[132] The court held that strict scrutiny applied, noting that in *Adarand*, "[t]he question of whether the SBA's implementing regulations were interpreted as requiring 8(d) subcontractors to make individualized showings of economic disadvantage was relevant only to the result of the application

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[124] *Id.*

[125] *Id.* at 968. While the court made reference in the opening paragraph to 8(d) (*id.* at 967), rather than 8(a), the court cites and quotes the 8(a) statutory definition of socially disadvantaged individuals under Section 637(a)(5). *Id.* at 968.

[126] *Id.* at 969.

[127] *Id.*

[128] *Id.*

[129] *See generally* W.H. Scott Constr. Co., Inc. v. City of Jackson, Miss., 199 F.3d 206 (5th Cir. 1999).

[130] *Id.* at 209-10. This case did not directly involve the Small Business Administration; rather, this was a municipal program designed to equitably distribute construction projects in the City of Jackson. However, the Special Notice that implemented the program made specific reference to and incorporated the SBA's definitions of socially disadvantaged under Section 8(a). *Id.*

[131] *Id.* at 209 ("Sections 8(d) and 8(a) are both implicated in a determination of disadvantage.").

[132] *See id.* at 215-16.

of strict scrutiny, not to whether strict scrutiny should apply."[133]

The Third Circuit has also chimed in on the matter.[134] There, a municipal ordinance established participation goals for disadvantaged business enterprises owned by socially and economically disadvantaged individuals.[135] The ordinance used a definition of socially disadvantaged similar to Section 8(a)'s definition, and did not name particular preferred races or ethnicities.[136] The defendant's primary argument revolved around the notion that individuals could qualify either as socially disadvantaged or economically disadvantaged, despite the use of the word "and" rather than "or."[137]

The court dismissed that argument, and almost as an afterthought, noted that the definition of socially disadvantaged involves a race-based classification.[138] Focusing on why both social and economic disadvantage were required, the court held:

> Additionally, the last clause of the definition describes economically disadvantaged individuals as those "whose ability to compete in the free enterprise system has been impaired ... as compared to others ... who are not socially disadvantaged." This clause demonstrates the drafters wished to rectify only economic disadvantage that results from social disadvantage, i.e., prejudice based on race, ethnicity, gender, or handicapped status. The plain language of the Ordinance forecloses the City's argument that a white male contractor could qualify for preferential treatment solely on the basis of economic disadvantage.[139]

It appears that it was obvious to the court that "social disadvantaged" is race-based; the court found that social disadvantage results from "prejudice *based on race* . . . ."[140] The court then concluded that strict scrutiny applied to the ordinance.[141]

Finally, the *Rothe* court cited *DynaLantic Corp. v. U.S. Department of Defense*—an earlier D.C. Circuit decision that directly

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[133] *Id.* at 216-17, 219 (citing *Adarand*, 515 U.S. at 238-39).

[134] *See generally* Contractors Ass'n of E. Pa., Inc. v. City of Phila., 6 F.3d 990 (3d Cir. 1993).

[135] *Id.* at 993-94. Similar to *Sherbrooke Turf*, the ordinance at issue did not directly involve the Small Business Administration but the language of Section 8(a) was incorporated for definitional purposes. The Philadelphia ordinance in this case added sexual and disability disparate treatment in addition to 8(a)'s inclusion of racial and ethnic prejudice. *Id.* at 994.

[136] *Id.* at 994.

[137] *Id.* at 999.

[138] *Id.* at 999-1000.

[139] *Id.*

[140] *Id.* at 1000 (emphasis added).

[141] *Id.*

contradicts the holding in *Rothe*.[142] In *DynaLantic*, the plaintiff challenged the Small Business Act regulations under Section 8(a), which specifically involve race-based preferences.[143] The issue before the Court was one of standing and did not directly address the constitutionality of 8(a).[144] The government argued that the 8(a) statute was not race-conscious, but the court found it unnecessary to rule on that issue since the underlying Small Business Act regulations were race-based and did give rise to an independent justification for standing.[145] The *Rothe* court seized on this notion and found that *DynaLantic* was essentially non-binding dicta.[146] But, the explicit and direct discussion on the constitutionality of Section 8(a) is remarkably on point. The court in *DynaLantic* stated that the government's assertion that Section 637(a)(5) was not race-based was "rather dubious."[147] Citing the Declaration of Policy, the court then stated that "the Act includes as a congressional *finding* that certain racial groups—the same groups as are identified in 13 C.F.R. § 124.105(b)(1)—are socially disadvantaged. . . . Given these explicit statutory references to race, we do not think we can assume, certainly at this stage of the litigation, that the statute itself is invulnerable."[148] The court further remarked that not only could 8(a) be seen as race-conscious, but "[t]he statute itself actually might *require* race-conscious regulations."[149] Certainly, the D.C. Circuit in *DynaLantic* was inclined, had the issue been directly before it, to hold that Section 637(a)(5) contains a race-based classification that must be subject to strict scrutiny.

To summarize, other courts that have discussed the nature of Section 637(a)(5) have found or indicated that it involved a race-based preference. Thus, regardless of the implementing regulations, the statute itself should receive strict scrutiny. *Rothe*, on the other hand, has forged different path.

III. THE IMPACT OF *ROTHE* ON THE SMALL BUSINESS ACT

A cursory glance at *Rothe* seems to indicate that this is simply an academic, esoteric discussion about the finer points of statutory interpretation. Why does it even matter that *Rothe* declares Section 8(a)

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[142] *Rothe*, 836 F.3d at 65.

[143] 115 F.3d 1012, 1013 (D.C. Cir. 1997).

[144] *Id.* at 1014-18.

[145] *Id.* at 1017.

[146] *Rothe*, 836 F.3d at 71 ("even if an earlier opinion could be read to reach the relevant issue, "[b]ecause that issue was not before the court, its overly broad language would be *obiter dicta* and not entitled to deference" (citation omitted)).

[147] *DynaLantic Corp.*, 115 F.3d at 1017

[148] *Id.*

[149] *Id.* at 1017 n.3 (emphasis in original) (internal citation omitted).

to be a non-racial classification subject only to rational basis scrutiny? This section will explore the potential consequences that a strategic Small Business Act might take to either further or inhibit race-based classifications in ways Congress never intended.[150]

First, if the statute only garners rational basis scrutiny, the Small Business Act could be free to ignore race as a consideration and frustrate the intended purpose of 8(a). As the above section notes, the statute evidences clear Congressional intent for the SBA to allocate funds on the basis of race to ameliorate the effects of past discrimination.[151] However, under *Rothe*, the SBA has extensive leeway to ignore that mandate and frustrate the essential aims of the program. If the statute actually looks only at individual discrimination and not race, the SBA could use a wide variety of other factors to base its allocation decisions. Perhaps the SBA could view rural contractors or faith-based contractors to be the prime targets of social disadvantage. If so, they could ignore race and concentrate their recruitment efforts on these classifications.

Would a system that prioritizes other classifications pass rational basis scrutiny, even if past racial discrimination could be shown through the effective use of disparity studies? Clearly so. In order for a statute to pass rational basis scrutiny, the statute need only "bea[r] a rational relation to some legitimate end."[152] This is a very low threshold to meet.[153] The more important question is: could the SBA justify not using race as a factor for consideration, even where past discrimination is evident? Under rational basis, the argument is fairly straightforward. The SBA could argue that other forms of discrimination are more important, and with only so many dollars to allocate, it has the authority to choose which forms of discrimination to combat. That determination would certainly bear a rational relation to some legitimate end, and rational basis scrutiny does not allow courts to second-guess the policymaking decisions of the government.[154] The range of latitude that a governmental actor has under rational basis is vast, and it is easy to envision a justification for the SBA refusing to use race as an 8(a) consideration.

Of course, this seems counter-intuitive, given the overwhelming evidence that Congress intended to nobly combat the effects of invidious

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[150] Although there is no evidence that the SBA intends to depart from its current understanding of 8(a), politics and new leadership could change the internal dynamics of the agency.

[151] *See infra*, Section II.

[152] Romer v. Evans, 517 U.S. 620, 631 (1996). *See also* City of Cleburn, Tex. v. Cleburn Living Ctr., 473 U.S. 432, 440 (1985) (noting that laws pass rational basis scrutiny where "the classification drawn by the statute is rationally related to a legitimate state interest.").

[153] *See* District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008) (noting that, "almost all laws" pass rational basis scrutiny).

[154] *City of Cleburn,* 473 U.S. at 440. (remarking that states are given "wide latitude" under rational basis scrutiny).

race discrimination.[155] This is partly why the court in *DynaLantic* remarked that race-consciousness regulations might be required by the statute.[156] If the statute only receives rational basis review, race-consciousness clearly is not mandated, and the SBA would be free to over or under-include race in the 8(a) program.

The other end of the spectrum is also in play if the statute is only afforded rational basis scrutiny. Suppose the SBA is hypersensitive to the impact of race discrimination and seeks to give significant bidding advantages to all minority candidates. To do so, this hypothetical SBA declares that minority applicants who can claim some sort of social disadvantage will always get preferential treatment. *Adarand*, of course, instructs agencies to narrowly tailor their remedial measures to ensure that only those truly impacted receive benefits so that white applicants are not disproportionately, and perhaps unfairly, affected.[157]

As it currently stands, courts generally rely on exhaustive disparity studies that conclude that past discrimination within the applicant's narrow field remains an impediment to equal access to contracts.[158] If the statute no longer receives strict scrutiny, there would no longer be any need to engage in this kind of fact-finding; the SBA could simply declare that race discrimination exists and engage in racial balancing in the 8(a) program. The entire purpose of strict scrutiny, as it pertains to race-conscious statutes, is to ensure that the discrimination based on race is limited in scope and lessen the impact on those who are not receiving the advantage.[159]

Strict scrutiny is the vehicle used by courts to limit these effects, and without that mechanism in place, the constitutionally protected rights of the majority could be endangered. As Justice Roberts famously declared, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[160] Without strict scrutiny, Justice Roberts's plea would be toothless. Certainly, an SBA policy that

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[155] *See generally* Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1171 (10th Cir. 2000) ("Congress has devoted considerable energy to investigating and considering this systematic exclusion of existing minority enterprises from opportunities to bid on construction projects resulting from the insularity and sometimes outright racism of non-minority firms in the construction industry.").

[156] *DynaLantic Corp.*, 115 F.3d at 1017 n.3.

[157] *See Adarand*, 515 U.S. at 235.

[158] *See generally Adarand*, 228 F.3d at 1172; *Contractors Ass'n of Eastern Pa., Inc.*, 6 F.3d at 1004-05; *W.H. Scott Constr. Co., Inc.*, 199 F.3d at 218 ("Disparity studies are probative evidence of discrimination because they ensure that the "relevant statistical pool," of qualified minority contractors is being considered."); Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep't of Transp., 713 F.3d 1187, 1196-97 (9th Cir. 2013) (using a disparity study to justify affirmative action plan and noting that courts use statistical evidence to identify discrimination).

[159] *Croson*, 488 U.S. at 493 ("Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.").

[160] *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

authorizes widespread advantages to socially disadvantaged minority applicants would bear a rational relation to some legitimate end, given this country's history of past discrimination, and would thus pass rational basis scrutiny.

The list of socially disadvantaged groups found in the regulations deserves more than a cursory glance and further highlights the dangers of rational basis scrutiny for 8(a).[161] One might reasonably hope that there is evidence justifying inclusion on the list, and that there is an objective to be reached, at which point the solution may be discontinued as the problem has been resolved. It is clear that whole geographic areas have been included without much thought. It is improper to assume on average that immigrants from, for example, Singapore are necessarily economically disadvantaged any more than if United States citizens were to go to Singapore.

On the other hand, there are good and noble reasons why it might be appropriate for Black or Hispanic Americans to be given additional opportunities in contracting, especially when the lack of access and need has been specifically documented. However, without strict scrutiny's ability to confine group advantages to the truly worthy groups, no documentation would be necessary to justify including Singapore or any other similar nation. The SBA itself, through its regulations, has already shown that it can and will cast a wide net for the categorization of disadvantaged groups.[162] The rationale for inclusion of groups and nations as eligible may come down to politics, or worse, something arbitrary and capricious.

The inclusion of other groups is a particularly worrisome exercise of discretion in a supposedly race-neutral environment. If the statute is race-neutral, how can the SBA add more race-conscious classifications, if and where it sees fit, without documentation to support the inclusion? Not all members of these groups experience the "individual-based" bias and prejudice necessary to satisfy the *Rothe* standard.[163] The danger is that the SBA might simply be more concerned with appearing to address problems that may or may not exist. Political considerations and public

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[161] 13 C.F.R. § 124.103(b)(1) (2012). The racial groups that qualify as socially disadvantaged include: "Black Americans; Hispanic Americans; Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal)." *Id.*

[162] *See id.*

[163] *Rothe*, 836 F.3d at 64 (noting that 8(a) "envisions an individual-based approach that focuses on experience rather than on a group characteristic.").

relations might determine who receives preferred status, regardless of need. Compliance with the program rules, rather than the achievement of a positive societal goal, could be the SBA's priority if the statute is read to be race-neutral.

Race neutrality in a statute intended to cure racial disparity is counterproductive. It effectively equates the problems and experiences of people across all racial groups, and places everyone in a one-size-fits-all policy solution bucket. At best, this solves the problem for no one; it may even exacerbate matters for some firms depending on the predicament of certain firms and their ability to remain afloat waiting for opportunities from public contracting that may never come. Prejudice and bias must be proved, but only by those who are not in groups already afforded the presumptive status via government, which may have little to do with actual individual experience of prejudice and bias. Groups are afforded the benefit of the doubt, but individuals could be left out, no matter how compelling their stories. There is no guarantee that a firm that survives this process will even be included in a solicitation, bidding, or evaluation process in a sheltered market for disadvantaged businesses.

Rothe's impact will likely be pronounced because it is binding precedent for the D.C. Circuit, which hears far more administrative law cases law than any other circuit.[164] Indeed, the D.C. Circuit hears over one-third of all administrative reviews that arise in federal circuit courts.[165] Given the disproportionate number of cases it reviews involving agencies like the SBA, and without clarity from the U.S. Supreme Court, the D.C. Circuit's impact on the direction of race-conscious programs like the 8(a) will be magnified. Thus, the decision in *Rothe* may foreshadow a wider application of rational basis scrutiny to the 8(a) program.

CONCLUSION

Section 8(a) was crafted by Congress with several race-conscious indicators. The clear purpose of the program is to ensure that firms owned by socially disadvantaged persons can enter the construction contracting market on a level playing field. It is meant to alleviate some of the past discrimination and does so in race-explicit ways. Even though *Croson* and *Adarand* instruct agencies to proceed cautiously when giving race-based preferences, given the right set of circumstances and documentation, they can be permissible. Disparity studies can show a

[164] Eric Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J. L. PUB. POL'Y 131, 137-38 (2013).

[165] *Id.* at 142 (noting that 36 percent of all such reviews in 2010 were conducted by the D.C. Circuit).

strong basis in evidence to justify remedial race-based preferences where there is a statistically significant showing of past discrimination in the local area. While time-consuming and potentially expensive, disparity studies can provide a means to correct discrimination in the contracting world. These studies are vital to ensure that governmental entities do not overreact or overreach to remedy discrimination that is merely perceived and not actual.

Reading the 8(a) statute as a race-conscious attempt by Congress to address inherent unfairness in government contracting is the straightforward and common-sense interpretation. Using terms such as "racial," "group," and "Minority Small Business" is an obvious indicator of race-consciousness.[166] If those terms were not clear enough, Congress listed several racial classifications to be included in the understanding of the term "socially and economically disadvantaged" individuals.[167] There should be little doubt that race was designed to be a factor for consideration, and consequently, the statute itself and the implementation of the program is subject to strict scrutiny.

Rothe, however, disregards the mountain of evidence pointing towards a race-based statute and instead holds that the statute differentiates on an individual rather than group level. Consequently, *Rothe* holds the statute should only receive rational basis scrutiny. Such a holding endangers Congress' intent to fashion a program that uses race on a limited basis to achieve limited goals. With only rational basis constraining the statute, the SBA, or other similarly situated agencies, has free reign to either over or under include race contrary to what Congress aimed to achieve. Given the D.C. Circuit's influence over administrative law, *Rothe* could usher in sweeping changes that stretch beyond the Small Business Act. The more prudent path—one foreclosed by *Rothe*—is to not overcomplicate the uncomplicated and simply acknowledge that 8(a)'s inclusion of overtly race-based terms demonstrates that it should be a race-based statute subject to strict scrutiny.

[166] *See* 15 U.S.C. § 637(a)(5) (2012); 15 U.S.C. § 637(a)(8) (2012).
[167] *See* 15 U.S.C. § 631(f)(1) (2012).