Constitutional Law -- Strictly Scrutinizing Fullilove v. Klutznick: A Proposed Analytical Model for Supreme Court Review of Congressional Legislation

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The Supreme Court traditionally has evaluated equal protection challenges to the validity of legislation using racial classifications by applying an ends-means analysis that incorporates a judicially fashioned standard of review called "strict scrutiny." In keeping with this tradition, Justice Powell alone explicitly adopted a strict scrutiny approach with a few modifications to join five other Justices in upholding a statutory preference for minority-owned businesses. The six-to-three decision in *Fullilove v. Klutznick* yielded no majority opinion, but it did hold that the congressional use of a racial quota in affirmative action legislation did not violate the equal protection component of the due process clause of the fifth amendment. Justice Marshall, in an opinion joined by Justices Brennan and Blackmun, determined that an ends-means analysis with an intermediate standard was more appropriate for review of affirmative action legislation. Chief Justice Burger, in an opinion in which Justices White and Powell joined, explicitly rejected the analytical formulas applied in the other two concurring opinions. The analytical model the Chief Justice devised, however, bore a striking resemblance to the strict scrutiny approach articulated in Justice Powell's separate opinion.

It is the contention of this Note that contrary to Justice Powell's reasoning, the Court's standard of review in *Fullilove* should not have been triggered by the racial classification itself, which customarily has dictated a strict scrutiny standard. Likewise, the standard should not have been triggered by the benign purpose for which the racial quota was to be used, which, according to Justice Marshall, would have dictated an intermediate standard. The standard in *Fullilove* should have been determined, instead, by the fact that the Court was reviewing an exercise of congressional power, a circumstance that consistently has demanded the most deferential standard, the rational basis standard of review. This approach has its origins in the seminal decision of American

1. See text accompanying note 15 infra.
2. 448 U.S. 448 (1980).
3. Id. at 518-19 (Marshall, J., concurring in the judgment).
4. Justice Powell, although concurring in Chief Justice Burger's opinion, wrote separately to apply explicitly the strict scrutiny analysis he developed. Id. at 495 (Powell, J., concurring).
5. Id. at 492 (opinion of Burger, C.J.). The Justices who wrote the other two concurring opinions each stated that the analytical formulas they were applying in *Fullilove* had been articulated in their opinions in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). 448 U.S. at 496 (Powell, J., concurring); id. at 517 (Marshall, J., concurring in the judgment).
7. E.g., Harris v. McRae, 448 U.S. 297, 325-26 (1980) (The Hyde Amendment, a congressional amendment that did not permit federal reimbursement of all medically necessary abortions, was considered to bear a "rational relationship" to the federal government's interest in protecting
constitutional law, *McCulloch v. Maryland*. In 1819, while reviewing the constitutionality of another act of Congress, Chief Justice John Marshall outlined in *McCulloch* an ends-means analytical model containing a standard of review consistent with this deferential attitude. The *Fullilove* opinions indicate, however, that the Court has forgotten this analytical approach and in so doing has found itself unable to formulate a consistent and definitive equal protection analysis for review of congressional legislation.

In focusing on the opinions written by Chief Justice Burger and Justice Powell, this Note will argue that the strict scrutiny approaches used in each opinion are inappropriate for review of congressional legislation claimed to violate the equal protection guarantee. Inconsistencies created by such an application will be examined. In applying a more appropriate analytical model—the *McCulloch* analysis—this Note will suggest how these inconsistencies can be corrected. Finally, several reasons rooted in the political process and confirmed by congressional history will be offered to support the application of the *McCulloch* analysis to suits challenging the validity of congressional legislation.

The Court in *Fullilove* examined the congressional enactment of the "minority business enterprise" (MBE) provision in the Public Works Employment Act of 1977. This provision requires that, absent an administrative waiver, at least ten percent of the federal funds granted to state and local governments for public works projects must be set aside for minority businesses. In *Fullilove* alleged that the MBE provision violated the equal protection component of the fifth amendment’s due process clause, the equal protection clause of the fourteenth amendment, and several antidiscrimination statutes. The federal district court upheld the validity of the MBE provision, and the Second Circuit Court of Appeals affirmed. A divided Supreme Court af-

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9. For a description of this analytical model, see text accompanying notes 39-42 infra.
12. 448 U.S. at 455 (opinion of Burger, C.J.).
firmed the lower court's decision on the grounds that the MBE provision did not violate the equal protection component of the due process clause of the fifth amendment.

As mentioned previously, Chief Justice Burger's opinion and Justice Powell's separate concurrence both could be characterized as traditional strict scrutiny approaches with a few modifications. The traditional strict scrutiny analysis considers three factors: (1) whether there is a compelling state interest furthered by the legislation; (2) whether the means chosen are necessary to effectuate that interest; and (3) whether less intrusive means are available to effectuate that interest. In determining whether there was a "compelling state interest" furthered by the legislation, Chief Justice Burger and Justice Powell asked whether Congress had the constitutional power to remedy past discrimination and if Congress had sufficient findings which demonstrated that this discrimination had adversely affected minority businesses. Both Justices concluded that the commerce and spending powers and the enforcement clause of the fourteenth amendment endowed Congress with the power to remedy the effects of past discrimination.

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In addressing the second prong of the strict scrutiny analysis, the Justices sought to determine whether the means chosen were "reasonably necessary" or "narrowly tailored." In answering this question, both Justices conducted a "searching examination" of the quota by analyzing many factors, an examination akin to the "less intrusive means" test—the third prong of the traditional strict scrutiny analysis. Between them, the two Justices surveyed (i) the efficacy of alternatives; (ii) the planned duration of the set-aside; (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority workers in the relevant work force or population; (iv) the availability of quota waivers; (v) the effect of the set-aside upon innocent third parties; and (vi) the under/over-inclusiveness of the

16. See 448 U.S. at 472-73 (opinion of Burger, C.J.); id. at 498 (Powell, J., concurring).
17. U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). Justice Powell concluded that the enforcement clause of the thirteenth amendment was also a source of power. 448 U.S. at 510 (Powell, J., concurring).
18. See 448 U.S. at 472-76 (opinion of Burger, C.J.); id. at 499-500 (Powell, J., concurring).
19. Id. at 503 (Powell, J., concurring).
20. Id. at 506 (Powell, J., concurring). See id. at 486 (opinion of Burger, C.J.).
21. Id. at 510 (Powell, J., concurring).
22. Id. at 480 (opinion of Burger, C.J.).
23. Id. at 491 (opinion of Burger, C.J.).
Both Justices concluded the quota was permissible.

Although he used an ends-means analysis in his opinion, Justice Marshall applied an intermediate standard that considered: (1) whether the racial classifications, designed to remedy the effects of past discrimination, served important governmental objectives; and (2) whether the ten percent set-aside was substantially related to achievement of these objectives. He concluded that the legislation met both tests.

The Court has addressed the claim of "reverse discrimination" as a violation of equal protection only once before—in *Regents of the University of California v. Bakke*. Bakke, a white male whose application to the state medical school was rejected, challenged the legality of the school's admissions program in which sixteen of the one hundred positions in the class were reserved for "disadvantaged" minority students. Chief Justice Burger and Justices Stevens, Stewart and Rehnquist rejected the Regents' minority admissions quota on statutory grounds. Justices Brennan, White, Marshall and Blackmun reached the equal protection issue and found the quota unobjectionable. Justice Powell broke the deadlock by rejecting the quota because it violated the equal protection guarantee but indicated that some race-conscious action may be acceptable. Justice Powell set forth in *Bakke* the modified strict scrutiny analysis he applied two years later in *Fullilove*. He held that the special admissions program violated the fourteenth amendment because the admissions committee did not have the authority to establish that it had discriminated against minorities in the past. In other words, the program was illegal because it failed to satisfy the "compelling state interest" prong of his modified strict scrutiny analysis.

In developing an equal protection analysis for suits challenging racial classifications, the Court has held that racial classifications trigger the most stringent level of judicial review and concomitant opportunity for judicial intervention. On the other hand, the Court has also held that review of an act of Congress triggers the most deferential attitude or level of judicial scrutiny in its equal protection analysis. These two judicial postures square off against each other in a case such as *Fullilove*, in which a congressional statute is challenged on equal protection grounds because it uses a racial classification. Chief Justice Burger and Justice Powell attempted to resolve this conflict in *Fullilove* by applying a modified strict scrutiny approach, creating several inconsistencies in the course of their analyses. It is the contention of this Note,

24. Id. at 484-89 (opinion of Burger, C.J.); id. at 510-15 (Powell, J., concurring).
25. Id. at 519 (Marshall, J., concurring in the judgment).
27. Id. at 408-21 (Stevens, J., joined by Burger, C.J. & Stewart & Rehnquist, J.J., concurring in part and dissenting in part).
28. Id. at 324-79 (Brennan, White, Marshall & Blackmun, J.J., concurring in part and dissenting in part).
29. Id. at 269-324 (opinion of Powell, J.).
30. Id. at 309 (opinion of Powell, J.).
31. See note 15 and accompanying text supra.
32. See note 7 and accompanying text supra.
however, that if the Justices had selected, instead, the most deferential analytical model—the McCulloch analysis—their constitutional analyses of the congressional legislation would have avoided these inconsistencies. Furthermore, they would have fulfilled their judicial duty of review without treading on legislative ground.

In McCulloch Chief Justice Marshall had to determine whether Congress had the power to incorporate a bank or whether such an exercise of power violated the tenth amendment mandate that the powers “not delegated to the United States . . . are reserved to the states . . . .” Marshall first noted that although the power to incorporate a bank was not specifically enumerated in the Constitution, it could be considered an implied or incidental power—a means by which to carry out other enumerated powers. More importantly, the power to exercise these implied or incidental powers was specifically granted to Congress in article I, section 8, clause 18 of the Constitution. That section states that Congress has the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers . . . .” In McCulloch, therefore, the power to incorporate a bank was an incidental or implied power—a “necessary and proper” means—of executing five specifically enumerated powers: the power “to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies.”

Chief Justice Marshall concluded that the constitutionality of any exercise of congressional power should be measured with reference to the following rule:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

The Chief Justice’s statement, which is the essence of the McCulloch analysis, can be divided into a three-prong test which inquires: (1) whether there is an enumerated power upon which the means (the incidental or implied power) rests; (2) whether the means are “plainly adapted” to the ends; and (3) whether the means are expressly prohibited by the Constitution or violate a substantive constitutional right.

33. The first Congress had created and incorporated the first national bank in 1791, but its charter was not renewed in 1811. In 1816 the Congress established the Second Bank of the United States. G. Gunther, John Marshall’s Defense of McCulloch v. Maryland 4 (1969).
35. Id. at 411.
36. Id. at 411-12.
39. Id. at 421.
40. This prong is analogous to the phrase “Let the end be legitimate, let it be within the scope of the constitution.”
41. This prong is the same as the phrase “[means] which are plainly adapted to that end.” If this prong and the third prong are satisfied, the means are “appropriate.”
42. This prong is analogous to the phrase “[means] which are not prohibited, but consist with
The Court held that the congressional decision to incorporate a bank was a valid exercise of an enumerated power and, therefore, did not violate the broad constitutional mandate of the tenth amendment. In so doing the Court did not need to deal with the third prong of its analytical model which asks whether the means selected violate any express prohibitions or substantive rights in the Constitution. Instead, the Court merely implied that the tenth amendment—a broad statement that is neither an express prohibition nor a substantive right—was not violated if the first two prongs of the analysis were satisfied. That is, the tenth amendment was not violated if (1) there was an enumerated power upon which the means rested, and (2) the Congress was validly exercising that enumerated power. The Court determined that the exercise of power was valid simply by examining the relationship between the enumerated power (the ends) and the implied or incidental power (the means). That is, if the means were “plainly adapted” (or had a rational relationship) to the ends, they were considered a valid exercise of the enumerated power. In determining whether the means were “plainly adapted” to the ends, Chief Justice Marshall examined the contemporary record upon which Congress grounded its decision to incorporate the bank; he did not merely imagine any conceivable basis for the exercise of congressional power. The resulting analysis, therefore, could be described as a classic ends-means analysis combined with a standard of review that one commentator has called “rational basis with bite.”

It is the contention of this Note that Fullilove and cases like it should be analyzed under the first two prongs of the McCulloch analysis. That is, cases should be treated under the McCulloch analysis if (1) they involve a congressional decision to support the congressional selection of means. E.g., Harris v. McRae, 448 U.S. 297 (1980); Schlesinger v. Ballard, 419 U.S. 498 (1975).

In applying the rational basis standard of review the Court historically has allowed any conceivable basis to support the congressional selection of means. E.g., Harris v. McRae, 448 U.S. 297 (1980); Schlesinger v. Ballard, 419 U.S. 498 (1975).

45. Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972). “Putting consistent new bite into the old equal protection would mean that the Court would be less willing to supply justifying rationales by exercising its imagination. It would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely conjecture.” Id.
sional exercise of an enumerated power, (2) the means selected are claimed to violate a broad constitutional mandate (such as the tenth amendment\textsuperscript{46} or the implied equal protection component of the fifth amendment) and (3) no substantive rights or express prohibitions are claimed to be violated. A comparison of the traditional strict scrutiny test and the \textit{McCulloch} analysis will illustrate the appropriateness of each analytical model when applied to cases like \textit{Fullilove}, which review the constitutionality of an act of Congress.

The first prong of the \textit{McCulloch} analysis—that the means selected rest upon an "enumerated power"—serves the same analytical purpose as the first prong of the strict scrutiny analysis—that the means further a "compelling state interest." The terms used in each, however, implicitly recognize the difference in sources of power upon which each analytical model rests. The term "enumerated power" refers to those powers delegated to Congress in the Constitution and directs the Court to that document when determining whether the means selected rest upon a congressional power.\textsuperscript{47} "Enumerated power" is a more accurate term for an analysis of the constitutionality of congressional acts than the broader concept of "compelling state interest" because Congress technically does not have any "interests" other than the powers specifically enumerated in the Constitution. Use of the general term "interests" is more appropriate when analyzing the validity of an exercise of state power since state legislatures may exercise all power not reserved to the federal government by the Constitution. In other words, Congress has \textit{only} constitutionally enumerated powers,\textsuperscript{48} while the states have \textit{no} constitutionally enumerated powers.\textsuperscript{49} From this distinction flows the major difference between strict scrutiny analysis and the \textit{McCulloch} analysis—they rest on opposite underlying presumptions.

The strict scrutiny analysis\textsuperscript{50} rests on the presumption that the enactment of legislation containing racial classifications violates the equal protection provision of the fourteenth amendment\textsuperscript{51} because the state has no constitutionally enumerated power with which to support its use of the classification. To begin to overcome this presumption, the state first must demonstrate an overwhelming or "compelling state interest," an interest which rises to the level of a constitutional power. The presumption of invalidity is not rebutted, however, unless the racial classification (the means) is "necessary" to effectuate the interest (the ends). To ensure that this second prong, the "necessary" standard, is met, the means are measured under the third prong of the strict scrutiny analysis: the Court determines if there are any "less intrusive means" available to carry out the state goal. Under this most rigorous judicial stan-

\textsuperscript{46} U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").
\textsuperscript{47} 17 U.S. (4 Wheat.) at 405.
\textsuperscript{48} Id.
\textsuperscript{49} See U.S. Const. amend. X.
\textsuperscript{50} See text accompanying note 15 supra.
\textsuperscript{51} E.g., \textit{Loving v. Virginia}, 388 U.S. 1 (1967).
The presumption is shifted, however, in the *McCulloch* analysis. That analytical model rests on the presumption that the means selected do not violate the Constitution if, under the first prong, Congress can support its selection of means with at least one enumerated power. Chief Justice Marshall explained the presumption in these words:

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.53

This presumption of validity ultimately rests on the notion that the provisions in the Constitution are consistent with one another54 so that the mere exercise of congressional constitutional power will not automatically violate another constitutional provision.

This presumption of validity is tested under the second prong of the *McCulloch* analysis. The Court determines whether the exercise of power is valid by examining the relationship between the enumerated power (the ends) and the incidental or implied power (the means). In *Fullilove*, for example, the contemporary record indicated that the racial classifications chosen were "plainly adapted" or rationally related to the congressional goal in remedying the effects of past discrimination pursuant to the enforcement clause of the fourteenth amendment and the spending and commerce powers.55 The exercise of power would almost certainly have been considered "appropriate" under the *McCulloch* analysis. The third prong of the analysis would not be triggered in a case like *Fullilove* because the quota was not claimed to violate any express prohibitions or substantive constitutional rights. Satisfaction of

52. Applying a strict scrutiny standard to review a state legislature's choice of means, while using a more deferential standard to review an act of Congress, may produce seemingly inconsistent results. That is, identical legislation may be deemed unconstitutional if enacted by a state government but constitutional if passed by the Congress. These inconsistent results can be reconciled—the Constitution grants Congress, and not the states, specific power to legislate in certain areas. See, e.g., *Sugarman v. Dougall*, 413 U.S. 634 (1973). There the Court held that a New York civil service law that provided that only United States citizens could hold permanent positions in the competitive class of the state's civil service violated the equal protection guarantee of the fourteenth amendment. In contrast, in *Hampton v. Mow Sun Wong*, 426 U.S. 88, 95 (1976), the Court stated that *Sugarman* was not controlling if the Congress passed a similar statute because "Congress and the President have broad power over immigration and naturalization which the States do not possess."

54. Chief Justice Marshall implicitly recognized this principle in *McCulloch*:

Even the 10th amendment... omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument.

Id. at 406 (emphasis added).
55. See 448 U.S. at 480-81 (opinion of Burger, C.J.); id. at 502-06 (Powell, J., concurring). Chief Justice Burger conducted an extensive review of the contemporary record. Id. at 461-72 (opinion of Burger, C.J.).
the first two prongs of the *McCulloch* analysis, which examine whether Congress is validly exercising its powers, is sufficient to support the presumption that the means do not violate the broad mandate of the equal protection guarantee.

The *McCulloch* analysis ensures, therefore, that the congressional use of a racial classification does not violate the equal protection guarantee, while allowing Congress the freedom to exercise its broad legislative powers. This analytical approach also corrects some inconsistencies created by the Court’s application of a modified strict scrutiny analysis in the congressional context. One inconsistency arises when the Court applies a “necessary” standard to review a congressionally authorized racial quota although the Court traditionally has held that the Constitution permits Congress to exercise “any appropriate means” in carrying out its enumerated powers.\(^5\) In *McCulloch* Chief Justice Marshall interpreted the “necessary and proper” clause as demanding only “appropriate” means, not “indispensibly necessary” ones.\(^5\) Subsequent cases not only have reiterated this decision,\(^5\) but have applied this “appropriate” standard when reviewing an exercise of congressional power under the enforcement clauses of the thirteenth,\(^5\) fourteenth\(^6\) and fifteenth\(^6\) amendments as well. Chief Justice Burger and Justice Powell aptly illustrate this constitutional inconsistency in their opinions in *Fullilove* when they find themselves unable to reconcile their “necessary” means standards with the deferential, “appropriate” means standard they acknowledge has been traditionally accorded congressional decisions.\(^6\) In trying to resolve the conflict, the two Justices watered down their “necessary” standards to a “reasonably necessary”\(^6\) and a “narrowly tailored”\(^6\) standard. Yet, Justice Powell, at least, still maintains he is applying a strict scrutiny standard of review.\(^6\)

Furthermore, this application of strict scrutiny analysis means the Court is adopting a judicial posture inconsistent with its strong tradition of according deference to determinations made by a coequal branch of the federal government.\(^6\) That is, in cases involving the congressional use of a racial classification, the Court finds itself in a position where it can defeat a congressional

\(^{56}\) 17 U.S. (4 Wheat.) at 316. See also Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); United States v. Darby, 312 U.S. 100 (1941).

\(^{57}\) 17 U.S. (4 Wheat.) at 414-16.


\(^{59}\) U.S. Const. amend. XIII, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”). See Jones v. Alfred H. Mayer & Co., 392 U.S. 409, 438-44 (1968).

\(^{60}\) U.S. Const. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”). See Katzenbach v. Morgan, 384 U.S. 641 (1966); Ex parte Virginia, 100 U.S. 339, 345-46 (1879).

\(^{61}\) U.S. Const. amend. XV, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”). See South Carolina v. Katzenbach, 383 U.S. 301, 326-28 (1966).

\(^{62}\) See 448 U.S. at 490-92 (opinion of Burger, C.J.); id. at 510 (Powell, J., concurring).

\(^{63}\) Id. at 510 (Powell, J., concurring).

\(^{64}\) Id. at 480 (opinion of Burger, C.J.).

\(^{65}\) Id. at 507 (Powell, J., concurring).

\(^{66}\) E.g., CBS v. Democratic Nat’l Comm., 412 U.S. 94, 102 (1973); Joint Anti-Fascist Refu-
choice of "appropriate" means if they do not meet the stringent "necessary" standard. Chief Justice Marshall commented on the impropriety of this interventionist stance in *McCulloch*: "But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." In *Fullilove*, for example, Chief Justice Burger and Justice Powell could have invalidated the ten percent quota if it had failed any one of the numerous tests they had erected to review it. If they had found, for example, that other "less intrusive means" were available, that the planned duration of the set-aside was too long, or that the quota was impermissibly under-inclusive or over-inclusive, the quota could have been struck down as unconstitutional.

The most compelling inconsistency arises when the strict scrutiny presumption of invalidity is applied to congressional exercises of constitutional power. In a strict scrutiny analysis the Court presumes that a congressional exercise of constitutional power violates the equal protection guarantee merely because the legislation utilizes a racial quota. In failing to presume that these constitutional provisions are more likely to be consistent than inconsistent with one another, the Court could conceivably cancel out the legitimate exercise of a constitutional power on the grounds that it violates another broad constitutional provision, the parameters of which are amenable to a liberal interpretation. The results produced in such an analysis can be absurd indeed. In *Fullilove*, for example, the Court could have defeated the use of affirmative-action quotas on the grounds that such a practice violated the equal protection component of the fifth amendment even though Congress passed this legislation pursuant to several constitutional powers, including the enforcement clause of the fourteenth amendment, a provision that exhorts Congress to carry out the equal protection guarantee. In other words, the legitimate exercise of power to further a particular goal could have been struck down as a violation of that same goal under a strict scrutiny analysis.

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In the *McGrath* opinion, Justice Frankfurter stated that the Court must have "due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government." 341 U.S. at 164.

68. *Cf. id.* at 423.

69. These tests are presented at text accompanying note 24 supra.

69. In adopting a presumption of validity, the Court, in effect, is submitting to a congressional determination of the meaning of a broad constitutional mandate. Such a stance is in keeping with the settled constitutional rule "that as between two possible interpretations of a statute . . . our plain duty is to adopt that which will save the Act." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.).

In addition, it has been stated by at least one commentator that the Congress can make a stronger argument than the Court as the most appropriate final authority to resolve controversies about the meaning of the Constitution, a document whose content evolves over time. That argument rests on two democratic premises: "first, that law should be responsive to the interests of the citizenry; and second, that in the long run it will be so only if lawmakers are amenable to popular control through ordinary political processes." *Cf. Sandalow, Judicial Protection of Minorities*, 75 Mich. L. Rev. 1162, 1166 (1977).
It has been argued that judicial deference to congressional decisions is unsuited to legislation that includes racial classifications. Strict scrutiny is a more effective standard, proponents argue, because in a political process in which the majority rules, a minority cannot adequately protect its interests. It is contended that the equal protection provisions of the Constitution demand that the judiciary protect "discrete and insular minorities." One commentator, however, has answered this argument by pointing out that the political process leading to deliberate congressional decisions affecting minorities contains internal safeguards for minority interests. Among these safeguards is the "effect upon the political process of an extraordinary variety of interest groups" and their "crosscutting loyalties and identities." The "interest group" safeguard has been explained this way:

To mobilize a majority of the votes in an election, each political party must appeal to a variety of "interests" and a wide spectrum of opinion. As a consequence of their catholicity, the major parties are unthinkable as instruments of tyranny because "it is impossible for the party in power to oppress any element of the opposition party without opposing a corresponding element within its own ranks." In addition, the party in power knows that any effort to "tyrannize" a particular minority may also antagonize other groups in the majority coalition, as well as the "independents" pursued by both major parties, and, therefore, may cost it the next election.

In short, the "monolithic" majority . . . does not exist; the majority is but a coalition of minorities which must act in a moderate, broadly representative fashion to preserve itself.

In addition, the organizational structure and procedures of Congress permit minority groups to exercise power beyond their mere numbers to protect their interests. They can prevent the enactment of unfavorable legislation by using several devices, including the following examples: the committee system, the filibuster in the Senate and the Rules Committee in the House.

71. Id. at 152 n.4.
72. Sandalow, supra note 69, at 1190-91.
73. Id. at 1190.
74. Id. (quoting Auerbach, The Reapportionment Cases: One Person, One Vote—One Vote, One Value, 1964 Sup. Ct. Rev. 1, 52) (citations omitted).
75. Id. at 1192.
76. Id.
77. The committee system has been defined as follows:
A committee may approve, alter (even totally revamp), kill or ignore proposals referred to it. It is difficult—almost impossible—to circumvent a committee that is determined not to act; a bill that has been approved by a committee may be amended when it reaches the House or Senate floor, but extensive changes are difficult and seldom occur. The work of a committee essentially becomes the work of Congress.
78. The filibuster has been defined as follows:
A time delaying tactic used by a minority in an effort to prevent a vote on a bill which probably would pass if brought to a vote. The most common method is to take advantage of the Senate's rules permitting unlimited debate, but other forms of parliamentary maneuvering may be used. The stricter rules in the House make filibusters
Commentators conclude, therefore, that strict judicial review of deliberately considered congressional legislation "merely permits courts to substitute their decisions for those of Congress ...." \(^{80}\) It can be argued in response that only well-organized, powerful minority groups are protected in such a democratic system, so that judicial intervention is required to protect impotent minorities. However, if a minority is the target of invidious, or irrational, discrimination, judicial review using the *McCulloch* analysis should detect it.\(^{81}\)

Finally, the statistics reflecting Supreme Court decisions on the constitutionality of state and federal statutes indicate that the political process leading to deliberate congressional decisions does provide adequate protection for minorities. While the Supreme Court repeatedly has struck down state laws that use invidious racial classifications,\(^{82}\) it has never found the congressional use

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more difficult, but they are attempted from time to time through various delaying tactics arising from loopholes in House rules.

Id. at xxvi (glossary of congressional terms).

79. The House Rules Committee has been defined as follows:

The House Rules Committee has long stood as a strategic gateway between the legislative committees and the floor of the House for a small but important part of the chamber's legislative business. The power of the committee lies in its roles of setting the agenda and allotting time for debate on those important and usually controversial bills that are not disposed of by the more routine procedures of the House. Thus the committee often has been able to prevent or delay bills it opposes from reaching the House floor.

Id. at 385.

80. Sandalow, supra note 69, at 1192.

81. For example, assume that Congress were to pass a ten percent quota favoring white-owned businesses. Such a set-aside should be declared unconstitutional because presumably there would be no findings of discrimination against whites to support a rational relationship between the use of the quota and the congressional power exercised, i.e., the enforcement clause of the fourteenth amendment under which Congress has an interest in remedying the effects of discrimination.

82. A cursory examination of the list of state laws which the Supreme Court has declared unconstitutional reveals that well over fifteen cases involved statutes which on their face invidiously discriminated against members of racial minorities. E.g., Lee v. Washington, 390 U.S. 333 (1968) (Alabama statutes requiring racial segregation in prisons and jails violate the equal protection clause); Loving v. Virginia, 388 U.S. 1 (1967) (Virginia statute prohibiting interracial marriage violates the equal protection clause); *McLaughlin* v. Florida, 379 U.S. 184 (1964) (Florida criminal statute prohibiting an unmarried interracial couple from habitually living in and occupying the same room in the nighttime violates the equal protection clause); *Lassiter v. United States*, 371 U.S. 10 (per curiam) (Louisiana laws that segregated passengers in terminal facilities of common carriers violate the equal protection clause), aff'd 203 F. Supp. 20 (W.D. La. 1962); Turner v. City of Memphis, 369 U.S. 350 (1962) (Tennessee statute and administrative regulation sanctioning racial segregation in a private restaurant operated on premises leased from a city violate the equal protection clause); *Bailey v. Patterson*, 369 U.S. 31 (1962) (Mississippi statutes that required racial segregation at interstate and intrastate transportation facilities violate the equal protection clause); *Orleans Parish School Bd. v. Bush*, 365 U.S. 569 (1961) (per curiam) (Louisiana statutes violated the equal protection clause when they (1) provided for segregation of races in public schools and the withholding of funds from integrated schools, (2) conferred on the Governor the right to close all schools upon integration of any one of them, and (3) directed the Governor to supersede a school board under a court order to desegregate and take over management of public schools violate the equal protection clause), aff'd 187 F. Supp. 42 (W.D. La. 1960); *State Athletic Comm'n v. Dorsey*, 359 U.S. 533 (1959) (per curiam) (Louisiana statute prohibiting athletic contests between Negroes and white persons violates the equal protection clause), aff'd 168 F. Supp. 149 (E.D. La. 1958); *Gayle v. Browder*, 352 U.S. 903 (per curiam) (Alabama statutes that required segregation of white and Negro races on motor buses in the City violate the equal protection clause), aff'd 142 F. Supp. 707 (M.D. Ala. 1956); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (state constitutional and statutory provisions requiring segregation of white and Negro children in public schools on the basis of race deny Negro children the equal protection of the laws); *McLau-
of a racial classification unconstitutional. It can be argued that resort to these statistics merely begs the question as to the legitimacy of congressional legislation; the Supreme Court simply does not dare undo congressional determinations. However, an inference can be drawn from the statistics that it is the states, which do not have the same political checks that Congress has, that historically have enacted legislation containing invidious racial classifications, not Congress. Indeed, in light of Congress’ passage of civil rights legislation since at least 1875, it is unlikely that it would begin suddenly to discriminate invidiously now.

Moreover, this number does not take into account the cases that were facially neutral, but whose effect, nonetheless, was to discriminate invidiously against a racial minority. E.g., United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972) (North Carolina statute that authorized creation of a new school district in a city that was part of a larger county school system is void inasmuch as its effect would be to impede the dismantling of the dual school system by affording a refuge to white students fleeing desegregation); Reitman v. Mulkey, 387 U.S. 369 (1967) (California constitutional provision adopted on referendum repealing “open housing” law and prohibiting state abridgment of realty owner’s right to sell and lease, or to refuse to sell and lease as he pleases, violates the equal protection clause); Anderson v. Martin, 375 U.S. 399 (1964) (Louisiana statute requiring that in all primary, general or special elections, the nomination papers and ballots shall designate the race of the candidates violates the equal protection clause).

Moreover, the Supreme Court has upheld the congressional use of a racial classification three times in modern history. Besides Fullilove, the Court sanctioned the use of a suspect classification in Korematsu v. United States, 323 U.S. 214 (1944), and Hirabayashi v. United States, 320 U.S. 81 (1943). Those two decisions, which upheld the placing of citizens of Japanese ancestry under curfew and in camps during World War II, have been severely criticized. However, those two cases should not be used as evidence in maintaining that strict scrutiny analysis and its concomitant presumption of validity are needed to review congressional legislation, or that a more deferential standard does not provide sufficient judicial review. This is so because the two cases both passed the strict scrutiny analysis that the Court applied. Also, it would be inaccurate to use those cases as evidence that Congress invidiously discriminates, because the classifications were not formed in the course of deliberate decision making by the Congress, but rather were made pursuant to a broad delegation of power to the military.

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84. The congressional power to curtail Supreme Court jurisdiction, see U.S. Const. art. III, § 2, could be considered a powerful incentive for the Court to give its imprimatur to congressional legislation.

85. Act of Mar. 1, 1875, ch. 114, § 1, 18 Stat. 335, provided in part:

That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations . . . of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

The Supreme Court held in the Civil Rights Cases, 109 U.S. 3 (1883), that the law was unconstitutional because it was not supported by the thirteenth or fourteenth amendments.
In sum, adoption of the *McCulloch* analysis for review of congressional legislation would cure the inconsistencies that flow from an application of the strict scrutiny standard. Moreover, in using such an analysis, the Supreme Court would not “tread on legislative ground”\(^8\) in ensuring that Congress has obeyed the Constitution.\(^7\)

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86. 17 U.S. (4 Wheat.) at 423.

87. It is interesting to note that in an apparent abandonment of the strict scrutiny, interventionist stance, the Court recently adopted in *Rostker v. Goldberg*, 101 S. Ct. 2646 (1981), an analysis similar to the *McCulloch* analysis. In writing for the majority, Justice Rehnquist stated that a congressional statute authorizing the President to require the registration of males and not females did not violate the fifth amendment’s equal protection component. This determination was based largely on the ground that Congress was exercising its authority over national defense and military affairs and that “in no other area has the Court accorded Congress greater deference.” Id. at 2651. Although it refused to advance “any further ‘refinement’ in the applicable [equal protection] tests,” id. at 2654, the Court found the exemption of women from registration was “closely related” to Congress’ purpose in authorizing registration. Id. at 2658. However, the articulated reasons for the exemption found in the congressional record were based primarily on administrative convenience. The Court stated, “It is not for this Court to dismiss such [administrative] problems as insignificant in the context of military preparedness and the exigencies of a future mobilization.” Id. at 2660. Administrative convenience, however, has never been sufficient to justify a gender classification. E.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973). Presumably administrative convenience would not be sufficient to support a classification examined under the rational basis standard because such a classification involves the “very kind of arbitrary legislative choice forbidden by the [Constitution]. . . .” Id. at 690 (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971)).

See also Loewy, Returned to the Pedestal—The Supreme Court and Gender Classification Cases: 1980 Term, 60 N.C.L. Rev. 87 (1981).