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# Notes

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# NOTES

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

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."[1] 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*[2] 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.[3] Chief Justice Burger, in an opinion in which Justices White and Powell[4] joined, explicitly rejected the analytical formulas applied in the other two concurring opinions.[5] The analytical model the Chief Justice devised, however, bore a striking resemblance to the strict scrutiny approach articulated in Justice Powell's separate opinion.[6]

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.[7] This approach has its origins in the seminal decision of American

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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).

6. See text accompanying notes 15-24 infra.

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*.[8] 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.[9] 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.[10] 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.[11] Plaintiffs 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.[12] The federal district court upheld the validity of the MBE provision,[13] and the Second Circuit Court of Appeals affirmed.[14] A divided Supreme Court af-

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the potential life of the fetus.); Schlesinger v. Ballard, 419 U.S. 498, 577-78 (1975) (The Court upheld a congressional statute that accorded female naval officers a thirteen-year tenure of commissioned service before mandatory discharge for want of promotion, while requiring mandatory discharge of male officers who were twice passed over for promotion but might have fewer than thirteen years of service. "Congress may thus quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with 'fair and equitable career advancement programs.' "). See Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976) (Civil Service Commission regulation that excluded aliens from employment in most federal service positions was held to violate the due process clause of the fifth amendment. The Court stated in the course of its holding, however, that "if the rule were expressly mandated by the Congress or the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption.").

8. 17 U.S. (4 Wheat.) 316 (1819).

9. For a description of this analytical model, see text accompanying notes 39-42 infra.

10. Pub. L. No. 95-28, §§ 101-111, 91 Stat. 116 (amending 42 U.S.C. §§ 6701-6710 (Supp. III 1979)).

11. 42 U.S.C. § 6705(f)(2) (Supp. III 1979) (The included minorities are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."). The requirement may be waived when a grantee demonstrates the infeasibility of achieving the ten percent requirement. Id.; see 123 Cong. Rec. 5328-29 (1977) (remarks of Reps. Mitchell & Roe).

12. 448 U.S. at 455 (opinion of Burger, C.J.).

13. Fullilove v. Kreps, 443 F. Supp. 253 (S.D.N.Y. 1977).

14. Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978).

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.[15] 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.[16] Both Justices concluded that the commerce and spending powers and the enforcement clause of the fourteenth amendment[17] endowed Congress with the power to remedy the effects of past discrimination.[18] After an exhaustive review not only of the administrative and legislative history of the bill, but also of the "total contemporary record of congressional action dealing with the problems of racial discrimination against minority business enterprises,"[19] both Justices determined that Congress had sufficient findings to establish that "purposeful discrimination contributed significantly to the small percentage of federal contracting funds that minority business enterprises [had] received."[20]

In addressing the second prong of the strict scrutiny analysis, the Justices sought to determine whether the means chosen were "reasonably necessary"[21] or "narrowly tailored."[22] In answering this question, both Justices conducted a "searching examination"[23] 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

15. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 635, 637 (1969). See also Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1101-04 (1969). See generally G. Gunther, Cases and Materials on Constitutional Law 670-971 (10th ed. 1980); L. Tribe, American Constitutional Law 991-1136 (1978).

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.).

quota.[24] 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.[25] 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*.[26] 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.[27] Justices Brennan, White, Marshall and Blackmun reached the equal protection issue and found the quota unobjectionable.[28] 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.[29] 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.[30] 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.[31] 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.[32] 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).

26. 438 U.S. 265 (1978).

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[33] 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 . . . ."[34] 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.[35] 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.[36] 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 . . . ."[37] 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."[38]

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.[39]

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;[40] (2) whether the means are "plainly adapted" to the ends;[41] and (3) whether the means are expressly prohibited by the Constitution or violate a substantive constitutional right.[42]

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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).

34. 17 U.S. (4 Wheat.) at 406 (quoting U.S. Const. amend: X).

35. Id. at 411.

36. Id. at 411-12.

37. U.S. Const. art. I, § 8, cl. 18.

38. 17 U.S. (4 Wheat.) at 407.

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)[43] 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.[44] 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."[45]

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 congres-

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the letter and spirit of the constitution." (The phrase "[means that] consist with the letter and spirit of the constitution" is the inverse of the phrase "[means] which are not prohibited.") If this prong and the second prong are satisfied, the means are "appropriate."

43. 17 U.S. (4 Wheat.) at 409-10. See generally L. Tribe, supra note 15, § 5-3, at 230.

44. The court observed:

> The bill for incorporating the bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved . . . . The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law.

17 U.S. (4 Wheat.) at 402.

> That [a bank] is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation.

Id. at 422-23.

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—Foreward: 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[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 *McCulloch* analysis will illustrate the appropriateness of each analytical model when applied to cases like *Fullilove*, which review the constitutionality of an act of Congress.

The first prong of the *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.[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 *only* constitutionally enumerated powers,[48] while the states have *no* constitutionally enumerated powers.[49] From this distinction flows the major difference between strict scrutiny analysis and the *McCulloch* analysis—they rest on opposite underlying presumptions.

The strict scrutiny analysis[50] rests on the presumption that the enactment of legislation containing racial classifications violates the equal protection provision of the fourteenth amendment[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-

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.").

47. 17 U.S. (4 Wheat.) at 405.

48. Id.

49. See U.S. Const. amend. X.

50. See text accompanying note 15 supra.

51. E.g., Loving v. Virginia, 388 U.S. 1 (1967).

dard the Court inquires extensively into the legislature's choice of means.[52]

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 another[54] 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

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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."

53. 17 U.S. (4 Wheat.) at 409-10.

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.[56] In *McCulloch* Chief Justice Marshall interpreted the "necessary and proper" clause as demanding only "appropriate" means, not "indispensibly necessary" ones.[57] Subsequent cases not only have reiterated this decision,[58] but have applied this "appropriate" standard when reviewing an exercise of congressional power under the enforcement clauses of the thirteenth,[59] fourteenth[60] and fifteenth[61] 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.[62] In trying to resolve the conflict, the two Justices watered down their "necessary" standards to a "reasonably necessary"[63] and a "narrowly tailored"[64] standard. Yet, Justice Powell, at least, still maintains he is applying a strict scrutiny standard of review.[65]

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.[66] 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.

58. E.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-62 (1964); United States v. Darby, 312 U.S. 100, 118-19 (1941).

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."[67] 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.[68] 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.[69] 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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gee Comm. v. McGrath, 341 U.S. 123, 164 (1951); Blodgett v. Holden, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.).

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.

67. 17 U.S. (4 Wheat.) at 423.

68. 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." 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 protects its interests.[70] It is contended that the equal protection provisions of the Constitution demand that the judiciary protect "discrete and insular minorities."[71] 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.[72] Among these safeguards is the "effect upon the political process of an extraordinary variety of interest groups" and their "crosscutting loyalties and identities."[73] 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 oppressing 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.
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> 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.[74]

In addition, the organizational structure and procedures of Congress permit minority groups to exercise power beyond their mere numbers to protect their interests.[75] They can prevent the enactment of unfavorable legislation by using several devices, including the following examples:[76] the committee system;[77] the filibuster in the Senate[78] and the Rules Committee in the House.[79]

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70. E.g., United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

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.

Congressional Quarterly's Guide to Congress 365 (2d ed. 1976).

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'g 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'g 187 F. Supp. 42 (E.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'g 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'g 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.[83] 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.[84] 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,[85] it is unlikely that it would begin suddenly to discriminate invidiously now.

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rin v. Oklahoma State Regents, 339 U.S. 637 (1950) (Oklahoma law requiring segregation in educational facilities at institutions of higher learning violates the equal protection clause); Sweatt v. Painter, 339 U.S. 629 (1950) (Texas constitutional and statutory provisions restricting admission to the University of Texas Law School to white students violate the equal protection clause); Sipuel v. Board of Regents, 332 U.S. 631 (1948) (per curiam) (Oklahoma constitutional and statutory provisions barring Negroes from the University of Oklahoma Law School violate the equal protection clause because the University Law School is the only institution for legal education maintained by the State); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938) (Missouri statute that accorded Negro residents financial aid to enable them to obtain instruction at out-of-state universities equivalent to that afforded exclusively to white students at the University of Missouri violates the equal protection clause because the obligation to give equal protection of the laws can be performed only within a state's own jurisdiction); Nixon v. Herndon, 273 U.S. 536 (1927) (Texas White Primary Law that barred Negroes from participation in Democratic Party primary elections violates the equal protection clause); and Strauder v. West Virginia, 100 U.S. 303 (1879) (West Virginia law barring Negroes from jury service violates the equal protection clause).

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).

83. 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.

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"[86] in ensuring that Congress has obeyed the Constitution.[87]

LISA MARIE NIEMAN

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).

## Civil Procedure—*Ager v. Jane C. Stormont Hospital:* Discovery of a Nontestifying Expert

Since the Federal Rules of Civil Procedure were amended in 1970 to include a separate provision for the pretrial discovery of experts,[1] the federal district courts have ruled several times on the discoverability of a nontestifying expert's identity under rule 26(b)(4)(B).[2] It was not until *Ager v. Jane C. Stormont Hospital*,[3] however, that a court of appeals reviewed this issue. The United States Court of Appeals for the Tenth Circuit, in rejecting the rationale advanced by a majority of district courts that had considered the issue,[4] held that the discovering party must show exceptional circumstances to justify disclosure of the identity and field of expertise of a nontestifying, specially employed or retained expert, or of any other collateral information relating to that expert.[5]

In *Ager* plaintiff, through her father, brought a malpractice action against defendants Stormont-Vail Hospital and Dr. Dan Tappen for injuries sustained at birth.[6] Subsequently, Dr. Tappen drafted a series of interrogatories, three of which essentially asked plaintiff to reveal the names and addresses of all experts who were contacted in preparation for the malpractice action.[7] The magistrate ordered plaintiff to answer the interrogatories unless the experts were only informally consulted, rather than specially employed or retained. Plaintiff refused to provide the identity of the consultative experts who were not expected to testify, apparently on the ground that an expert who is unable

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1. Fed. R. Civ. P. 26(b)(4)(B) states:

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

For a general survey of the new rule, see Graham, Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study, 1976 U. Ill. L.F. 895 [hereinafter cited as Graham, Part One].

2. See notes 43-59 and accompanying text infra.

3. 622 F.2d 496 (10th Cir. 1980).

4. See notes 50-59 and accompanying text infra.

5. 622 F.2d at 503.

6. During Emily Ager's birth, her mother suffered a massive rupture of the uterine wall, resulting in Mrs. Ager's death. Also, the placenta prematurely separated from the uterine wall, resulting in fetal asphyxia. As a consequence, Emily suffered severe neurological dysfunction and now is a mentally impaired quadraplegic with no control over her bodily functions. Id. at 498.

7. The specific interrogatories at issue were:

> 1. Have you contacted any person or persons, whether they are going to testify or not, in regard to the care and treatment rendered by Dr. Dan Tappen involved herein?
> 2. If the answer to the question immediately above is in the affirmative, please set forth the name of said person or persons and their present residential and/or business address.
> 3. If the answer to question #1 is in the affirmative, do you have any statements or written reports from said person or persons?

Id.

to aid the party and will not testify falls within the definition of an informally consulted expert. The magistrate rejected plaintiff's view that the classification of an expert as retained or specially employed was determined by the value of the expert's opinion and ruled that if a medical expert "is paid or makes a charge for such service, he has been 'retained' or 'specially employed' within the meaning of the Rule."[8] Plaintiff, therefore, was required to answer the interrogatories. Rather than respond, plaintiff sought review, but the United States District Court for the District of Kansas affirmed the magistrate's order. Plaintiff again refused to reveal the identity of her consultative experts, and a civil contempt order was entered against plaintiff's attorney, who had agreed to accept all sanctions.

On appeal, plaintiff challenged the contempt power of the district court[9] and raised two discovery issues. The first involved the proper means, for discovery purposes, of distinguishing between an expert who was retained or specially employed in anticipation of litigation and one who was only informally consulted.[10] The second raised the question of proper criteria to be used in determining discoverability of an expert found to have been specially employed or retained.[11]

Rule 26(b)(4) of the Federal Rules of Civil Procedure distinguishes between experts who will testify at trial and those who will not.[12] Subsection (A) provides for the discovery, through interrogatories, of the names of experts who will testify at trial and the subject matter of their testimony.[13] Subsection (B), however, permits discovery of nontestifying experts only if they were specially employed or retained, and even then discovery is allowed only under special circumstances.[14] Because no reference was made to informally consulted experts in rule 26(b)(4), the Advisory Committee maintained that dis-

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8. Id.

9. Id. at 499-500. The court held the civil contempt order to be dependent on the validity of the underlying order. Id. at 500. Plaintiff's attorney, therefore, would be held in contempt only if the court affirmed the trial court's ruling on the discovery issues.

10. See notes 15-24 and accompanying text infra.

11. See notes 28-63 and accompanying text infra.

12. This distinction was the subject of much debate when first proposed. One commentator stated:

> In setting a higher standard for discovery of materials prepared by experts who are not prospective witnesses, the Proposed Rule implicitly recognizes that fear of discovery may deter thorough preparation in cases where an expert's work is not indispensable. Litigants may refrain from hiring experts when the threat of discovery is great. However, when an expert's work is indispensable—when the expert will be called as a witness—the danger of surprise and the possible introduction of new issues justify the abandonment of high standards for discovery, especially since the threat of disclosure of information favorable enough to be used at trial probably will not deter preparation of a case.

Note, Proposed 1967 Amendments to the Federal Discovery Rules, 68 Colum. L. Rev. 271, 282 (1968). But see Note, Civil Procedure—Discovery of Expert Information, 47 N.C.L. Rev. 401, 406 (1969): "The first party to reach and 'buy' an expert, because of the stringent showing required for discovery of non-testifying experts, would be able to suppress unfavorable findings of that expert simply by declining to offer his testimony at trial."

13. Fed. R. Civ. P. 26(b)(4)(A).

14. Id. 26(b)(4)(B).

covery of informally consulted experts is unavailable.[15] All courts that have considered the question have recognized this prohibition as it relates to the discovery of expert identity and opinions,[16] although some courts have asserted, in dicta, that in extreme circumstances even discovery of informally consulted experts may be permitted.[17] Unfortunately, the Advisory Committee did not define "informally consulted," and the *Ager* court had to distinguish between the two classes of experts.

Several different tests for distinguishing between informally consulted and specially retained experts were discussed in *Ager*. Plaintiff argued that an expert was informally consulted and excluded from discovery if the consulting party considered the expert to be of no assistance.[18] Using a different approach, the *Ager* trial court relied on the formality of the consultation, placing emphasis on the payment of a fee and a scheduled appointment.[19] The court of appeals, believing that the trial court's test was too rigid, took a third view and held that an expert's status must be determined on an ad hoc basis.[20] Among the factors the court of appeals considered relevant were:

> (1) the manner in which the consultation was initiated; (2) the nature, type and extent of information or material provided to, or determined by, the expert in connection with his review; (3) the duration and intensity of the consultative relationship; and (4) the terms of the consultation, if any (*e.g.* payment, confidentiality of test data or opinions, etc.). Of course, additional factors bearing on this determination may be examined if relevant.[21]

In many cases the *Ager* test yields the same result as the no-assistance test suggested by plaintiff.[22] After a preliminary meeting, the consulting party

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15. Id. 26(b), Advisory Comm. Notes. See also 8 C. Wright & A. Miller, Federal Practice and Procedure § 2033 (1970). The Committee probably made this distinction because informally consulted experts are more likely to cooperate with the adverse party than are those who have been specially employed. Graham, Part One, supra note 1, at 938 n.172.

16. See, e.g., In re Folding Carton Antitrust Litigation, 83 F.R.D. 256 (N.D. Ill. 1979); Weiner v. Bache Halsey Stuart, Inc., 76 F.R.D. 624 (S.D. Fla. 1977); Baki v. B.F. Diamond Constr. Co., 71 F.R.D. 179 (D. Md. 1976); Nemetz v. Aye, 63 F.R.D. 66 (W.D. Pa. 1974).

17. See, e.g., Nemetz v. Aye, 63 F.R.D. 66 (W.D. Pa. 1974). Discovery should be allowed in some unusual circumstances. For example, if as a result of destructive testing the expert is the only one with knowledge of the facts, then the "exceptional circumstances" test should override the "informally consulted" test. "This approach would neither discourage a party from searching for expert witnesses, nor would it deprive a party of discovery from an expert who had not been of assistance to the adversary when exceptional circumstances have been shown." Graham, Part One, supra note 1, at 940.

18. 622 F.2d at 501. Professor Graham states that "[a] consulting party may consider the expert of no assistance because of his insufficient credentials, his unattractive demeanor, or his excessive fees." Graham, Part One, supra note 1, at 939-40 n.182.

19. 622 F.2d at 501. If an attorney met a doctor socially and they discussed the case without a consultation charge, then it would be viewed as an informal consultation. Id. See USM Corp. v. American Aerosols, Inc., 631 F.2d 420 (6th Cir. 1980) (lack of compensation a factor in determining that expert was informally consulted).

20. 622 F.2d at 501.

21. Id.

22. The strictest test of the three was that proposed by the trial court. The court of appeals implied that, under the trial court's test, if a telephone inquiry were made in which an expert provided general information and a fee were charged, the expert would be specially employed. See id. at 502. While the court may have exaggerated to make its point, the trial court's test

may determine that the expert will be of no assistance because he is unfamiliar with the theory or techniques involved, he advocates a school of thought that is unfavorable to the party's action or he charges excessive fees. Since the consultative relationship was of a short duration and nothing more than general information was exchanged, a court using the *Ager* test would label it an informal consultation, as would a court using the no-assistance test. A conflict arises, according to the *Ager* court, when the consulting party does not discover that the expert will be of no assistance until after a working relationship has been established.[23] Perhaps the undesirable information or characteristics are not revealed until a series of meetings have taken place or the expert has made a preliminary analysis. While this expert may be considered informally consulted under the no-assistance test, the *Ager* court believed that consideration of the factors it listed would cause the expert to be labelled specially employed.[24] If an expert finally is deemed to have been informally consulted, no discovery may ensue. If, on the other hand, an expert is deemed specially employed or retained, the second prong of the *Ager* test, under rule 26(b)(4)(B), requires a showing of exceptional circumstances before an expert may be the subject of discovery.

The *Ager* court realized, however, that rule 26(b)(4)(B) does not address affirmatively the question of discoverability of a nontestifying expert's identity. Rather, it turned to the Advisory Committee Notes, which suggest that discovery was available on "proper showing."[25] The court equated this to a showing of exceptional circumstances.[26]

The requirement of showing exceptional circumstances promotes the policy of allowing a party to seek advice freely without fear that the expert will later disclose to the opposing party information gained during consultation.[27] The expert may know facts that would be detrimental if possessed by the opposing party. Additionally, the expert may be aware of litigation strategy. It was imperative, therefore, for the rulemakers to fashion rule 26(b)(4)(B) to protect the retaining party. Defendant in *Ager*, on the other hand, argued that discovery of an expert's identity did not violate the policies of the rule 26(b) provisions,[28] which were designed to prevent the discovering party from using his opponent's resources, diligence and aggressive preparation to develop his own case.[29] Defendant contended that after he knew which experts plaintiff

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requires little in the way of balancing. Any consultation with a semblance of formality will result in the retention of the expert, regardless of the duration or fruitfulness of the relationship.

23. See id.

24. Id.

25. "As an ancillary procedure, a party may on a proper showing require the other party to name experts retained or specially employed, but not those informally consulted." Fed. R. Civ. P. 26(b), Advisory Comm. Notes.

26. 622 F.2d at 503. Contra, 8 C. Wright & A. Miller, supra note 15, § 2032 (properly worded interrogatory satisfies the "proper showing" requirement).

27. Graham, Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, An Empirical Study and a Proposal, 1977 U. Ill. L.F. 169, 194 [hereinafter cited as Graham, Part Two].

28. 622 F.2d at 502.

29. See Fed. R. Civ. P. 26(b), Advisory Comm. Notes.

had retained, he would have to rely on his own diligence and resourcefulness to contact the experts and enlist their assistance.[30] This is precisely one problem that rule 26(b)(4)(B) seeks to avoid. The *Ager* court noted several reasons why the discovery of an expert's identity, without an exceptional circumstance requirement, may lead to the discovery of information and opinions that would have been nondiscoverable under rule 26(b)(4)(B).[31] After discovery, the litigant may contact the expert, who would in turn provide the litigant with relevant facts and views on the case. Despite the apparent unfairness that such an activity would create, the likelihood of its occurrence may be minimal. A doctor-patient privilege or some other ethical or moral duty would probably prevent the expert from revealing freely the product of his employment with the retaining party. As an added precaution, one commentator has suggested that a party who anticipates that the court is going to permit disclosure of an expert's identity absent a showing of exceptional circumstances should draft a contractual agreement that prohibits the expert from discussing the case with other parties to the suit.[32]

The *Ager* court also recognized the possibility that the discovering party may compel the expert to testify after disclosure of his identity.[33] Although the court questioned the propriety of this action,[34] other federal courts have used their subpoena powers to force experts to testify.[35] Nevertheless, it is unlikely that a party's expert will be called by the opposing party because most litigants would fear that their adversaries' experts would be "client-oriented" and uncooperative on the witness stand.[36] Professor Friedenthal argues that even if the expert is called, the retaining party can successfully maintain that the discovering party should be required to use his own expert if the retaining party shows that there are other, similarly competent experts available.[37] Friedenthal's analysis, in effect, permits trial examination upon a showing of

30. 622 F.2d at 502-03.

31. Id. at 503.

32. Graham, Part Two, supra note 27, at 195. A finding of exceptional circumstances by the court would, of course, supersede any such contract.

33. 622 F.2d at 503.

34. Id. at 503 n.6.

35. See, e.g., Carter-Wallace, Inc. v. Otte, 474 F.2d 529 (2d Cir. 1972), cert. denied, 412 U.S. 929 (1973); United States v. 284,392 Square Feet of Floor Space, 203 F. Supp. 75 (E.D.N.Y. 1962); Boynton v. R.J. Reynolds Tobacco Co., 36 F. Supp. 593 (D. Mass. 1941). State courts are split on the issue but lean toward the federal practice. Graham, Part One, supra note 1, at 935.

36. Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan. L. Rev. 455, 484 (1962). See also Graham, Part One, supra note 1, at 934.

37. Friedenthal, supra note 36, at 484. Even if there are experts available, in some cases it would be appropriate to compel the expert to testify. Friedenthal asserts:

> But even if the basic information is available and there are experts willing to be employed, this does not mean that they are as informed, as capable of analyzing the problems, or as adept at testifying at trial as is the adverse party's expert. Indeed, it may be that out of a group of five or six capable experts in a field only one would agree with a litigant. If he is one of two hired by the adverse party, the fact that there are three or four others willing to be employed will not be of much assistance. If availability of other experts were the sole criterion for prohibiting disclosure the need for expert testimony might often result in a race between litigants to employ the most prominent expert whose opinions obviously would carry much weight with a local jury.

Id. at 484-85.

exceptional circumstances. Unlike discovery, however, the retaining party must prove an absence of exceptional circumstances, rather than placing the burden on the discovering party to prove their existence.

Furthermore, the *Ager* court feared that by permitting discovery without demonstrating exceptional circumstances the discovering party may use the information to influence unduly the jury. The court hypothesized that the discovering party could ask his opponent, at trial, if he had retained any experts who were not going to testify. By doing so, the discovering party would hope to leave the jury with "an inference that the retaining party is attempting to suppress adverse facts or opinions."[38] The court implied that such questioning might be improper but that it may be admitted into evidence.[39] While the possibility does exist, it appears that the relevancy of such questioning is low and the chance of undue influence high. Thus a court would be expected to instruct both parties that the information was irrelevant and all statements relating to the employment of retained experts were inadmissible.[40]

Finally, the *Ager* court noted the adverse effect that unlimited discovery would have on the number of experts willing to discuss a potential law suit. In particular the court agreed with appellant's fear that the number of candid opinions supplied by medical experts would decrease.[41] Because of the "widespread aversion" among health-care providers to assist in malpractice actions, the number of consultative experts is limited. Physicians may be unwilling to provide evaluative consultations if discovery of their identities may be obtained whether or not they ultimately testify. "[A]ccess to informed opinions is desirable in both prosecuting valid claims and eliminating groundless ones . . . ."[42]

There is currently a split of decisions among district courts on the necessity of showing exceptional circumstances, with the court of appeal's decision in *Ager* representing the minority view among the district courts. The approach taken by *Ager* was first articulated by the United States District Court for the Eastern District of Wisconsin in *Perry v. W.S. Darley & Co.*,[43] which held that a showing of exceptional circumstances was required to discover a nontestifying expert's identity. The court stated that the rigorous standards pertaining to the discovery of facts and opinions held by experts under rule 26(b)(4)(B) should be applied to disclosure of identity.[44] The *Perry* court

38. 622 F.2d at 503.

39. See id.

40. A similar instruction was suggested by Professor Graham in regard to an expert who previously was retained by one party but at trial was a witness for the other party. Graham, Part Two, supra note 27, at 196.

41. 622 F.2d at 503.

42. Id. (quoting Brief of Appellant at 27-28, 29-30).

43. 54 F.R.D. 278 (E.D. Wis. 1971). In *Perry* plaintiff fireman was struck by a fire truck as he attempted to activate a water pump manufactured and installed by defendant. Defendant requested the identity of all experts who examined the truck and the pump shortly after the accident. Id. at 279.

44. Id. at 280. The court stated that the standard under rule 26(b)(4)(B) should not be relaxed. Id.

found support for this view in rule 26(e), which provides: "(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to . . . (B) the identity and location of each person expected to be called as an expert witness at trial . . . ."[45] The court inferred from this provision that identity was discoverable only after an expert was expected to testify.[46]

The only other federal court[47] to enforce an exceptional circumstances requirement, prior to *Ager*, was the United States District Court for Massachusetts in *Guilloz v. Falmouth Hospital Association*.[48] The magistrate in that case noted that rule 26(b)(4)(B) contained no provision for disclosure of an expert's identity and that the Advisory Committee's "proper showing" requirement amounted to a showing of exceptional circumstances. To demonstrate exceptional circumstances, the discovering party must prove that the information is relevant and material to the litigation.[49]

Those courts that have rejected the analysis taken by *Ager* have followed the reasoning of Professors Wright and Miller[50] and have held that no special showing is required in order to discover the identity of an opposing party's expert.[51] The leading cases articulating this view are *Sea Colony, Inc. v. Conti-*

45. Fed. R. Civ. P. 26(e).

46. 54 F.R.D. at 280. The court's reliance on rule 26(e) was unfounded. The purpose of this provision is to supply the opposing party with an updated list of all expert witnesses so that he may prepare for cross-examination; it does not imply that the experts were unknown to that party prior to supplementation.

47. A state court has construed its parallel discovery provision to require a showing of exceptional circumstances. Trainor v. Young, 348 So. 2d 1004 (La. App.), cert. denied, 351 So. 2d 169 (La. 1977) (defendant sought identity of doctor consulted about merits of medical malpractice suit; held not discoverable absent exceptional circumstances).

48. 21 F.R. Serv. 2d 1367 (D. Mass. 1976).

49. Id. at 1369-71. *Guilloz* deserves further analysis. As a precautionary measure, plaintiff's attorney always consulted a doctor before instituting a malpractice suit to ensure that the action was not frivolous. Defendant asserted that the doctor was an "educating expert" whose identity and area of expertise were discoverable under Massachusetts practice. Id. at 1368.

> An educating expert, as opposed to a testifying expert, is largely immune from discovery, except for his name and the subject of his knowledge and opinions. The facts he knows and the opinions he holds are generally undiscoverable in all but the highly unique situations. Before the immunity obtains, of course, the party seeking to establish immunity must show that the expert was hired in anticipation of trial. At that point the burden shifts, and the party attempting to discover the contents of the expert's mind must demonstrate exceptional circumstances.

Id. (quoting 7 J. Smith & H. Zobel, Massachusetts Practice 214 (1974)).

Plaintiff claimed that defendant must demonstrate exceptional circumstances. The doctor was simply a "consulting expert" who informed plaintiff that he had a colorable claim. Discovery of his identity would not lead to any admissible evidence. Furthermore, plaintiff argued that it was necessary to keep the identity private to avoid embarassment to the doctor. The court accepted plaintiff's argument, recognizing that, by divulging his name, the doctor's future usefulness would be destroyed and that defendant had not asserted a corresponding benefit to be gained through discovery. Id. at 1371.

50. See 8 C. Wright & A. Miller, supra note 15, § 2032.

51. E.g., Martin v. Easton Publishing Co., 85 F.R.D. 312 (E.D. Pa. 1980); Roesburg v. Johns Manville Corp., 85 F.R.D. 292 (E.D. Pa. 1980); In re Folding Carton Antitrust Litigation, 83 F.R.D. 256 (N.D. Ill. 1979); Arco Pipeline Co. v. S/S Trade Star, 81 F.R.D. 416 (E.D. Pa. 1978); Weiner v. Bache Halsey Stuart, Inc., 76 F.R.D. 624 (S.D. Fla. 1977); Baki v. B.F. Diamond Constr. Co., 71 F.R.D. 179 (D. Md. 1976); Sea Colony, Inc. v. Continental Ins. Co., 63 F.R.D. 113 (D. Del. 1974).

*nental Insurance Co.*[52] and *Baki v. B.F. Diamond Construction Co.*,[53] both United States district court cases. In *Sea Colony* defendant requested the "names of all experts retained by plaintiff who were not intended to be called at trial," but plaintiff refused to comply, claiming that the information was work product and that defendant had made no showing of exceptional circumstances.[54] After dismissing the work product argument,[55] the court emphasized that the rule 26(b)(4)(B) exceptional circumstances requirement pertained only to the impracticality of obtaining "facts or opinions." Because rule 26(b)(4)(B) did not mention identity, exceptional circumstances were not required in order to discover only the identity of an expert.[56] In *Baki*, which followed *Sea Colony*, the court noted that the general discovery provision, rule 26(b)(1), provides for the discovery of "persons having knowledge of any discoverable matter."[57] The court stressed that rule 26(b)(4)(B) does not mention "identity" because the authority to obtain an expert's identity is found in rule 26(b)(1).[58] A number of cases following *Baki* have employed the same reasoning to allow discovery of a nontestifying expert's identity.[59]

Commentators also have argued that an expert's identity should be freely discoverable. Professor Graham recognized that awareness of an expert's identity may be helpful if he is associated with a particular school of thought or approach to the conflict.[60] By discovering his identity the discovering party could prepare for trial accordingly. The circumstances in *Sea Colony* raise the dilemma that until a party is aware of the identity of the adverse party's retained experts, he may be unable to determine whether there are exceptional circumstances, which are required under rule 26(b)(4)(B) to discover facts or opinions of the experts.[61] While these contentions have some merit, it appears that the benefits of disclosure are outweighed by the possible abuses of unlimited discovery as articulated in *Ager*. The rulemakers adopted a discovery

52. 63 F.R.D. 113 (D. Del. 1974).

53. 71 F.R.D. 179 (D. Md. 1976).

54. 63 F.R.D. at 113.

55. Id. at 114. The trial court cited the Advisory Committee, which had rejected "as ill-considered the decisions which have sought to bring expert information within the work-product doctrine." Fed. R. Civ. P. 26(b), Advisory Comm. Notes.

56. 63 F.R.D. at 114.

57. Fed. R. Civ. P. 26(b)(1).

58. 71 F.R.D. at 182. The party opposing discovery may avoid answering the interrogatories if he can show that the information "is irrelevant, privileged, or for some other reason should not be disclosed." Id.

59. See Martin v. Easton Publishing Co., 85 F.R.D. 312 (E.D. Pa. 1980); Roesberg v. Johns Manville Corp., 85 F.R.D. 292 (E.D. Pa. 1980); In re Folding Carton Antitrust Litigation, 83 F.R.D. 256 (N.D. Ill. 1979); Arco Pipeline Co. v. S/S Trade Starr, 81 F.R.D. 416 (E.D. Pa. 1978); Weiner v. Bache Halsey Stuart, Inc., 76 F.R.D. 624 (S.D. Fla. 1977).

60. Graham, Part One, supra note 1, at 934 n.148.

61. See 63 F.R.D. at 114. Cf. Martin v. Easton Publishing Co., 85 F.R.D. 312 (E.D. Pa. 1980) (court held plaintiff needs to discover identity of opponent's expert so that he can prepare for cross-examination if he is called to testify and so that he can decide if he should employ his own expert). One student commentator argues that discovery of identity should be allowed so that a party may be aware of "the possible existence of information to which he may be entitled." Once he discovers identity, he can then demonstrate exceptional circumstances. Comment, Discovery of Expert Information Under the Federal Rules, 10 U. Rich. L. Rev. 706, 717 n.59 (1976).

provision that was designed to prevent a party from using his opponent's expert information to prepare for trial.[62] This intent should not be circumvented.

Rather than on preparation through discovery, emphasis should be placed on retaining one's own qualified experts to alert a party to different approaches on which his opponent might rely. A party should rely on his own expert for information about possible strategies, and if the litigation involves different theories, the expert can suggest another expert with comparable qualifications to assist in trial preparation. Of course, in most cases the opposing party must rely on expert witnesses to develop a particular approach, and the identity of these experts and the facts and opinions on which they will testify are discoverable through rule 26(b)(4)(A).[63] An additional problem arises when the opposing party has retained all the available experts in a given area in an attempt to frustrate the opponent's preparation. Applying the *Ager* analysis, a party then could demonstrate the requisite exceptional circumstances and discover the identities of the opposing party's experts, as well as their facts and opinions. In the majority of cases, however, a party should be required to rely on his own experts for instruction.

The two-pronged test for the discovery of a nonwitness expert's identity, as presented in *Ager*, is firmly rooted in rule 26(b)(4)(B)'s limited discovery provisions. Rule 26(b)(4)(B) permits discovery "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."[64] Commentators[65] and courts[66] have determined that this requirement was designed to make discovery difficult. An empirical study, however, concluded that discovery was permitted more often than would be expected under such a stringent test.[67] The significance of the *Ager* decision, therefore, is affected greatly by the courts' interpretation of "exceptional circumstances." For this decision to have the proper effect, courts must strictly construe the requirements for exceptional circumstances.

In *Crocket v. Virginia Folding Box Co.*[68] the United States District Court for the Eastern District of Virginia reasoned that in addition to "exceptional circumstances," the discovering party must demonstrate "substantial need." Even though information was unavailable from other experts, the court held that a party must demonstrate sufficient need to overcome the potential for

62. Fed. R. Civ. P. 26(b), Advisory Comm. Notes.

63. See id. 26(b)(4)(A).

64. Id. 26(b)(4)(B).

65. See, e.g., 8 C. Wright & A. Miller, supra note 15, § 2032.

66. See, e.g., Hoover v. United States Dept. of Interior, 611 F.2d 1132, 1142 n.13 (5th Cir. 1980) ("A party seeking disclosure under Rule 26(b)(4)(B) carries a heavy burden."); United States v. Meyer, 398 F.2d 66, 76 (9th Cir. 1968) ("Since a litigant will not know what facts the opposing party's experts have discovered and what opinions they have formed, it will rarely be possible to make the required showing."). See also 8 C. Wright & A. Miller, supra note 15, § 2032 nn.86-87, for a review of other cases.

67. See Graham, Part Two, supra note 27, at 192-93.

68. 61 F.R.D. 312 (E.D. Va. 1974).

misuse of discovered information against the retaining party.[69] Discovery of an expert's identity, as it relates to exceptional circumstances, should be no different from discovery of facts or opinions. The special requirement is designed to prevent unfairness in permitting the discovering party to use the retaining party's experts to build his case.[70] The policy considerations developed in *Ager* dealt with the same concern[71]—the potential danger that the information will be used by the discovering party. Nevertheless, it should not be impossible to demonstrate exceptional circumstances; rather they should be determined on a case-by-case basis. For example, if a party is unable to locate a competent expert who is willing to provide assistance on a subject that is vital to his action or defense, the party should be permitted to discover, through a properly framed interrogatory, whether the opposing party has retained any experts who are qualified.[72]

If courts strictly construe the requirements for exceptional circumstances, the *Ager* approach should add uniformity to discovery of nontestifying experts because the standard for discovering an expert's identity differs little from the standard for discovering his facts or opinions. The *Ager* court recognized that the discovery of an expert's identity without exceptional circumstances will allow a litigant to gather facts and opinions that otherwise would have been unavailable. Although added precautions, such as contractual agreements, diminish the possibility of an abuse of discovery power, the potential still exists. Furthermore, unlimited discovery could decrease the number of experts, especially within the medical profession, who will be willing to participate in trial preparation and litigation that pits expert against expert. In addition to the policy considerations, discovery of the nontestifying expert's identity must be subject to the requirement of exceptional circumstances if the primary objective of rule 26(b)(4)(B)—the protection of the expert's facts and opinions—is to be preserved. Thus, the *Ager* analysis of the discoverability of the identity

69. Id. at 320.

70. In Marine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984 (D.C. Cir. 1979), plaintiff, a gasoline marketer, sought discovery of a nontestifying consultant for defendant, a petroleum refiner. The United States Court of Appeals for the District of Columbia, while recognizing that the consultant had been specially employed in anticipation of litigation, held that plaintiff could not discover facts known and opinions held by the expert if it failed to show that it could not acquire the information from other sources. Id. at 994.

In Dixon v. Cappellini, 88 F.R.D. 1 (M.D. Pa. 1980), the discovering party was able to demonstrate exceptional circumstances. Plaintiff, a member of the Unification Church, alleged that she suffered extreme fright and nervous shock while she was in the custody of defendants, who were "de-programmers." Defendants sought discovery of the reports and opinions of a psychologist and a psychiatrist who were consulted by plaintiff immediately after the de-programming. The court had reservations about declaring these experts as ones specially employed or retained in anticipation of litigation but stated that if they were, the rule 26(b)(4)(B) exceptional circumstances requirement had been met. The court noted that the plaintiff's physical and mental condition immediately after de-programming was central to the case and that the defendants could not obtain that information except through discovery of the plaintiff's doctors. Id. at 3.

71. See notes 31-42 and accompanying text supra.

72. Cf. Bailey v. Meister Brau, Inc., 57 F.R.D. 11 (N.D. Ill. 1972) (defendant could not depose plaintiff's retained expert when there was no showing that defendant was without sufficient funds or information to obtain comparable opinions).

of nontestifying, specially employed or retained experts is the preferable approach.

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