"[I]n no organ of government ... does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees."

FULLILOVE v. KLUTZNICK

448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980).

In § 103(f)(2) of the Public Works Employment Act of 1977, Congress provided that:

> Except to the extent that the Secretary [of Commerce] determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least ten per centum of the amount of each grant shall be expended for minority business enterprises. For the purposes of this paragraph, the term "minority business enterprise" (MBE) means a business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Eskimos, and Aleuts.

Later that year several contracting and subcontracting firms filed suit in a federal district court, asking for an injunction against the Secretary of Commerce as well as city and state officials in New York who accepted grants under § 103(f)(2). The contractors claimed that the section, on its face, violated the equal protection clause and the "equal protection component" of the Fifth Amendment. Both the district court and the court of appeals upheld the constitutionality of § 103(f)(2). The contractors obtained certiorari from the Supreme Court.

Mr. Chief Justice **BURGER** announced the judgment of the Court and delivered an opinion in which Mr. Justice **WHITE** and Mr. Justice **POWELL** joined....

III

When we are required to pass on the constitutionality of an Act of Congress, we assume "the gravest and most delicate duty that this Court is called on to perform." Blodgett v. Holden (1927) (opinion of Holmes, J.). A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the ... general Welfare of the United States" and "to enforce by appropriate legislation" the equal protection guarantees of the Fourteenth Amendment. In Columbia Broadcasting System, Inc. v. Democratic National Committee (1973), we accorded "great weight to the decisions of Congress" even though the legislation implicated fundamental constitutional rights guaranteed by the First Amendment. The rule is not different when a congressional program raises equal protection concerns.

Here we pass, not on a choice made by a single judge or a school board but on a considered decision of the Congress and the President. However, in no sense does that render it immune from judicial scrutiny and it "is not to say we 'defer' to the judgment of the Congress ... on a constitutional question," or that we would hesitate to invoke the Constitution should we determine that Congress has overstepped the bounds of its constitutional power. *Columbia Broadcasting*....

Our analysis proceeds in two steps. At the outset, we must inquire whether the *objectives* of this legislation are within the power of Congress. If so, we must go on to decide whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment.

A

1

In enacting the MBE provision, it is clear that Congress employed an amalgam of its specifically delegated powers. The Act, by its very nature, is primarily an exercise of the Spending Power.... This Court has recognized that the power to "provide for the ... general Welfare" is an independent grant of legislative authority, distinct from other broad congressional powers. Buckley v. Valeo (1976); United States v. Butler (1936). Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal monies upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy....

The MBE program is structured within this familiar legislative pattern....

... The reach of the Spending Power, within its sphere, is at least as broad as the regulatory powers of Congress. If, pursuant to its regulatory powers, Congress could have achieved the objectives of the MBE program, then it may do so under the Spending Power. And we have no difficulty perceiving a basis for accomplishing the objectives of the MBE program through the Commerce Power ... and through the power to enforce the equal protection guarantees of the Fourteenth Amendment....

2

We turn first to the Commerce Power.... Had Congress chosen to do so, it could have drawn on the Commerce Clause to regulate the practices of prime contractors on federally funded public works projects. Katzenbach v. McClung (1964); Heart of Atlanta Motel v. United States [1964]. The legislative history of the MBE provision shows that there was a rational basis for Congress to conclude that the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities, and that this inequity has an effect on interstate commerce. Thus Congress could take necessary and

proper action to remedy the situation....

... Insofar as the MBE program pertains to the actions of private prime contractors, the Congress could [also] have achieved its objectives under the Commerce Clause. We conclude that in this respect the objectives of the MBE provision are within the scope of the Spending Power.

3

In certain contexts, there are limitations on the reach of the Commerce Power to regulate the actions of state and local governments. National League of Cities v. Usery (1976). To avoid such complications, we look to § 5 of the Fourteenth Amendment for the power to regulate the procurement practices of state and local grantees of federal funds. A review of our cases persuades us that the objectives of the MBE program are within the power of Congress under § 5 "to enforce by appropriate legislation" the equal protection guarantees of the Fourteenth Amendment.

In Katzenbach v. Morgan (1966), we equated the scope of this authority with the broad powers expressed in the Necessary and Proper Clause. "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." ...

... Congress reasonably determined that the prospective elimination of [discriminatory] barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws. Insofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment. We conclude that in this respect the objectives of the MBE provision are within the scope of the Spending Power....

B

We now turn to the question whether, as a means to accomplish these plainly constitutional objectives, Congress may use racial and ethnic criteria, in this limited way, as a condition attached to a federal grant. We are mindful that "[i]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power," National Mutual Insurance Co. v. Tidewater Transfer Co. (1949) (opinion of Jackson, J.). However, ... [w]e recognize [that the equal protection component of the Due Process Clause of the Fifth Amendment requires] careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal....

1

As a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly "color-blind" fashion.... [I]n Board of Education v. Swann (1971), we ... held that "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." ...

When we have discussed the remedial powers of a federal court, we have been alert to the limitation that "[t]he power of the federal courts to restructure the operation of local and state governmental entities 'is not plenary....' [A] federal court is required to tailor 'the scope of the remedy' to fit the nature and extent of the ... violation." Dayton Board of Education v. Brinkman [I] (1977) (quoting Milliken v. Bradley (1974), and Swann v. Charlotte-Mecklenburg Board of Education [1971]. Here we deal, ... not with the limited remedial powers of a federal court, ... but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct.

2

A more specific challenge to the MBE program is the charge that it impermissibly deprives nonminority businesses of access to at least some portion of the government contracting opportunities generated by the Act....

... [A]lthough we may assume that the complaining parties are innocent of any discriminatory conduct, it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.

3

Another challenge to the validity of the MBE program is the assertion that it is underinclusive– that it limits its benefit to specified minority groups rather than extending its remedial objectives to all businesses whose access to government contracting is impaired by the effects of disadvantage or discrimination. Such an extension would, of course, be appropriate for Congress to provide; it is not a function for the courts.

Even in this context, the well-established concept that a legislature may take one step at a time to remedy only part of a broader problem is not without relevance. See Dandridge v. Williams (1970); Williamson v. Lee Optical (1955)....

The Congress has not sought to give select minority groups a preferred standing in the construction industry, but has embarked on a remedial program to place them on a more equitable footing with respect to public contracting opportunities. There has been no showing in this case that Congress has inadvertently effected an invidious discrimination by excluding from

coverage an identifiable minority group that has been the victim of a degree of disadvantage and discrimination equal to or greater than that suffered by the groups encompassed by the MBE program....

4

It is also contended that the MBE program is overinclusive– that it bestows a benefit on businesses identified by racial or ethnic criteria which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination. It is conceivable that a particular application of the program may have this effect; however, the peculiarities of specific applications are not before us in this case....

IV

Congress, after due consideration, perceived a pressing need to move forward with new approaches in the continuing effort to achieve the goal of equality of economic opportunity. In this effort, Congress has necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives.... That the program may press the outer limits of congressional authority affords no basis for striking it down....

In a different context ... Mr. Justice Brandeis had this to say:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. New State Ice Co. v. Liebmann (1932) (dissenting opinion).

Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees. This case is one which requires; and which has received, that kind of examination. This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as University of California Regents v. Bakke (1978). However, our analysis demonstrates that the MBE provision would survive judicial review under either "test" articulated in the several *Bakke* opinions. The MBE provision ... does not violate the Constitution.

Affirmed.

Mr. Justice **POWELL,** concurring.

Although I would place greater emphasis than The Chief Justice on the need to articulate judicial standards of review in conventional terms, ... I join [his] opinion and write separately to apply the analysis set forth by my opinion in *Bakke*.

... Section 103(f)(2) employs a racial classification that is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest....

... In my view, the effect of the set-aside is limited and so widely dispersed that its use is

consistent with fundamental fairness.

... [T]he set-aside is a reasonably necessary means of furthering the compelling governmental interest in redressing the discrimination that affects minority contractors. Any marginal unfairness to innocent nonminority contractors is not sufficiently significant– or sufficiently identifiable– to outweigh the governmental interest served by § 103(f)(2). When Congress acts to remedy identified discrimination, it may exercise discretion in choosing a remedy that is reasonably necessary to accomplish its purpose. Whatever the exact breadth of that discretion, I believe that it encompasses the selection of the set-aside in this case....

Distinguishing the rights of all citizens to be free from racial classifications from the rights of some citizens to be made whole is a perplexing, but necessary, judicial task. When we first confronted such an issue in *Bakke*, I concluded that the Regents of the University of California were not competent to make, and had not made, findings sufficient to uphold the use of the race-conscious remedy they adopted.... [U]se of racial classifications, which are fundamentally at odds with the ideals of a democratic society implicit in the Due Process and Equal Protection Clauses, cannot be imposed simply to serve transient social or political goals, however worthy they may be. But the issue here turns on the scope of congressional power, and Congress has been given a unique constitutional role in the enforcement of the post-Civil War Amendments. In this case, where Congress determined that minority contractors were victims of purposeful discrimination and where Congress chose a reasonably necessary means to effectuate its purpose, I find no constitutional reason to invalidate § 103(f)(2).

Mr. Justice **MARSHALL**, with whom Mr. Justice **BRENNAN**, and Mr. Justice **BLACKMUN** join, concurring in judgment.

My resolution of the constitutional issue in this case is governed by the separate opinion I coauthored in *Bakke*. In my view, the 10% minority set-aside provision ... passes constitutional muster under the standard announced in that opinion....

Mr. Justice **STEWART**, with whom Mr. Justice **REHNQUIST** joins, dissenting....

"Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.... The law regards man as man, and takes no account of his surroundings or of his color...." Those words were written by a Member of this Court 84 years ago. Plessy v Ferguson [1896] (Harlan, J., dissenting). [Mr. Justice Harlan's] colleagues disagreed with him, and held that a statute that required the separation of people on the basis of their race was constitutionally valid because it was a "reasonable" exercise of legislative power and had been "enacted in good faith for the promotion [of] the public good...." Today, the Court upholds a statute that accords a preference to citizens who are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts," for much the same reasons. I think today's decision is wrong for the same reason that *Plessy* was wrong....

The equal protection standard of the Constitution has one clear and central meaning– it absolutely prohibits invidious discrimination by government.... Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently

suspect and presumptively invalid. Bolling v. Sharpe [1954]; Korematsu v. United States [1944]....

... In short, racial discrimination is by definition invidious discrimination.

The rule cannot be any different when the persons injured by a racially biased law are not members of a racial minority. The guarantee of equal protection is "universal in [its] application, to all persons ... without regard to any differences of race, of color, or of nationality." Yick Wo v. Hopkins [1886].... From the perspective of a person detrimentally affected by a racially discriminatory law, the arbitrariness and unfairness is entirely the same, whatever his skin color and whatever the law's purpose, be it purportedly "for the promotion of the public good" or otherwise....

... [The Court's] self-evident truisms [about Congress's powers to spend, to regulate commerce, and to enforce § 5 of the Fourteenth Amendment] do not begin to answer the question before us in this case. For in the exercise of its powers, Congress must obey the Constitution just as the legislatures of all the States must.... If a law is unconstitutional, it is no less unconstitutional just because it is a product of the Congress of the United States....

Mr. Justice **STEVENS**, dissenting....

Our historic aversion to titles of nobility is only one aspect of our commitment to the proposition that the sovereign has a fundamental duty to govern impartially. When government accords different treatment to different persons, there must be a reason for the difference. Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate....

... I assume that the wrong committed against the Negro class is both so serious and so pervasive that it would constitutionally justify an appropriate classwide recovery.... But that serious classwide wrong cannot in itself justify the particular classification Congress has made in this Act. Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification. Quite obviously, the history of discrimination against black citizens in America cannot justify a grant of privileges to Eskimos or Indians.

Even if we assume that each of the six racial subclasses has suffered its own special injury at some time in our history, surely it does not necessarily follow that each of those subclasses suffered harm of identical magnitude.... There is no reason to assume, and nothing in the legislative history suggests, much less demonstrates, that each of these subclasses is equally entitled to reparations from the United States Government.

At best, the statutory preference is a somewhat perverse form of reparation for the members of the injured classes. For those who are the most disadvantaged within each class are the least likely to receive any benefit from the special privilege even though they are the persons

most likely still to be suffering the consequences of the past wrong. A random distribution to a favored few is a poor form of compensation for an injury shared by many.

... [If the history of discrimination against Negroes] can justify such a random distribution of benefits on racial lines ..., it will serve not merely as a basis for remedial legislation, but rather as a permanent source of justification for grants of special privileges. For if there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate "a piece of the action" for its members.

Although I do not dispute the validity of the assumption that each of the subclasses identified in the Act has suffered a severe wrong at some time in the past, I cannot accept this slapdash statute as a legitimate method of providing classwide relief....

III

The legislative history of the Act discloses that there is a group of legislators in Congress identified as the "Black Caucus" and that members of that group argued that if the Federal Government was going to provide $4,000,000,000 of new public contract business, their constituents were entitled to "a piece of the action." ...

The legislators' interest in providing their constituents with favored access to benefits distributed by the Federal Government is, in my opinion, a plainly impermissible justification for this racial classification.

IV

The interest in facilitating and encouraging the participation by minority business enterprises in the economy is unquestionably legitimate. Any barrier to such entry and growth ... should be vigorously and thoroughly removed.... This statute, however, is not designed to remove any barriers to entry. Nor does its sparse legislative history detail any insuperable or even significant obstacles to entry into the competitive market....

This Act has a character that is fundamentally different from a carefully drafted remedial measure like the Voting Rights Act of 1965.... Whereas the enactment of the Voting Rights Act was preceded by exhaustive hearings and debates concerning discriminatory denial of access to the electoral process, and became effective in specific States only after specific findings were made, this statute authorizes an automatic nationwide preference for all members of a diverse racial class regardless of their possible interest in the particular geographic areas where the public contracts are to be performed....>

A comparable approach in the electoral context would support a rule requiring that at least 10% of the candidates elected to the legislature be members of specified racial minorities. Surely that would be an effective way of ensuring black citizens the representation that has long been their due. Quite obviously, however, such a measure would merely create the kind of

inequality that an impartial sovereign cannot tolerate. Yet that is precisely the kind of "remedy" that this Act authorizes. In both political and economic contexts, we have a legitimate interest in seeing that those who were disadvantaged in the past may succeed in the future. But neither an election nor a market can be equally accessible to all if race provides a basis for placing a special value on votes or dollars....

V

A judge's opinion that a statute reflects a profoundly unwise policy determination is an insufficient reason for concluding that it is unconstitutional. Congress has broad power to spend money to provide for the "general Welfare of the United States," to "regulate Commerce among the several States," to enforce the Civil War Amendments, and to discriminate between aliens and citizens. But the exercise of these broad powers is subject to the constraints imposed by the Due Process Clause of the Fifth Amendment. That Clause has both substantive and procedural components; it performs the office of both the Due Process and Equal Protection Clauses of the Fourteenth Amendment in requiring that the federal sovereign act impartially.

Unlike Mr. Justice Stewart and Mr. Justice Rehnquist, however, I am not convinced that the [Due Process] Clause contains an absolute prohibition against any statutory classification based on race. I am nonetheless persuaded that it does impose a special obligation to scrutinize any governmental decisionmaking process that draws nationwide distinctions between citizens on the basis of their race and incidentally also discriminates against noncitizens in the preferred racial classes. For just as procedural safeguards are necessary to guarantee impartial decisionmaking in the judicial process, so can they play a vital part in preserving the impartial character of the legislative process....

Although it is traditional for judges to accord the same presumption of regularity to the legislative process no matter how obvious it may be that a busy Congress has acted precipitately, I see no reason why the character of their procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law. Whenever Congress creates a classification that would be subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment if it had been fashioned by a state legislature, it seems to me that judicial review should include a consideration of the procedural character of the decisionmaking process. A holding that the classification was not adequately preceded by a consideration of less drastic alternatives or adequately explained by a statement of legislative purpose would be far less intrusive than a final determination that the substance of the decision is not "narrowly tailored to the achievement of that goal." ...

In all events, rather than take the substantive position expressed in Mr. Justice Stewart's dissenting opinion, I would hold this statute unconstitutional on a narrower ground. It cannot fairly be characterized as a "narrowly tailored" racial classification because it simply raises too many serious questions that Congress failed to answer or even to address in a responsible way. The risk that habitual attitudes toward classes of persons, rather than analysis of the relevant characteristics of the class, will serve as a basis for a legislative classification is present when benefits are distributed as well as when burdens are imposed. In the past, traditional attitudes

too often provided the only explanation for discrimination against women, aliens, illegitimates, and black citizens. Today there is a danger that awareness of past injustice will lead to automatic acceptance of new classifications that are not in fact justified by attributes characteristic of the class as a whole.

When Congress creates a special preference, or a special disability, for a class of persons, it should identify the characteristic that justifies the special treatment. When the classification is defined in racial terms, I believe that such particular identification is imperative.

In this case, only two conceivable bases for differentiating the preferred classes from society as a whole have occurred to me: (1) that they were the victims of unfair treatment in the past and (2) that they are less able to compete in the future. Although the first of these factors would justify an appropriate remedy for past wrongs, ... this statute is not such a remedial measure. The second factor is simply not true. Nothing in the record of this case, the legislative history of the Act, or experience that we may notice judicially provides any support for such a proposition. It is up to Congress to demonstrate that its unique statutory preference is justified by a relevant characteristic that is shared by the members of the preferred class. In my opinion, because it has failed to make that demonstration, it has also failed to discharge its duty to govern impartially embodied in the Fifth Amendment....

Editors' Notes

(1) **Query:** Does Burger actually subject § 103(f)(2) to strict scrutiny?

(2) **Query:** To what extent does Powell rely on balancing as a *technique* of constitutional interpretation here? To what extent is his approach in *Fullilove* consistent with that which he took in *Bakke?*

(3) In Firefighters v. Stotts (1984), the Court interpreted Title VII of the Civil Rights Act of 1964, outlawing racial discrimination in employment, as protecting "bona fide" seniority programs and thus allowing a city, faced with budgetary cutbacks, to lay off workers according to length of service even though that standard meant that a disproportionate share of blacks, as the last hired, would be the first fired. The majority did not consider it important that the city involved, Memphis, had been hiring blacks under an affirmative action plan approved by the local federal district court and that the discharges under the seniority system would undermine that plan.

(4) Among the better studies of affirmative action are: Henry J. Abraham, "Some Post-*Bakke* and *Weber* Reflections on 'Reverse Discrimination,' " 14 *Uni. of Richmond L.Rev*. 373 (1980); Marshall Cohen, Thomas Nagel and Thomas Scanlon, eds., *Equality and Preferential Treatment* (Princeton: Princeton University Press, 1977); Joel Dreyfuss and Charles Lawrence, III, *The Bakke Case* (New York: Harcourt, Brace, Jovanovitch, 1979); Terry Eastland and William J. Bennett, *Counting by Race* (New York: Basic Books, 1979); John Hart Ely, "The Constitutionality of Reverse Discrimination," 41 *U.Chi.L.Rev*. 723 (1974); Alan H.

Goldman, *Justice and Reverse Discrimination* (Princeton: Princeton University Press, 1979); Allan P. Sindler, *Bakke, DeFunis, and Minority Admissions* (New York: Longman, 1978); Laurence H. Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation Press, 1978), pp. 1032052; J. Harvie Wilkinson, III, *From Brown* to *Bakke* (New York: Oxford University Press, 1979).