In other words, two requirements must be met. First, the governmental body that attempts to impose a race conscious remedy must have the authority to act in response to identified discrimination. Cf. Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976). Second, there must be findings by such a body that demonstrate the existence of a constitutional or statutory violation. In Bakke, I concluded that the Regents failed both requirements. They were entrusted only with educational functions, and they conceded that there had been no past discrimination. Thus, no compelling governmental was present to justify the use of a racial quota in medical school admissions. Bakke, 438 U.S., at 309-310.
this court held that Congress had the power to prohibit racial discrimination in public restaurants on the basis of its "finding that [such discrimination] had a direct and adverse effect on the free flow of interstate commerce" in violation of the Commerce Clause.

Jon: I have reframed the above sentence to make it fit more neatly into the two steps analysis described in the preceding three paragraphs.
7. Although this record suffices to support the congressional judgment that minority contractors suffered identifiable discrimination, legislative and administrative bodies need not be content with findings that must constitutional standards. Race conscious remedies, popularly referred to as affirmative action programs, almost inevitably affect some innocent persons. See infra, at . Respect and support for law, especially in an area as sensitive as this, depend in large measure upon the public's perception of its fairness. See Bakke, 438 U.S. at 319 n. 53; J. Wilkinson, "From Brown to Bakke", 264-266 (1979); M. Perry, Modern Equal Protection: A Conceptualization and Appraisal, Colum. L. Rev. 1023, 1048-49 (1979). It therefore is important for the record upon which race conscious remedies are based to be well documented with evidence that satisfies fair minded people with the justness of such remedies.
This is not a case in which Congress has employed a racial classification solely as a means to confer a racial preference. Such a purpose plainly would be unconstitutional. See *Bakke*, 438 U.S., at 307, 310-311. Here the purpose sought to be served was the compelling state interest of redressing racial discrimination. The question, therefore, is whether the remedy chosen is appropriate, having in mind that any effective remedy is likely to affect persons differently depending upon their race. See, e.g., *Board of Education v. Swann*, 402 U.S. at 45-46. Although a federal court may not properly approve, any more than it may order, remedies that exceed the scope of a constitutional violation, (add cites to the three cases referred to on page 12), this Court has not required that remedial plans be limited to the least restrictive means of implementation. We have recognized, where the purpose is to redress discrimination, that the choice of a remedy by the court is "a balancing process left, within an appropriate constitutional or statutory limits, to the sound discretion of the trial court". (pick up cite on page 12). Similarly, in reviewing a remedy
chosen by a legislative or administrative body, courts should recognize the deference usually accorded the exercise of discretion by such a body.

Jon: One rereading IV-A, and particularly the first paragraph commencing at the bottom of page 11, it seems to me that we have not phrased it quite a felicitously as we should. You have undertaken some editing, and I have dictated the above revision. I am not satisfied with either, and suggest that you put your hand to this - bearing in mind the need for clarification that both your editing and mine have pointed up. This is quite a critical paragraph, and not an easy one to write - especially in view of the paucity of authority. Maybe we are trying to analyze in steps that are two refined. Do you think we should try to generalize to a greater degree?

L.F.P., Jr.
In view of the numerically limited and widely dispersed effect of the set asides, I cannot say that congressional choice of this remedy was inequitable.
Memorandum of Mr. Justice Powell

I write to apply the analysis set forth in my opinion in University of California v. Bakke, 438 U.S. 265 (1978), to the issue presented in this case. We are asked to decide whether the Due Process Clause of the Fifth Amendment is violated by the requirement in § 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), that 10% of federal grants for local public works projects funded by the Act be set-aside for minority business enterprises. I conclude that this set-aside enacted by Congress is justifiable as a remedy that serves the compelling governmental interest in eradicating the continuing effects of past identifiable discrimination.

Section 103 (f)(2) employs a racial classification that is constitutionally prohibited unless its use is a necessary means of advancing a compelling state interest. University of California Regents v. Bakke, 438 U.S. 265, 291, 305 (1978)(opinion of Powell, J.)(hereinafter Bakke); see In re

Griffiths, 413 U. S. 717, 721-722 (1973); Loving v. Virginia, 388 U. S. 1, 11 (1967); McLaughlin v. Florida, 379 U. S. 184, 196 (1964). Racial preference does not constitute such an interest. "‘Distinctions between citizens solely because of their ancestry’ [are] ‘odious to a free people whose institutions are founded upon the doctrine of equality.’" Loving v. Virginia, 388 U. S., at 11, quoting Hirabayashi v. United States, 320 U. S. 81, 100 (1943). Thus, if the set-aside merely expresses a congressional desire to prefer one racial or ethnic group over another, § 103 (f)(2) violates the equal protection component in the Due Process Clause of the Fifth Amendment. See Bolling v. Sharpe, 347 U. S. 497, 499 (1954).


Because the distinction between permissible remedial action and impermissible racial preference rests on the existence of
a constitutional or statutory violation, the legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred. In other words, two requirements must be met. First, the governmental body that attempts to impose a race-conscious remedy must have the authority to act in response to identified discrimination. Cf. Hampton v. Mow Sun Wong, 426 U. S. 88, 103 (1976). Second, the governmental body must make findings that demonstrate the existence of illegal discrimination. In Bakke, the Regents failed both requirements. They were entrusted only with educational functions, and they made no findings of past discrimination. Thus, no compelling governmental interest was present to justify the use of a racial quota in medical school admissions. Bakke, 438 U. S., at 300–310.

Our past cases also establish that even if the government proffers a compelling interest to support reliance upon a suspect classification, the means selected must be narrowly drawn to fulfill the governmental purpose. In re Griffiths, 413 U. S., at 721–722. In Bakke, for example, the state university did have a compelling interest in the attainment of a diverse student body. But the method selected to achieve that end, the use of a fixed admissions quota, was not an appropriate means. The Regents' quota system eliminated some non-minority applicants from all consideration for a specified number of seats in the entering class, although it allowed minority applicants to compete for all available seats. 438 U. S., at 275–276. In contrast, an admissions program that recognizes race as a factor, but not the sole factor, in assessing an applicant's qualifications serves the University's interest in diversity while ensuring that each applicant receives fair and competitive consideration. Id., at 317–318.

In reviewing the constitutionality of §103 (f)(2), we must decide: (i) whether Congress is competent to make findings of unlawful discrimination; (ii) if so, whether sufficient find-
ings have been made to establish that unlawful discrimination has affected adversely minority business enterprises, and (iii) whether the 10% set-aside is a permissible means for redressing identifiable past discrimination. None of these questions may be answered without explicit recognition that we are reviewing an Act of Congress.

II

The history of this Court's review of congressional action demonstrates beyond question that the National Legislature is competent to find constitutional and statutory violations. Unlike the Regents of the University of California, Congress properly may—and indeed must—address directly the problem of discrimination in our society. See Heart of Atlanta Motel v. United States, 379 U. S. 241, 257 (1964). In Katzenbach v. McClung, 379 U. S. 294, 304 (1964), for example, this Court held that Congress had the power under the Commerce Clause to prohibit racial discrimination in public restaurants on the basis of its "findings that [such discrimination] had a direct and adverse effect on the free flow of interstate commerce."


Acting to further the purposes of Title VII, Congress vested in the federal courts broad equitable discretion to ensure that "persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." Franks v. Bowman Transportation Co., 424 U. S. 747, 764 (1976), quoting Section-by-Section:

In addition, Congress has been given the unique constitutional power of legislating to enforce the provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments. At an early date, the Court stated that "[i]t is the power of Congress which has been enlarged" by the enforcement provisions of the post-Civil War Amendments. Ex parte Virginia, 100 U. S. 339, 345 (1879). In Jones v. Alfred H. Mayer & Co., 392 U. S. 409, 441-443 (1968), the Court recognized Congress' competence to determine that private action inhibiting the right to acquire and convey real property was racial discrimination forbidden by the Thirteenth Amendment. Subsequently, we held that Congress' enactment of 42 U. S. C. § 1981 pursuant to its powers under the Thirteenth Amendment, see Runyon v. McCrary, 427 U. S. 160, 168-170, 179 (1976), provides to all persons a federal remedy for racial discrimination in private employment. See McDonald v. Santa Fe Transportation Co., 427 U. S. 273, 295-296 (1976); Johnson v. Railway Express Agency, 421 U. S. 454, 459-460 (1975).

In Katzenbach v. Morgan, 384 U. S. 641 (1966), the Court considered whether § 5 of the Fourteenth Amendment gave Congress the power to enact § 4 (e) of the Voting Rights Act of 1965, 42 U. S. C. § 1973 (b)(e). Section 4 (e) provides that no person educated in Puerto Rico may be denied the right to vote in any election for failure to read or write the English language. The Court held that Congress was empowered to enact § 4 (e) as a remedy for discrimination

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Section 2 of the Thirteenth Amendment, which abolished slavery, provides that "Congress shall have power to enforce this article by appropriate legislation." In virtually identical language, § 6 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment give Congress the power to enforce the provisions of those amendments.
against the Puerto Rican community. *Id.*, at 652-653. Implicit in its holding was the Court's belief that Congress had the authority to find, and had found, that members of this minority group had suffered governmental discrimination. Congress' authority to find and provide for the redress of constitutional violations also has been confirmed in cases construing the enforcement clause of the Fifteenth Amendment. In *South Carolina v. Katzenbach*, 383 U. S. 301, 308 (1966), for example, the Court upheld the Voting Rights Act of 1965, 42 U. S. C. § 1973 et seq., as an appropriate remedy for violations of the Fifteenth Amendment. It noted that Congress had found "inadvisable and pervasive" discrimination demanding "ster[n] and elabora.te" measures. *Id.*, at 306. Most relevant to our present inquiry was the Court's express approval of Congress' decision to "prescrib[e] remedies for voting discrimination which go into effect without the need for prior adjudication." *Id.* at 328.*

It is beyond question, therefore, that Congress has the authority to identify unlawful discriminatory practices, to

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* Among the remedies approved in *South Carolina v. Katzenbach*, 383 U. S. 301 (1966), was the temporary suspension of literacy tests in some jurisdictions. The Voting Rights Act of 1970, 42 U. S. C. § 1973aa et seq., temporarily banned the use of literacy tests in all jurisdictions. In *Griggs v. Blesch*, 400 U. S. 112 (1970), this Court, speaking through five separate opinions, unanimously upheld the action as a proper exercise of Congress' authority under the post-Civil War Amendments. See *id.*, at 117 (Black, J.); *id.*, at 131 (Douglas, J.); *id.*, at 152 (Harlan, J.); *id.*, at 229 (BRENNAN, WHITE, and MARSHALL, JJ.); *id.*, at 281 (STEWART, J., with whom BRENNER, C. J., and BLACKMUN, J., concurred).

Mr. Justice STEWART said that:

"Congress was not required to make state-by-state findings concerning . . . actual impact of literacy requirements on the Negro citizen's access to the ballot box. In the interests of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records . . . . The findings that Congress made when it enacted the Voting Rights Act of 1965 would have supported a nationwide ban on literacy tests." *Id.*, at 284 (citation omitted).
prohibit those practices, and to prescribe remedies to eradi­
cate their continuing effects. The next inquiry is whether
Congress has made findings adequate to support its
determination that minority contractors have suffered exten­
sive discrimination.

III
A

The petitioners contend that the legislative history of
§ 103 (f)(2) reflects no congressional finding of statutory or
constitutional violations. Crucial to that contention is the
assertion that a reviewing court may not look beyond the
legislative history of the PWEA itself for evidence that Con­
gress believed it was combatting invidious discrimination.
But petitioners' theory would erect an artificial barrier to
full understanding of the legislative process.

Congress is not an adjudicatory body called upon to resolve
specific disputes between competing adversaries. Its consti­
tutional role is to be representative rather than impartial, to
make policy rather than to apply settled principles of law.
The petitioners contention that this Court should treat the
debates on § 103 (f)(2) as the complete "record" of con­
gressional decisionmaking underlying that statute is essentially
a plea that we treat Congress as if it were a lower federal court.
But Congress is not expected to act as though it were duty
bound to find facts and make conclusions of law. The cre­
ation of national rules for the governance of our society simply
does not entail the same concept of recordmaking that is
appropriate to a judicial or administrative proceeding. Con­
gress has no responsibility to confine its vision to the facts and
evidence adduced by particular parties. Instead, its special
attribute as a legislative body lies in its broader mission to
investigate and consider all facts and opinions that may be
relevant to the resolution of an issue. One appropriate
source in the information and expertise that Congress acquires
in the consideration and enactment of earlier legislation.
After Congress has legislated repeatedly in an area of national concern, its members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.

Acceptance of petitioners' argument would force Congress to make specific factual findings with respect to each legislative action. Such a requirement would mark an unprecedented imposition of adjudicatory procedures upon a coordinate branch of Government. Neither the Constitution nor our democratic tradition warrants such a constraint on the legislative process. I therefore conclude that we are not confined in this case to an examination of the legislative history of § 103 (f)(2) alone. Rather, we properly may examine the total contemporary record of congressional action dealing with the problems of racial discrimination against minority business enterprises.

B

In my view, the legislative history of § 103 (f)(2) demonstrates that Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors. The opinion of the Court provides a careful overview of the

*I cannot accept the suggestion of the Court of Appeals that § 103 (f) (2) must be viewed as serving a compelling state interest if the reviewing court can "perceive a basis" for legislative action. 588 F.2d 603, 634-635 (CA2 1978), quoting Katzenbach v. Morgan, 384 U. S., at 656. The "perceive a basis" standard refers to congressional authority to act, not to the distinct question whether that action violates the Due Process Clause of the Fifth Amendment. See text, at pp. 1-2, supra.

In my view, a court should uphold a reasonable congressional finding of discrimination. A more stringent standard of review would impinge upon Congress' ability to address problems of discrimination, see pp. 1-8, supra, of standard requiring a court to "perceive a basis" is essentially meaningless in this context. That standard might allow a court to justify legislative action even in the absence of affirmative evidence of congressional findings.
relevant legislative history, see ante, at 4–16, to which only a few words need be added.

Section 103 (f)(2) originated in an amendment introduced on the floor of the House of Representatives by Representative Mitchell. Congressman Mitchell noted that the Federal Government was already operating a set-aside program under § 8 (a) of the Small Business Administration Act of 1958, 15 U.S.C. § 637(a). He described his proposal as "the only sensible way for us to begin to develop a viable economic system for minorities in this country, with the ultimate result being that we are going to eventually be able to . . . end certain programs which are merely support survival programs for people which do not contribute to the economy." 123 Cong. Rec. H1436–H1437 (daily ed. Feb. 24, 1977). Senator Brooke, who introduced a similar measure in the Senate, reminded the Senate of the special provisions previously enacted into § 8 (a) of the SBA Act and the Railroad Revitalization Act of 1976, 49 U.S.C. § 1657a, which, he stated, demonstrated the validity of his amendment. 123 Cong. Rec. S8000–10 (daily ed. March 10, 1977).

Section 8 (a) of the SBA Act provides that the Small Business Administration may enter into contracts with the Federal Government and subcontract them out to small businesses. The Small Business Administration has been directed by Executive Order to employ § 8 (a) to aid socially and economically disadvantaged persons. Ante, at 12. The opera-

6 During subsequent debate in the House, Representative Conyers emphasized that minority businesses "through no fault of their own simply have not been able to get their foot in the door." 123 Cong. Rec. H1440 (daily ed. Feb. 24, 1977); see ibid. (remarks of Rep. Biaggi).

6 In 1969, 1970, and 1971, the President issued Executive Orders directing federal aid for minority business enterprises. See Exec. Order 11458, 34 Fed. Reg. 4037 (1969); Exec. Order 11512, 35 Fed. Reg. 4006 (1970); Exec. Order 11525, 36 Fed. Reg. 10907 (1971). The President noted that "members of certain minority groups through no fault of their own have been denied the full opportunity to participate in the free enterprise
tion of the § 8(a) program was reviewed by congressional committees between 1972 and 1977. In 1972, the House Subcommittee on Minority Small Business Enterprise found that minority businessmen face economic difficulties that "are the result of past social standards which linger as characteristics of minorities as a group." H.R. Rep. No. 92-1615, 92d Cong., 2d Sess., 3 (1972). In 1975, the House Subcommittee on SBA Oversight and Minority Enterprise concluded that "the effect of past inequities stemming from racial prejudice have not remained in the past," and that low participation by minorities in the economy was the result of "past discriminatory systems." H.R. Rep. No. 94-468, 94th Cong., 1st Sess., 1–2 (1975). In 1977, the House Committee on Small Business found that "over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating in effect, to perpetuate these past inequities." H.R. Rep. No. 94-1791, 94th Cong., 2d Sess., 124 (1977).

The Committee’s report was issued on January 3, 1977, less than two months before Representative Mitchell introduced § 103 (f)(2) into the House of Representatives. The system,” Exec. Order 11518, supra, at 4940, and that the “opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic justice.” Exec. Order 11925, supra, at 1960. Assistance to minority business enterprises through the § 8(a) program has been designed to promote the goals of these Executive Orders. Ray Bailie Trash Handling, Inc. v. Klepp, 447 F. 766, 769, 770 (CA9 1973), cert. denied, 415 U.S. 914 (1974).

Two sections of the Railroad Revitalisation Act also reflect Congress’
In light of these legislative materials and the discussion of legislative history contained in the Court’s opinion, I believe that a court must accept as established the conclusion that purposeful discrimination contributed significantly to the small percentage of federal contracting funds that minority business enterprises have received. Refusals to subcontract work to minority contractors may, depending upon the identity of the discriminating party, violate Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, or 42 U. S. C. § 1981, or the Fourteenth Amendment. Although the discriminatory activities were not identified with the exactitude expected in judicial or administrative adjudication, it must be remembered that “Congress may paint with a much broader brush than may this Court.” Oregon v. Mitchell, 400 U. S. 112, 284 (1970) (Stewart, J., concurring in part and dissenting in part). Recognition of the need for remedial steps on behalf of minority businesses, Section 803, 43 U. S. C. § 803 prohibits discrimination in any activity funded by the Act, and § 901, 49 U. S. C. § 9015a establishes a Minority Business Center to assist minority businesses obtain contracts and business opportunities related to the maintenance and rehabilitation of railroads. The provisions were enacted by a Congress that recognized the “established national policy, since at least the passage of the Civil Rights Act of 1964, to encourage and assist in the development of minority business enterprises.” S. Rep. No. 94-409, 94th Cong., 1st Sess., 44 (1975) (Commerce Committee). In January 1977, the Department of Transportation issued regulations pursuant to 45 U. S. C. § 403 that require contractors to formulate affirmative action programs to ensure that minority businesses receive a fair proportion of contract opportunities. See 49 Fed. Reg. 4290-4291 (1977) (codified at 49 CFR Part 265). See also pp. 17-19, nn. 11 and 12, infra. Although this record suffices to support the congressional judgment that minority contractors suffered identifiable discrimination, Congress need not be content with findings that merely meet constitutional standards. Race-conscious remedies, popularly referred to as affirmative action programs, almost invariably affect some innocent persons. See infra, at 16-18. Respect and support for the law, especially in an area as sensitive as this, depend in large measure upon the public’s perception of
Under this Court’s established doctrine, a racial classification is suspect and subject to strict judicial scrutiny. As noted in Part I, the Government may employ such a classification only when necessary to accomplish a compelling governmental purpose. See Bakke, 438 U.S., at 305. The conclusion that Congress found a compelling governmental interest in redressing identified discrimination against minority contractors therefore leads to the inquiry whether use of a 10% set-aside is a constitutionally appropriate means of serving that interest. In the past, this “means” test has been virtually impossible to satisfy. Only two of this Court’s modern cases have held the use of racial classifications to be constitutional. See Korematsu v. United States, 323 U. S. 214 (1944); Hirabayshi v. United States, 320 U. S. 81 (1943). Indeed, the failure of legislative action to survive strict scrutiny has lead some to wonder whether our review of racial classifications has been strict in theory, but fatal in fact. See Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

A

Application of the “means” test necessarily demands an understanding of the type of congressional action at issue. This is not a case in which Congress has employed a racial classification solely as a means to confer a racial preference. Such a purpose plainly would be unconstitutional. Supra, at 2. Nor has Congress sought to employ a racially conscious means to further a nonracial goal. In such instances, a non-fairness. See Bakke, 438 U. S., at 319, n. 51; J. H. Winkins III, From Brown to Bakke, 264–266 (1979); M. Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1053, 1048–1049 (1979). It therefore is important that the legislative record supporting race-conscious remedies contain evidence that satisfies fair-minded people that the congressional action is just.
racial means should be available to further the legitimate governmental purpose. See Bakke, 438 U. S., at 310–311.

Enactment of the set-aside is designed to serve the compelling governmental interest in redressing racial discrimination. As this Court has recognized, the implementation of any affirmative remedy for redress of racial discrimination is likely to affect persons differently depending upon their race. See, e. g., Board of Education v. Swann, 402 U. S., at 45–46. Although federal courts may not order or approve remedies that exceed the scope of a constitutional violation, see Milliken v. Bradley, 433 U. S. 267, 280–281 (1977); Dayton v. Brinkman, 433 U. S. 406 (1977); Austin Independent School District v. United States, 429 U. S. 991 (1976) (Powell, J., concurring), this Court has not required remedial plans to be limited to the least restrictive means of implementation. We have recognized that the choice of remedies to redress racial discrimination is "a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court." Frank v. Bowman Transportation Co., 424 U. S., at 794 (1976) (Powell, J., concurring in part and dissenting in part).

I believe that the enforcement clauses of the Thirteenth and Fourteenth Amendments give Congress a similar measure of discretion to choose a suitable remedy for the redress of racial discrimination. The legislative history of § 5 of the Fourteenth Amendment is particularly instructive. Senator Howard, who was a member of the Joint Committee on Reconstruction and who introduced the Amendment into the Senate, described § 5 as "a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees" of § 1 of the Amendment. Cong. Globe, 39th Cong., 1st Sess., 2766 (1866). Furthermore, he stated that § 5 "casts upon the Congress the responsibility of seeing to it, for the future, that all sections of the amendment are carried out in good faith, and that no State infringes the
rights of persons or property. I look upon this clause as indispensable for the reason that it thus imposes upon the Congress this power and this duty." *Id.* at 2768.

Senator Howard’s emphasis on the importance of congressional action to effectuate the goals of the Fourteenth Amendment was echoed by other Members of Congress. Representative Stevens, also a member of the Reconstruction Committee, said that the Fourteenth Amendment “allows Congress to correct the unjust legislation of the States,” *id.* at 2459, and Senator Poland wished to leave no doubt “as to the power of Congress to enforce principles lying at the very foundation of all republican government. . . .” *Id.* at 2961. See *id.* at 2512-2513 (remarks of Rep. Raymond); *id.* at 2511 (Rep. Miller). See also *Ex parte Virginia*, 100 U. S., at 345.*

Although the Framers of the Fourteenth Amendment may have contemplated that Congress, rather than the federal courts, would be the prime force behind enforcement of the Fourteenth Amendment, see C. Fauman, *History of the Supreme Court of the United States: Reconstruction and Reunion*, pt. 1, 1295, 1296 (1971), they did not believe that congressional action would be unreviewable by this Court. Several Members of Congress emphasized that a primary purpose of the Fourteenth Amendment was to place the provisions of the Civil Rights of 1866 “in the eternal firmament of the Constitution.” Cong. Globe, 39th Cong., 1st Sess. 2462 (1866) (remarks of Rep. Garfield). See *id.* at 2459 (remarks of Rep. Stephens); *id.*, at 2462 (remarks of Rep. Thayer); *id.*, at 2406 (remarks of Rep. Broomall). By 1866, Members of Congress fully understood that judicial review was the means by which action of the Legislative and Executive Branches would be required to conform to the Constitution. See, e. g., *Marbury v. Madison*, 5 U. S. 737 (1803).

I conclude, therefore, that the enforcement clauses of the Thirteenth and Fourteenth Amendments confer upon Congress the authority to select reasonable remedies to advance the compelling state interest in repairing the effects of discrimination. But that authority must be exercised in a manner that does not erode the guarantees of these Amendments. The Judicial Branch has the special responsibility to make a searching inquiry into the justification for employing a race-conscious remedy. Courts must be sensitive to the possibility that less intrusive means might serve the compelling state interest equally as well. I believe that Congress' choice of a remedy should be upheld, however, if the means selected are equitable and reasonably necessary to the redress of identified discrimination. Such a test allows the Congress to exercise necessary discretion but preserves the essential safeguard of judicial review of racial classifications.

B

When reviewing the selection by Congress of a race-conscious remedy, it is instructive to note the factors upon which the Courts of Appeals have relied in a closely analogous area. Courts reviewing the proper scope of race-conscious hiring remedies have considered (i) the efficacy of alternative remedies, *NAACP v. Allis*, 493 F. 2d 614, 619 (CA5 1974); *Vulcan Society Inc. v. Civil Service Comm'n*, 490 F. 2d 887, 398 (CA2 1973), (ii) the planned duration of the remedy, *Vulcan Society Inc. v. Civil Service Comm'n*, 490 F. 2d at 399; *United States v. Wood, Wire, & Metal Lathers Local 46*, 471 F. 2d 428, 414, n. 12 (CA2), cert. denied, 412 U. S. 939 (1973), (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force, *Association Against Discrimination v. Bridgeport*, 594 F. 2d 306, 311 (CA2 1979); *Boston Chapter NAACP v. Beecher*, 594 F. 2d 1017, 1026-1027 (CA1 1974), cert. denied, 421 U. S. 910.
FULLILove v. KLUTZNICK

(1975); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n, 482 F. 2d 1333, 1341 (CA2 1972), cert. denied, 411 U. S. 861 (1973); Carter v. Gallagher, 452 F. 2d 315, 331 (CA8) (en banc), cert. denied, 410 U. S. 950 (1973), and (iv) the availability of waiver provisions if the hiring plan could not be met, Associated General Contractors Inc. v. Altshuler, 490 F. 2d 9, 18-19 (CA1 1973), cert. denied, 416 U. S. 957 (1974).

By the time Congress enacted § 103 (f) (2) in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry. Although the problem had been addressed by antidiscrimination legislation, executive action to remedy employment discrimination in the construction industry, and federal aid to minority businesses, the fact remained that minority contractors were receiving less than 1% of federal contracts. See 123 Cong. Rec. S3910 (daily ed. Mar. 10, 1977) (remarks of Sen. Brooke). Congress also knew that economic recession threatened the construction industry as a whole. Section 103 (1) (2) was enacted as part of a bill designed to stimulate the economy by appropriating $4 billion in federal funds for new public construction. Since the emergency public construction funds were to be distributed quickly, any remedial provision designed to prevent those funds from perpetuating past discrimination also had to be effective promptly. Moreover, Congress understood that any effective remedial program had to provide minority contractors the experience necessary for continued success without federal assistance. And Congress

11 The Public Works Employment Act of 1977 (PWEA) provided that federal monies be committed to state and local grantees by September 30, 1977. 42 U. S. C. A. § 6707 (h) (1) (Supp. 1978). Action on applications for funds was to be taken within 90 days after receipt of the application, id., § 6705 (1978 Supp.), and onsite work was to begin within 90 days of project approval, id., § 6705 (d).

12 In 1972, a congressional oversight committee addressed the “complex problem—how to achieve economic prosperity despite a long history of racial bias.” See H. R. Rep. No. 92-1915, 92d Cong., 2d Sess., 3 (Select
knew that the ability of minority group members to gain experience had been frustrated by the difficulty of entering the construction trades. The set-aside program adopted

Committee on Small Business. The committee explained how the effects of discrimination translate into economic barriers:

"In attempting to increase their participation as entrepreneurs in our economy, the minority businessman usually encounters several major problems. These problems, which are economic in nature, are the result of past social standards which linger as characteristics of minorities as a group.

"The minority entrepreneur is faced initially with a lack of capital, the most serious problem of all beginning minorities or other entrepreneurs. Because minorities as a group are not traditionally holders of large amounts of capital, the entrepreneur must go outside his community in order to obtain the needed capital. Lending firms require substantial security and a track record in order to lend funds, security which the minority businessmen usually cannot provide. Because he cannot produce either, he is often turned down.

"Functional expertise is a necessity for the successful operation of any enterprise. Minorities have traditionally assumed the role of the labor force in business with few gaining access to positions whereby they could learn not only the physical operation of the enterprise, but also the internal functions of management." Id. at 3-4.

"When Senator Brooke introduced the PWEM set-aside in the Senate, he stated that aid to minority businessmen also would help to alleviate problems of minority unemployment. 123 Cong. Rec. S3910 (daily ed. Mar. 10, 1977) Congress had considered the need to remedy employment discrimination in the construction industry when it refused to override the "Philadelphia Plan." The "Philadelphia Plan," promulgated by the Department of Labor in 1969, required all federal contractors to use hiring goals in order to redress past discrimination. See Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F. 2d 189, 163 (CA3), cert. denied, 404 U. S. 854 (1971). The House of Representatives refused to adopt an amendment to an appropriations bill that would have had the effect of overturning the Labor Department's order. 115 Cong. Rec. 40921 (1969). The Senate, which had approved such an amendment, then voted to recede from its position. 115 Cong. Rec. 40749 (1969).

During the Senate debate, several legislators argued that implementation of the Philadelphia Plan was necessary to ensure equal opportunity.
as part of this emergency legislation served each of these concerns because it took effect as soon as funds were expended under PWEA and because it provided minority contractors with experience that could enable them to compete without governmental assistance.

The § 103 (f)(2) set-aside is not a permanent part of federal contracting requirements. As soon as the PWEA program concludes, this set-aside program ends. The temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate. It will be necessary for Congress to re-examine the need for a race-conscious remedy before it extends or re-enacts § 103 (f)(2).

The percentage chosen for the set-aside is within the scope of congressional discretion. The Courts of Appeals have approved temporary hiring remedies insisting that the percentage of minority group workers in a business or governmental agency will be reasonably related to the percentage of minority group members in the relevant population. Boston Chapter NAACP v. Beecher, 504 F. 2d, at 1027; Bridgeport Guard Inc. v. Bridgeport, 482 F. 2d, at 1341; Carter v. Gallagher, 452 F. 2d, at 331. Only 4% of contractors are members of minority groups, see Fullilove v. Kreps, 584 F. 2d 600, 608 (CA2 1978), although minority group members constitute about 17% of the national population, see Contractors Association of Western Pennsylvania v. Kreps, 441 F. Supp. 936, 951 (WD Pa. 1977), aff'd, 573 F. 2d 811 (CA3 1978).

See 115 Cong. Rec. 40740 (remarks of Sen. Scott); id., at 40741 (remarks of Sen. Griffith); id., at 40744 (remarks of Sen. Bayh). Senator Percy argued that the Plan was needed to redress discrimination against blacks in the construction industry. Id., 40740-40741. The day following the Senate vote to rescind from its earlier position, Senator Kennedy noted "exceptionally blatant" racial discrimination in the construction trades. He commended the Senate's decision that "the Philadelphia Plan should be a useful and necessary tool for insuring equitable employment of minorities." Id., at 41072.
The choice of a 10% set-aside thus falls roughly halfway between the present percentage of minority contractors and the percentage of minority group members in the Nation. Although the set-aside is pegged at a reasonable figure, its effect might be unfair if it were applied rigidly in areas of the country where minority group members constitute a small percentage of the population. To meet this concern, Congress enacted a waiver provision into § 103 (f)(2). The factors governing issuance of a waiver include the availability of qualified minority contractors in a particular geographic area, the size of the locale's minority population, and the efforts made to find minority contractors. Department of Commerce, Guidelines for 10% Minority Business Participation LFW Grants, App. 165a-167a. We have been told that 1281 waivers had been granted by September 9, 1979. Brief for the Secretary of Commerce 62, n. 37.

A race-conscious remedy should not be approved without consideration of an additional crucial factor—the effect of the set-aside upon innocent third parties. See Teamsters v. United States, 431 U.S., at 374-375. In this case, the petitioners contend with some force that they have been asked to bear the burden of the set-aside even though they are innocent of wrongdoing. I do not believe, however, that their burden is so great that the set-aside must be disapproved. As noted above, Congress knew that minority contractors were receiving only 1% of federal contracts at the time the set-aside was enacted. The PWEA appropriated $4 billion for public work projects, of which it could be expected that approximately $400 million would go to minority contractors. The Court of Appeals calculated that the set-aside would reserve about 25% of all the funds expended yearly on construction work in the United States for approximately 4% of the Nation’s contractors who are members of a minority
group. 584 F. 2d., at 607-608. The set-aside would have no effect on the ability of the remaining 96% of contractors to compete for 99.75% of construction funds. In my view, the effect of the set-aside is limited and so widely dispersed that its use is consistent with fundamental fairness. 13

Consideration of these factors persuades me that the set-aside is a reasonably necessary means of furthering the compelling governmental interest in redressing the discrimination that affects minority contractors. Nor is any marginal unfairness to innocent nonminority contractors 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. 14

13 Although I believe that the burden placed upon nonminority contractors is not unconstitutional, I reject the suggestion that it is legally irrelevant. Apparently on the theory that Congress could have enacted no set-aside and provided $450 million less in funding, the Secretary of Commerce argues that "[n]onminorities have lost no right or legitimate expectation by the addition of Section 103 (f)(2) to the 1976 Act." Brief for the Secretary of Commerce 61. But the United States may not employ unconstitutional classifications, or base a decision upon unconstitutional considerations, when it provides a benefit to which a recipient is not legally entitled. Cf. Califano v. Goldfarb, 430 U.S. 199, 210-212 (1976) (opinion of BRENNAN, J.); Richardson v. Belcher, 404 U.S. 78, 81 (1971) ("To characterize an Act of Congress as conferring a 'public benefit' does not, of course, immunize it from scrutiny under the Fifth Amendment"). Similarly, I cannot accept the suggestion that the set-aside should be considered a "technique to induce governments and private parties to cooperate voluntarily with federal policy." Ante, at 22. The petitioners, contractors who wish to compete for all federal funds, certainly have not accepted voluntarily the adoption or the implementation of the set-aside.

14 Petitioners have suggested a variety of alternative programs that could be used in order to aid minority business enterprises in the construction industry. My view that this set-aside is within the discretion of Con-
In the history of this Court and this country, few questions have been more divisive than those arising from governmental action taken on the basis of race. Indeed, our own decisions played no small part in the tragic legacy of government-sanctioned discrimination. See Plessy v. Ferguson, 163 U. S. 537 (1896); Dred Scott v. Sanford, 19 How. 393 (60 U. S.) (1857). At least since the decision in Brown v. Board of Education, 347 U. S. 483 (1954), the Court has been resolute in its dedication to the principle that the Constitution envisions a Nation where race is irrelevant. The time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin. But in our quest to achieve a society free from racial classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination.

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. As my opinion made clear, I believe that the use 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, which does not imply that other methods are unavailable to Congress. Nor do I conclude that use of a set-aside always will be an appropriate remedy or that the selection of a set-aside by any other governmental body would be constitutional. See Bakke, 438 U. S., at 300-310. The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body.
and Congress has been given a unique constitutional role in the enforcement of the post-Civil War Amendments. In this case, where Congress acted on the basis of its determination 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).\(^\text{16}\)

\(^{16}\) Petitioners also contend the § 103 (f)(2) violates Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d et seq. Because I believe that the act itself is constitutional, I also conclude that the program does not violate Title VI. See Bakke, 438 U. S., at 287 (opinion of Powell, J.); id., at 348-350 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).
FN. The dissent of Mr. Justice Marshall asserts that the Court's opinion satisfies the "intermediate" standard of review proposed by Justices Brennan, White, Marshall and Blackmun in Bakke. That assertion is surely correct. Any legislative enactment that satisfies strict scrutiny must also pass muster under a more lenient standard of review.

Mr. Justice Marshall also asserts, I believe incorrectly, that the Court's opinion rejects the "strict scrutiny" standard. It is hard for me to understand how this contention can be made in light of the Court's explicit statement that

[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. Some have characterized such an examination as a "test;" it is not essential that these standards of review be characterized as one degree or another in the hierarchy of judicial analysis. What is essential is that any enactment of Congress which [sic] employs racial or ethnic criteria receives probing examination.

Ante, at 39.

It may seem that disagreement over the appropriate standard of review for racial classifications is sterile so long as majority of
the Members of this Court agree that § 103(c)(2) is constitutional. But such a view overlooks this Court's role in providing guidance to federal and state courts who are forced to confront complex questions of constitutional law. The Equal Protection Clause, and the equal protection component of the Due Process Clause of the Fifth Amendment, means that any classification among groups must be justifiable. Different standards of review applied to different sorts of classifications simply recognize that some classifications are less likely to be justifiable than others. Racial classifications must be assessed under the most stringent level of review because immutable characteristics that bear no relation to individual merit are necessarily irrelevant to virtually every kind of governmental decision.

While racial classifications demand strict scrutiny, I cannot agree that the Constitution absolutely prohibits any racial classification. Mr. Justice Stewart recognizes the correct principle: "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." Post at 2. But, in rare and narrowly defined circumstances, that presumption may be rebutted.

In my view, Mr. Justice Stewart's view would create an additional anamoly. The dissenters state unequivocally that "[u]nder our Constitution, the government may never act to the detriment of a person solely because of that person's race." Post at 2. But the dissenters recognize that irreconciliable principle that federal courts, surely a part of our government, "may take race into account in devising a remedial decree to undo a violation of a law prohibiting discrimination on the basis of race." Post at 13 n.4. So long as race may be noted in devising a remedy, and so long as Congress is an appropriate body to devise a remedy, then it must be that some legislative acts that mass strict judicial scrutiny can enact race-conscious remedies.