

bear the brunt of the program, or that was not justified by an important and articulated purpose.¹⁷³⁶

Justice Powell, however, argued that all racial classifications are suspect and require strict scrutiny. Because none of the justifications asserted by the college met this high standard of review, he would have invalidated the program. But he did perceive justifications for a less rigid consideration of race as one factor among many in an admissions program; diversity of student body was an important and protected interest of an academy and would justify an admissions set of standards that made affirmative use of race. Ameliorating the effects of past discrimination would justify the remedial use of race, the Justice thought, when the entity itself had been found by appropriate authority to have discriminated, but the college could not inflict harm upon other groups in order to remedy past societal discrimination.¹⁷³⁷ Justice Powell thus agreed that Bakke should be admitted, but he joined the four justices who sought to allow the college to consider race to some degree in its admissions.¹⁷³⁸

The Court then began a circuitous route toward disfavoring affirmative action, at least when it occurs outside the education context. At first, the Court seemed inclined to extend the result in *Bakke*. In *Fullilove v. Klutznick*,¹⁷³⁹ the Court, still lacking a majority opinion, upheld a federal statute requiring that at least ten percent of public works funds be set aside for minority business enterprises. A series of opinions by six Justices all recognized that alleviation and remediation of past societal discrimination was a legitimate goal and that race was a permissible classification to use in remedying the present effects of past discrimination. Chief Judge Burger issued the judgment, which emphasized Congress's preeminent role under the Commerce Clause and the Fourteenth Amendment to determine the existence of past discrimination and its continuing effects and to implement remedies that were race conscious in order to cure those effects. The principal concurring opinion by Justice Marshall applied the Brennan analysis in *Bakke*, using middle-tier scrutiny to hold that the race conscious set-aside was "substan-

¹⁷³⁶ 438 U.S. at 355–79 (Justices Brennan, White, Marshall, and Blackmun). The intermediate standard of review adopted by the four Justices is that formulated for gender cases. "Racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" *Id.* at 359.

¹⁷³⁷ 438 U.S. at 287–320.

¹⁷³⁸ *See* 438 U.S. at 319–20 (Justice Powell).

¹⁷³⁹ 448 U.S. 448 (1980). Justice Stewart, joined by Justice Rehnquist, dissented in one opinion, *id.* at 522, while Justice Stevens dissented in another. *Id.* at 532.