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Race-Conscious Admissions Programs in Higher Education: It's Not a Black and White Issue

Kira M. Feeny
University of Dayton

RACE-CONSCIOUS ADMISSIONS PROGRAMS IN HIGHER EDUCATION: IT'S NOT A BLACK AND WHITE ISSUE

Kira M. Feeny[*]

TABLE OF CONTENTS

I. INTRODUCTION

The Equal Protection Clause of the Fourteenth Amendment states that "[n]o State shall . . . deny to any person . . . the equal protection of the laws."[1] Since *Brown v. Board of Education*,[2] courts have labored to find an appropriate and consistent interpretation of the Equal Protection Clause, particularly as it relates to governmental racial classifications. Today, courts agree that racial classifications are highly suspect and that such

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[*] Articles Editor, 1999-2000, University of Dayton Law Review. J.D. expected, May 2000, University of Dayton School of Law; B.A., 1997, Providence College.

[1] U.S. Const. amend. XIV, § 1.

[2] 347 U.S. 483 (1954).

classifications, therefore, require the strict scrutiny standard of review.[3] Under this standard, to be constitutionally valid, a racial classification must be justified by a compelling interest and it must be narrowly tailored to achieve that interest.[4] Race-conscious admissions programs in higher education are examples of racial classifications that require the strict scrutiny standard of review.

Schools implementing race-conscious admissions programs have faced attacks by individuals alleging that the programs violate their equal protection rights. For example, in *Hopwood v. Texas*, the United States Court of Appeals for the Fifth Circuit examined the admissions program of the University of Texas School of Law.[5] Cheryl Hopwood, a resident of Texas, applied to the University of Texas School of Law.[6] In college, she maintained a 3.8 grade point average and later scored 160[7] on the Law School Admissions Test ("LSAT").[8] However, despite her academic performance, the University of Texas denied her admission to the law

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[3] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 218 (1995); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986).

[4] *See Adarand*, 515 U.S. at 219; *Wygant*, 476 U.S. at 274.

[5] 78 F.3d 932 (5th Cir. 1996). The law school made its initial admissions decisions on an applicant's Texas Index ("TI") number. *Id.* at 935. This number was a composite of the applicant's undergraduate GPA and LSAT score. *Id.* To interpret the index number, the school considered "the strength of the applicant's undergraduate education, the difficulty of his major, and significant trends in his own grades and the undergraduate grades at his respective college. . . ." *Id.* Additionally, the school considered other factors like the "applicant's background, life experiences, and outlook." *Id.* The school placed each applicant into one of three categories according to the TI number: "presumptive admit," "presumptive-deny," or "discretionary zone." *Id.* This determined how extensively the school would review the application. *Id.*

According to members of the admissions committee, most applicants in the presumptive admit category received admissions offers without much review. *Id.* at 935-36. Conversely, most applicants in the presumptive-deny category were rejected with little review. *Id.* at 936. The discretionary zone applicants received the most scrutiny. For applicants other than African-Americans and Mexican-Americans, the application files were stacked, reviewed by sub-committee members, and were voted on to determine admission or rejection. *Id.*

"Blacks and Mexican Americans were treated differently from other candidates." *Id.* They had lower TI ranges for placement into the three admissions categories, which allowed the school to consider and admit more minorities. *Id.* For example, the presumptive-denial score for non-minority applicants was 192 or lower while "the same score for [B]lacks and Mexican[-]Americans was 179." *Id.* Also, the "resident [W]hite applicants had a *mean* GPA of 3.53 and an LSAT of 164," while the "Mexican[-]Americans scored 3.27 and 158; [B]lacks scored 3.25 and 157." *Id.* These different standards affected an applicant's chance of admission. *Id.* at 937. For example, because the presumptive-deny TI number for a non-minority was 192 or lower and the presumptive admit TI number for a minority was 189 or higher, a minority applicant with a score of 189 or higher would likely be admitted despite a TI number below the level at which a non-minority applicant would likely be rejected. *Id.*

[6] *Id.* at 938.

[7] The range for LSAT scores is 120 to 180.

[8] *Hopwood*, 78 F.3d at 938.

school.[9] Hopwood and other rejected applicants sued the University under the Equal Protection Clause and claimed that the school subjected them to unconstitutional racial discrimination through its evaluation of their applications.[10]

The court in *Hopwood* asked whether the Fourteenth Amendment permits the school to discriminate in favor of certain minority students by giving significant racial preferences in its admissions program.[11] The court held that the Fourteenth Amendment does not allow this type of discrimination.[12] The court reasoned that the University of Texas offered "no compelling justification . . . to elevate some races over others, even for the wholesome purpose of correcting perceived racial imbalance in the student body."[13]

In *Wessmann v. Gittens*, the United States Court of Appeals for the First Circuit examined the admissions policy of the Boston Latin School.[14] Sarah Wessmann applied to the Boston Latin School for the 1997 ninth-grade entering class.[15] Although Wessmann qualified for admission to the school, her admission was denied.[16] Wessmann's father, acting on her

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[9] *Id.*

[10] *Id.*

[11] *Id.* at 934.

[12] *Id.*

[13] *Id.*

[14] 160 F.3d 790 (1st Cir. 1998). Admission to Boston Latin School ("BLS") involves taking a standardized test. *Id.* at 793. Based on a mathematical formula that predicts academic performance, the school combines each applicant's test score with his or her grade point average, derives a composite score, ranks the applicants, and assigns individuals to the applicant pool. *Id.* Eligibility for admission depends on being in the qualified applicant pool, which includes those who rank in the top fifty percent of the overall applicant pool for the school. *Id.* "Half of the available seats for a school's entering class are allocated in strict accordance with composite score rank order." *Id.* The other half is allocated "on the basis of 'flexible racial/ethnic guidelines established by the admissions program.'" *Id.* To apply the guidelines, school officials determine the relative proportions of different racial and ethnic categories in the remaining pool of qualified applicants. *Id.*

The school then fills the open seats in rank order. *Id.* However, the number of students taken from each racial and ethnic category must match the proportion of that specific category in the remaining qualified applicant pool. *Id.* Because the racial and ethnic distribution of the second group of successful students must reflect that of the remaining qualified applicant pool, a member of a racial and ethnic group may be passed in favor of a lower ranking applicant from another group if the seats designated for the former applicant's racial and ethnic group have already been filled. *Id.*

[15] *Id.*

[16] *Id.* BLS had ninety available seats for the 1997 ninth-grade entering class. *Id.* "Based on her composite score, Sarah ranked 91st (out of 705) in the qualified applicant pool." *Id.* To fill the first forty-five seats, the school used the first forty-seven persons on the list (two applicants declined). *Id.* If the composite scores alone had determined the selection of the remainder of the class, Sarah would have been admitted. *Id.* However, "the racial/ethnic composition of the [remaining pool of qualified applicants] was 27.83% [B]lack, 40.41% [W]hite, 19.21% Asian, 11.64% Hispanic, and 0.13% Native

behalf, sued the Boston Latin School Committee and claimed that its admissions program was unconstitutional and precluded her from gaining admission into the school.[17]

Although the District Court in *Wessmann* held that the school's interests in promoting diversity were compelling and that the means used were narrow enough to avoid violating the Constitution, the United States Court of Appeals for the First Circuit disagreed.[18] After an examination of Supreme Court precedent addressing whether diversity is a compelling interest justifying race-based classifications, the court concluded that the Boston Latin School's admissions program and goal of diversity did not justify the racial classification.[19]

Schools like the University of Texas and the Boston Latin School have created admissions programs that use race-based classifications to improve racial and ethnic diversity within the student body.[20] These race-based classifications used in school admissions programs are justified by the compelling interest in attaining racial and ethnic diversity in schools so long as the classification is narrowly tailored to meet the interest of diversity.

In *Regents of the University of California v. Bakke*, the Supreme Court recognized that achieving diversity in student bodies is a compelling interest.[21] In *Bakke*, the University of California at Davis Medical School denied admission to a White male applicant under the school's admissions program.[22] The admissions program provided for the acceptance of a certain number of applicants from specified minority groups.[23] In *Bakke*, Justice Powell confronted the constitutionality of the admissions program and set forth the "plus" factor approach.[24] This approach allows race to be a "plus" in an applicant's file, but does not exempt the applicant from being compared to all other applicants.[25]

American." *Id.* Therefore, the admissions policy required that the school officials "allocate the remaining 45 seats to 13 [B]lacks, 18 [W]hites, 9 Asians, and 5 Hispanics." *Id.* "As a result, [B]lack and Hispanic students whose composite score rankings ranged from 95th to 150th displaced Sarah and ten other White students who had higher composite scores and ranks." *Id.* at 793-94.

[17] *Id.* at 794.

[18] *Id.*

[19] *Id.* at 796.

[20] *Id.*; Hopwood v. Texas, 78 F.3d 932, 938 (5th Cir. 1996).

[21] 438 U.S. 265 (1978).

[22] *Id.* at 276-77.

[23] *Id.*

[24] *Id.* at 315-17.

[25] *Id.* at 317.

Justice Powell's "plus" factor approach is reasonable and fair because it recognizes and balances the importance of equal protection in general and the importance of diversity in higher education. Therefore, courts should use this approach when determining whether a race-conscious admissions program survives the strict scrutiny analysis. Part II of this Comment presents a brief history of race-based classifications.[26] Additionally, Part II explores the Supreme Court's refusal to apply intermediate levels of scrutiny to race-based classifications.[27] Finally, Part II briefly considers recent and pending cases pertaining to race-conscious admissions programs.[28]

Part III analyzes Justice Powell's "plus" factor approach and discusses how it provides courts with a reasonable and fair approach to evaluate a race-conscious admissions program.[29] Specifically, this section applies the "plus" factor approach to the admissions programs at issue in *Hopwood* and *Wessmann* to illustrate the effectiveness of the approach.[30] Part IV concludes that Justice Powell's "plus" factor approach is reasonable and fair because it recognizes and balances the importance of equal protection in general and the importance of diversity in higher education. Therefore, courts should use this approach when determining whether a race-conscious admissions program survives strict scrutiny analysis.

II. BACKGROUND

A. A Brief History of Race-Based Classifications

In *DeFunis v. Odegaard*, the Supreme Court initially examined the issue of racial preferences in higher education in 1974.[31] In *DeFunis*, the University of Washington Law School denied admission to DeFunis, a White applicant, two years in a row.[32] DeFunis subsequently brought suit against the University alleging that the University's minority admissions

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[26] *See infra* notes 31-55 and accompanying text.

[27] *See infra* notes 56-91 and accompanying text.

[28] *See infra* notes 92-103 and accompanying text.

[29] *See infra* notes 104-63 and accompanying text.

[30] *See infra* notes 146-63 and accompanying text.

[31] 416 U.S. 312 (1974).

[32] *Id.* at 314.

program discriminated against him because of his race.[33] Although the Court never reached the merits of the case,[34] Justice Douglas stated in his dissent that DeFunis "had a constitutional right to have his application considered on its individual merits in a racially neutral manner."[35]

Four years after *DeFunis*, the Supreme Court again faced the issue of race-conscious admissions programs in higher education.[36] In *Bakke*, the divided Court held that the University of California's admissions program violated the Equal Protection Clause.[37] Despite this splintering, Justice Powell announced the decision of the Court.[38] While ultimately holding that the University's admissions program violated equal protection, Justice Powell stated that diversity could be a compelling interest that justified the use of race-based classifications in admissions programs.[39]

In *Bakke*, the University of California at Davis Medical School's admissions program insured the admission of a certain number of applicants from specific minority groups.[40] Allen Bakke, a White male, applied late in the year to the medical school.[41] Notwithstanding a strong overall score, the University denied him admission to the medical school under the general admissions program.[42] Subsequently, the University denied him admission the following year after he re-applied.[43] After his

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[33] *Id.*

[34] *Id.* at 319-20. By the time the case reached the Supreme Court, the plaintiff was in his third year at another law school. *Id.* at 319. The Court held that he would inevitably graduate, therefore, the case was moot. *Id.* at 320.

[35] *Id.* at 337 (Douglas, J., dissenting).

[36] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[37] *Id.* at 320.

[38] *Id.* at 269.

[39] *Id.* at 311-12.

[40] *Id.* at 279. The regular admissions procedure involved the submission of an application in July of the year before the year the applicant sought admission. *Id.* at 273. The school's admissions committee screened the applications for further consideration. *Id.* An applicant's GPA, personal interview, letters of recommendation, extracurricular activities, and other biographical data were added together to arrive at a "benchmark" score which the school later used to determine whether to make an offer of admission. *Id.* at 274. Additionally, the school employed a special admissions program. *Id.* Applicants had the option of designating themselves as "economically and/or educationally disadvantaged" on the 1973 application and as a member of a "minority group" on the 1974 application. *Id.* If an applicant designated himself or herself as either disadvantaged or a minority, the admissions committee forwarded the application to the special admissions committee. *Id.* The special committee then rated the applications similar to the way the general admissions committee screened its applications. *Id.* at 275. However, the special applicants did not have to meet the 2.5 grade point average required of general applicants. *Id.* Further, the special admissions committee did not compare or rate the special applicants against the general applicants. *Id.*

[41] *Id.* at 276.

[42] *Id.*

[43] *Id.* at 277.

second denial, Bakke filed suit in the Superior Court of California claiming that the University's special admissions program rejected his application because of his race and thus violated his equal protection rights under the Fourteenth Amendment.[44] The case traveled from the trial court to an appeal in the California Supreme Court and finally, after a grant of *certiorari*, to the United States Supreme Court.[45]

Justice Powell, announcing the judgment of the Court,[46] stated that the characterization of the special admissions program either as a "goal of minority representation" as advocated by the school, or as a "racial quota" as advocated by Bakke, was irrelevant.[47] The fact was that "[t]he special admissions program [was] undeniably a classification based on race and ethnic background."[48] The basis of the classification was the dispositive fact in analyzing the constitutionality of the classification. From the outset of his opinion, Justice Powell reinforced the significance of the guarantees of the Fourteenth Amendment:

> It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.[49]

The school essentially argued that being a "discrete and insular minority" was a prerequisite to strict scrutiny analysis.[50] It insisted that the Court apply an intermediate level of scrutiny in examining its admissions program and that the special admissions program, by affecting White

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[44] *Id.* at 277-78.

[45] *Id.* at 277-81.

[46] *Id.* at 269. It is important to emphasize that Justice Powell announced the judgment of the Court. *Id.* The Court was significantly divided in this case and it offered several opinions. *Id.* at 324-421. Justice Brennan, joined by Justices White, Marshall and Blackmun concurred in part and dissented in part. *Id.* at 324-79. The Brennan coterie concluded that the school's admission program was constitutional because its goal was to admit minority students disadvantaged by the effects of past discrimination. *Id.* at 369. Brennan's group concluded that this goal was sufficiently important to justify the use of a race-based classification in the school's admissions program. *Id.* Justice Stevens, joined by Justices Stewart and Rehnquist, opined that Title VI of the Civil Rights Act applied to the case, and that the school's program, by denying admission to Bakke, violated Title VI. *Id.* at 421.

[47] *Id.* at 288-89.

[48] *Id.* at 289.

[49] *Id.* at 289-90 (internal citations omitted).

[50] *Id.* (quoting United States v. Carolene Products Co., 304 U.S. 144, 152-53, n.4 (1938)). The concept of a "discrete and insular minority" embodies the idea that "prejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial scrutiny." *Carolene Products Co.*, 304 U.S. at 153.

males, did not target a "discrete and insular minority" requiring special protection.[51] The school reasoned that intermediate scrutiny was appropriate because the party discriminated against, a White male, was not a discrete and insular minority.[52]

Justice Powell, however, stated that race-based classifications, regardless of the racial identity of the individual seeking redress, should always be subjected to the two prongs of the strict scrutiny standard: (1) the race-based classification must serve a compelling interest, and (2) the classification must be narrowly tailored to achieve that compelling interest.[53] Justice Powell further stated that the Supreme Court has never held that discreteness and insularity of a minority are pre-conditions necessary for holding that a racial classification is unconstitutional.[54] He opined that courts must apply "stringent examination" to racial and ethnic classifications irrespective of a minority's discreteness and insularity.[55] Thus, Justice Powell upheld the application of strict scrutiny to all race-based classifications.

B. The Supreme Court Fluctuates

1. *City of Richmond v. Croson*

Eleven years after *Bakke*, the Supreme Court faced another equal protection dispute concerning a construction contract.[56] In *Croson*, the city of Richmond implemented a plan that required prime contractors having city construction contracts to subcontract at least thirty percent of the value of the contracts to minority businesses.[57] The city argued that the purpose of the plan was primarily to remedy the city's past discrimination against minority subcontractors.[58]

Justice O'Connor, delivering the opinion of the Court, concluded that the city had not demonstrated a compelling interest to justify the plan because the factual predicate supporting the plan failed to demonstrate the

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[51] *Bakke*, 438 U.S. at 290.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] 488 U.S. 469 (1989).
[57] *Id.* at 477.
[58] *Id.* at 478-80.

type of identified past discrimination in the city's construction industry that would permit race-based assistance under the Fourteenth Amendment's Equal Protection Clause.[59] Essentially, Justice O'Connor stated that generalized past discrimination in the construction industry did not justify racial quotas and that the plan was not narrowly tailored to remedy such discrimination.[60]

Courts have accepted that remedying the present effects of past discrimination may be a justification for the governmental use of racial quotas.[61] However, for the interest to be considered compelling, it must meet two conditions.[62] First, the discrimination must be identified.[63] That is, "the State[s] . . . may take remedial action when . . . they identify that discrimination, public or private, with some specificity before they may use race-conscious relief."[64] Second, the institution that makes the racial classification must have a strong evidentiary basis for concluding that the remedial action was necessary before it created and implemented the affirmative action program.[65] These conditions must be met because general assertions of past discrimination do not give legislatures the necessary guidance in determining the exact scope of the injury which the government seeks to remedy.[66]

In *Croson*, Justice O'Connor reaffirmed the need for applying strict scrutiny to government actions, which deny people opportunities solely because of their race.[67] She explained that the strict scrutiny standard required firm evidentiary basis for concluding that the underrepresentation of minorities is a product of past discrimination.[68] Application of that standard, which "is not dependent on the race of those burdened or benefited by a particular classification,"[69] "assur[es] that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool"[70] and "that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the

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[59] *Id.* at 498-506.

[60] *Id.*

[61] *See, e.g.*, Shaw v. Hunt, 517 U.S. 899, 909 (1996).

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* at 910.

[66] *Id.* at 909-10.

[67] City of Richmond v. Croson, 488 U.S. 469, 495-98 (1989).

[68] *Id.* at 493-98, 509-11.

[69] *Id.* at 493.

[70] *Id.*

classification was illegitimate racial prejudice or stereotype."[71] Thus, Justice O'Connor reaffirmed that all race-based classifications must be subjected to the strict scrutiny standard.

2. *Metro Broadcasting, Inc. v. Federal Communications Commission*

Over a year later, Justice Brennan, in a majority opinion, rejected the application of the strict scrutiny standard when the Federal Communications Commission implemented a congressionally mandated race-based classification.[72] *Metro* involved a congressionally mandated minority preference policy in awarding licenses to radio stations.[73] Specifically, the Court considered the constitutionality of minority preference policies adopted by the Federal Communications Commission.[74]

In a previous Supreme Court decision, Justice Brennan, in a concurring opinion, noted that a benign race-based classification is one in which "[t]he challenged race assignment may be permissible because it is cast in a remedial context with respect to a disadvantaged class rather than in a setting that aims to demean or insult any racial group."[75] According to Justice Brennan, as a result of these benign classifications, innocent people may have to carry some of the responsibility to destroy racial discrimination.[76] Justice Brennan emphasized that when an administrative agency adopts a program using a benign race-based classification at the direction of Congress, the courts owe great deference to the congressional act.[77] Therefore, he reasoned that the strict scrutiny applied in *Croson*, a case involving a municipality program, is inapplicable to benign race-based classifications used by Congress.[78]

Justice Brennan announced that an intermediate level of scrutiny, the substantial relation test, should be applied to benign race-based classifications.[79] The substantial relation test requires that the government show "important governmental objectives" for making a race-based classification and that the means chosen by the government to implement

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[71] *Id.*

[72] 497 U.S. 547, 552 (1990).

[73] *Id.*

[74] *Id.*

[75] *See* United Jewish Org. of Williamsburg v. Carey, 430 U.S. 144, 170 (1977) (Brennan, J., concurring in part).

[76] *Metro*, 497 U.S. at 596.

[77] *Id.* at 563.

[78] *Id.* at 565.

[79] *Id.* at 564.

this important objective be substantially related to the objective.[80] After applying the test, Justice Brennan held that the minority preference policy served the important governmental objective of broadcast diversity and that the policy was substantially related to achieving that objective.[81]

The application of an intermediate scrutiny test to race-conscious school admissions programs would allow many more programs to survive constitutional challenge than would a strict scrutiny test. However, the substantial relation standard prevailed only until 1995, when the Supreme Court decided *Adarand v. Pena*.[82] In *Adarand*, the Supreme Court returned to the strict scrutiny standard and held that racial classifications "are constitutional only if they are narrowly tailored measures that further compelling governmental interests."[83]

3. *Adarand v. Pena*

In *Adarand*, Justice O'Connor upheld the necessity of applying the strict scrutiny standard to race-based classifications.[84] Like *Croson*, *Adarand* involved a program providing construction contracts to disadvantaged business enterprises.[85] Specifically, the federal government gave contractors financial incentives to hire economically disadvantaged subcontractors.[86]

Justice O'Connor surveyed past cases dealing with race-based classifications.[87] She illustrated that these cases demanded the application of strict scrutiny.[88] She also noted the Court's use of intermediate scrutiny via the substantial relation test in *Metro* departed from established precedent.[89] Justice O'Connor also stated that congressional racial classifications, as well as municipal classifications, require strict scrutiny.[90] Finally, she concluded that requiring strict scrutiny "is the best way to

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[80] *Id.* at 565.
[81] *Id.* at 566.
[82] 515 U.S. 200 (1995).
[83] *Id.* at 227.
[84] *Id.* at 236.
[85] *Id.* at 204.
[86] *Id.*
[87] *Id.* at 218-35.
[88] *Id.*
[89] *Id.* at 226.
[90] *Id.* at 227.

ensure that courts will consistently give racial classifications [the] kind of detailed examination, both as to ends and as to means," that they deserve.[91]

These cases illustrate that all race-based classifications, because of their inherently suspect nature, require strict scrutiny analysis to determine whether or not the classification can and will be deemed constitutional under equal protection principals. These cases demonstrate the fluctuations that equal protection jurisprudence has experienced. Courts in recent and pending cases face similar issues regarding race-conscious admissions programs in higher education.

C. Opponents of Race-Conscious Admissions Programs

The Supreme Court has long acknowledged that race-based classifications are permissible when there is strong evidence that remedial action is necessary.[92] Further, courts have stated that justification of racial classifications (vis-a-vis affirmative action programs) requires showing the present effects of past discrimination.[93] These courts view remedying present effects of past discrimination as the only justification for racial classifications and thus are likely to denounce the use of racial classifications for the purpose of achieving a diverse student body.[94] The court in *Hopwood*, for example, rejected Justice Powell's *Bakke* decision.[95] The court stated that "Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications . . . . [T]he classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection."[96]

Hopwood rejects the precedential value of Justice Powell's *Bakke* decision.[97] *Hopwood* maintains that *Bakke* is not binding precedent on the issue of whether diversity is a compelling interest under strict scrutiny.[98]

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[91] *Id.* at 236.

[92] *See supra* notes 56-91; *see also*, Wygant v. Board of Educ., 476 U.S. 267, 277 (1986).

[93] *See* Podberesky v. Kirwan, 38 F.3d 147, 153-54 (4th Cir. 1994) (stating that "[t]o have a present effect of past discrimination sufficient to justify the program, the party seeking to implement the program must, at a minimum, prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program").

[94] *See e.g.*, Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

[95] *Id.*

[96] *Id.* at 944.

[97] *Id.*

[98] *Id.* To be constitutionally valid under the strict scrutiny standard, a racial classification must be justified by a compelling interest and it must be narrowly tailored to achieve that interest. *Id.* Therefore, Hopwood rejects that diversity is a compelling interest to justify a racial classification vis-a-vis a race-conscious admissions program. *Id.* at 944-45.

According to *Hopwood*, no case since *Bakke* has accepted diversity as a compelling interest and the Supreme Court precedent shows that the interest in diversity will not satisfy strict scrutiny under the compelling interest prong of the standard.[99] Finally, *Hopwood* declares that the only compelling interest to justify racial classifications is the remedying of past wrongs.[100]

In *Croson*, the Supreme Court seems to have foreclosed the possibility of diversity qualifying as a compelling interest under strict scrutiny.[101] While the Court indicated that racial classifications reserved strictly for remedial settings were permissible, it also indicated that broad allegations of past discrimination would not satisfy this interest.[102] Specifically, the Court stated that:

> [F]or the governmental interest in remedying past discrimination to be triggered "judicial, legislative, or administrative findings of constitutional or statutory violations" must be made. Only then does the government have a compelling interest in favoring one race over another . . . . [A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.[103]

Although race-conscious admissions programs meet strong criticism, Justice Powell's "plus" factor approach is a fair and reasonable response to the opposition because it recognizes and balances the importance of equal protection and the importance of diversity in higher education. Thus, courts should use Justice Powell's approach when determining whether a race-conscious admissions program survives strict scrutiny analysis.

III. ANALYSIS

The Supreme Court has firmly established that all racial classifications are inherently suspect, and must, therefore, be subjected to the strict scrutiny standard.[104] Thus, if a school's race-conscious admissions program furthers a compelling interest and if the program is narrowly

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[99] *Id.* at 944.

[100] *Id.*

[101] *Id.*

[102] City of Richmond v. Croson Co., 488 U.S. 469, 492, 498 (1988).

[103] *Id.* at 497-98 (internal citations omitted).

[104] *See supra* notes 56-71, 83-91 and accompanying text.

tailored to achieve that interest, the program will survive strict scrutiny.[105] Courts, in general, seem to be unwilling to recognize the constitutionality of race-conscious admissions programs designed to achieve racial and ethnic diversity within the student body. The Supreme Court however, has declared that diversity is a compelling interest and that a program can be narrowly tailored to effectuate an interest in achieving diversity.[106] This analysis describes, in detail, Justice Powell's "plus" factor approach and applies it to the admissions programs in *Hopwood* and *Wessmann*.

A. Justice Powell's "Plus" Factor Approach

Justice Powell noted that racial classifications, while inherently suspect, could pass constitutional muster as long as the classifications are narrowly tailored to achieve the interest in diversity.[107] The "plus" factor approach was Justice Powell's attempt to tailor a race-based classification to comport with the strict scrutiny standard. In *Bakke*, the University of California at Davis Medical School argued that one of the purposes of the special admissions program was to obtain "the educational benefits that flow from an ethnically diverse student body."[108] In deciding whether this interest was compelling enough to support the school's use of an inherently suspect racial classification, Justice Powell stated that "the attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education."[109]

Justice Powell qualified this declaration. He explained that ethnic diversity is only one of a number of elements that contribute to a diverse student body and that although a university has broad discretion in making admissions decisions, a university may not disregard constitutional limits that protect individual rights.[110] In light of Bakke's claim that the school's admissions program violated his Fourteenth Amendment rights and Justice Powell's assertion that diversity is a compelling interest, Justice Powell still faced the question of whether the admissions program's racial classification was narrowly tailored to effectuate this interest of diversity.[111]

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[105] *See supra* notes 56-71, 83-91 and accompanying text.

[106] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 362 (1978).

[107] *Id.* at 291.

[108] *Id.* at 306.

[109] *Id.* at 311-12.

[110] *Id.* at 314.

[111] *Id.* at 314-15.

Although Justice Powell found that reserving a certain number of places for specific minority groups was not the only effective means to serve the interest of diversity in this particular case, he explained when and how a racial classification could be narrowly tailored to achieve diversity.[112] First Justice Powell explained:

> [T]he nature of the state interest that would justify consideration of race or ethnic background . . . is not an interest in simple ethnic diversity, in which a specified percentage of the student body is . . . guaranteed to be members of selected ethnic groups . . . . The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.[113]

Justice Powell stated that the assignment of a specified number of places in an entering class to a minority group is not a valid means of achieving the goal of diversity.[114] According to Justice Powell, this type of assignment violated equal protection.[115] As an alternative, Justice Powell offered the "plus" factor approach which allows a school to consider race and ethnicity in making its admissions decisions while still protecting the individual rights guaranteed in the Fourteenth Amendment.[116]

Justice Powell's "plus" factor approach allows race or ethnicity to be a "plus" in an applicant's file, but does not exempt the applicant from being compared to all other applicants for competing places in the class.[117] Justice Powell also stated that:

> The file of a particular Black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism . . . . [A]n admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. [118]

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[112] *Id.* at 315.

[113] *Id.*

[114] *Id.* at 316.

[115] *Id.* at 320.

[116] *Id.*

[117] *Id.* at 317.

[118] *Id.* Justice Powell offered the Harvard College program as an example of a successful application of the "plus" approach. *Id.*

Justice Powell further defended the "plus" factor approach by explaining that a successful admissions program would treat each applicant as an individual, and that someone who lost a seat to an applicant with a "plus" "will not have been foreclosed from all consideration . . . simply because he was not the right color . . . ."[119] The approach considers a combination of qualifications, and weighs them fairly against the qualifications of other applicants.[120] It further allows a school to consider race and ethnicity in admissions while regarding the individual rights guaranteed in the Fourteenth Amendment.[121]

Ethnic origin and race, however, may not serve as the sole criteria to achieve educational diversity under Justice Powell's "plus" factor approach. Instead, ethnic origin and race may be counted as additions, or "pluses," in an applicant's admissions file.[122] Justice Powell acknowledged that educational diversity is a worthwhile and necessary goal.[123] However, he was cognizant of the restraints that strict scrutiny placed on racial classifications and, therefore, tried to fit educational diversity within its confines. Thus, he claimed that the type of diversity the Constitution allows is one that engenders a broad array of characteristics.[124] Among these characteristics, ethnic origin is a single, though important factor.[125] This idea implies that ethnic diversity includes other characteristics and qualifications that create diversity.

Justice Powell suggested that a diverse ethnic makeup in a student body would ensure diverse characteristics and qualities that enhance an individual's overall education.[126] That is, an African-American, a Caucasian, and an Asian applicant, while each having a different ethnic origin, may also have different characteristics and qualities because of that ethnic background. In this sense, a school, when making an admissions decision, can focus on the applicant's different qualities or characteristics, while merely looking at the applicant's ethnic background as a "plus" in the applicant's file. This way, the applicant's ethnicity is not the

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[119] *Id.* at 318.

[120] *Id.* at 317-18. Justice Powell stressed that race or ethnic background may be deemed a "plus" in an application file when considered along with other qualifications such as "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor . . . ." *Id.* at 317.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

determinative factor, but is a "plus," a factor that really encompasses a "broad array" of characteristics and qualities of which ethnic origin is a single, though important factor.

Justice Powell's "plus" factor approach to ethnic diversity stays within the rigid structure of the strict scrutiny standard because first, the racial classification in the admissions program serves the compelling interest of diversity. Second, the racial classification, in the form of a "plus," is narrowly tailored to achieve the interest in educational diversity because it does not focus solely on race and ethnicity. Rather, an applicant's race is a "plus" within a broad array of other qualities. Thus, Powell prescribed a way for schools to increase diversity in their student bodies by considering race, while staying within the bounds of both strict scrutiny and the Constitution.

B. Bakke *Provides the Standard for School Admissions Committees to Follow When Making Race-Conscious Admissions Programs*

Justice Powell's "plus" factor approach tells courts that diversity is compelling enough, in some circumstances, to withstand strict scrutiny. However, courts must decide when race is a "plus" in an applicant's file. When a court determines that race is a "plus" in an applicant's file, the race-based classification is constitutionally permissible. On the other hand, when a court finds that the classification is the determinative factor in an admissions decision, the classification violates equal protection.

Courts should and do rely on *Bakke* as precedent when race-conscious admissions programs present courts with equal protection challenges. In a case involving the University of Washington Law School and its admissions program, the United States District Court for the Western District of Washington affirmed *Bakke* as precedent.[127] The University considered racial and ethnic origin and cultural background in its admissions decisions for the purpose of achieving educational diversity.[128] The court then explained the importance of Justice Powell's *Bakke* decision:

> In *Bakke*, Justice Powell established certain standards for considering race or ethnicity in a graduate admissions program. . . . [T]he attainment of a diverse student body . . . is a compelling interest and constitutionally permissible

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[127] Smith v. University of Wash. Law School, 2 F. Supp. 2d 1324 (W.D. Wash. 1998).

[128] *Id.* at 1329.

> goal for a university or graduate program . . . . [A]n institution of higher education may take race into account in achieving "educational diversity."[129]

Additionally, other courts deciding the constitutionality of race-conscious admissions programs that have resolved the equal protection issue have adopted a view similar to that of *Bakke*.[130] Thus, Justice Powell's decision in *Bakke* and the "plus" factor approach provide precedent and guidance for courts to use when examining race-conscious admissions programs in higher education.

C. The "Plus" Factor Approach in Action: The Harvard College Program

The race-conscious admissions program used at Harvard University, illustrates how the "plus" factor approach works in actuality.[131] Harvard University receives many admissions applications from candidates who have the academic ability to succeed at Harvard, leaving the Committee on Admissions to choose between many qualified applicants.[132] Harvard University believes that if academic achievement were the predominant factor in making its admissions decisions, the University would lose much of its "vitality and intellectual excellence and the quality of the educational experience . . . would suffer."[133] Therefore, after choosing the "qualified" applicants, the Committee looks for variety in making its ultimate admissions decisions because it adds an essential ingredient to the whole Harvard educational experience.[134]

Harvard has long seen the importance and necessity of diversity in education.[135] Historically, diversity meant students from various states, cities, areas of study, and students with a variety of hobbies.[136] However, this definition of diversity failed to create significant racial and cultural diversity at Harvard.[137] Therefore, Harvard has broadened its definition of

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[129] *Id.* at 1334.

[130] *See* Higgins v. Vallejo, 823 F.2d 351 (9th Cir. 1987) (approving of and applying Justice Powell's *Bakke* rationale); *see also* DeRonde v. Regents of the Univ. of Cal., 625 P.2d 220 (Cal. 1981); University & Community College Sys. of Nev. v. Farmer, 930 P.2d 730 (Nev. 1997) (treating Justice Powell's opinion in *Bakke* as the decision of the Court); McDonald v. Hogness, 598 P.2d 707 (Wash. 1979).

[131] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 321 (1978). Stanford University and the University of Pennsylvania also have implemented programs similar to the program at Harvard. *Id.*

[132] *Id.*

[133] *Id.* at 321-22.

[134] *Id.* at 322.

[135] *Id.*

[136] *Id.*

[137] *Id.*

diversity and includes "students from disadvantaged economic, racial and ethnic groups."[138] "This new definition of diversity has meant that race has been a factor in some admissions decisions."[139] For example, when the Committee looks at the many "qualified" applicants, "the race of an applicant may tip the balance in his [or her] favor just as geographic origin or a life spent on a farm may tip the balance in other . . . cases."[140] Justice Powell illustrated:

> A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a Black student can usually bring something that a [W]hite person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.[141]

While Harvard has not established quotas, the Committee acknowledges that if "Harvard College is to provide a truly heterogen[e]ous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers."[142] Therefore, when the Committee on Admissions makes its decisions, it is aware of the relationship between numbers and the benefits of diversity.[143] However, the Committee's awareness means only that in choosing among many qualified applicants, "the Committee, with a number of criteria in mind, pays *some* attention to distribution among many types and categories of students."[144]

The Court set forth the following example to illustrate the type of importance the Committee places on race:

> The Committee with few spots left to fill, might be forced to choose between A, the child of a [B]lack doctor with the potential of stellar academic performance, and B, a [B]lack applicant who grew up in an impoverished urban area with semi-literate parents whose scholastic performance was lower but whose leadership abilities and interest in [B]lack power are strong. Hypothetically, if there were many students like A, but few like B, the Committee might choose B; and if C, a [W]hite student with excellent musical ability were also looking for one of the remaining seats, his qualification as an artist might give him a "plus" over both A and B. Thus,

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[138] *Id.* at 323.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.* "Numbers" signifies the number of different racial and ethnic groups within the student body.

[143] *Id.*

[144] *Id.* at 324 (emphasis added).

> the critical criteria are often individual qualities or experiences not dependent upon race but sometimes associated with [race].[145]

The Harvard program demonstrates how the "plus" factor approach works to consider race and ethnic background in its decision-making process. It illustrates that the racial and ethnic component of the process is not an independent factor, but a factor that may or may not tip the balance in favor of one applicant over another. Thus, Harvard's program survives constitutional challenge because it recognizes the importance of equal protection in general and the importance of diversity in higher education.

D. Hopwood *and* Wessmann*: Could the Admissions Programs Have Survived Under a "Plus" Factor Approach*

Justice Powell's "plus" factor approach in *Bakke* and the Harvard model provide university admissions committees and courts with tools for creating and examining race-conscious admissions programs. First, it permits schools to advance diversity as a compelling interest. Second and more importantly, the "plus" factor approach focuses on the second requirement of strict scrutiny: that the school narrowly tailors the use of racial classification to achieve the interest of diversity.

An admissions program that truly considers race and ethnic background as only a "plus" in an applicant's file must meet two requirements under Justice Powell's "plus" factor approach. The first requirement is that the applicant must not be insulated from comparison with all other applicants for available places.[146] That is, all applicants must compete on an equal level. The second requirement is that the applicant who loses out on the last available seat to an applicant with a racial "plus" factor "will not have been foreclosed from all consideration for that seat simply because he or she was not of the right color."[147] *Bakke* also specified that a race-conscious admissions program must not merely reserve a certain number of places for specific minority applicants.[148]

Neither *Hopwood* nor *Wessmann* focused on Justice Powell's "plus" factor approach. However, if the *Hopwood* and *Wessmann* courts had focused on the "plus" factor approach, the admissions program in *Hopwood* would not have survived while the program in *Wessmann* would have succeeded. The University of Texas Law School's admissions

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[145] *Id.*

[146] *Id.* at 315.

[147] *Id.* at 318.

[148] *Id.* at 289.

program at issue in *Hopwood* would fail under the "plus" factor approach because the program was not sufficiently narrowly tailored to effect the interest in creating a diverse student body. The University operated a dual system of admissions.[149] In this sense, the University merely reserved a certain number of places for minority applicants. However, for the sake of analysis, it is worthwhile to examine the University's admissions program under the two requirements of the "plus" factor approach.

First, the applicants did not compete on equal levels, thus failing to meet the first requirement under the "plus" factor approach.[150] African-Americans and Mexican-Americans were minorities according to the University.[151] The admissions program held them to lower numerical standards.[152] The standards for presumptively denying an African-American or Mexican-American applicant were lower than the standards for denying a non-minority applicant.[153] In other words, an African-American or Mexican-American applicant can have lower numerical scores than a non-minority applicant before the university will deny admission to the African-American or Mexican-American applicant. Additionally, the standards for presumptively admitting an African-American or Mexican-American applicant were also lower than the standards for non-minority applicants.[154] That is, the minimum numerical standard for admitting African-American and Mexican-American applicants was lower than the numerical standards for admitting non-minority applicants.

Second, presumably a non-minority applicant who lost a seat to an African-American or Mexican-American applicant would have been foreclosed from all consideration for that seat simply because he or she was not of a particular race or ethnicity. Thus, in *Hopwood*, the race-conscious admissions program fails under both requirements of Justice Powell's "plus" factor approach.

The admissions program in *Wessmann*, on the other hand, meets both requirements under the "plus" factor approach. The Boston Latin School allocated half of its available seats for an entering class according to a rank order system.[155] The school allocated the other half "on the basis of

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[149] Hopwood v. Texas, 78 F.3d 932, 936 (5th Cir. 1996).

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.* at 936-37.

[155] Wessman v. Gittens, 160 F.3d 790, 793 (1st Cir. 1998).

'flexible racial/ethnic guidelines.'"[156] To apply the guidelines, the school determined the proportions of different racial categories in the remaining qualified applicant pool, then filled the places in rank order.[157] However, the school then matched the number of applicants from the ethnic categories with the proportion of that category in the remaining qualified applicant pool.[158] This technique resembles Harvard's practice of paying some attention to racial distribution while also considering a variety of other criteria.[159]

In this way, the admissions program does not reserve a specified number of places to each racial and ethnic category. Rather, it looks at proportions of applicants in certain racial and ethnic categories in determining admission. Thus, unlike the admissions program at issue in *Hopwood*, the program in *Wessmann* legitimately survives an analysis of the two requirements of the "plus" factor approach.

First, the Boston Latin School's admissions program satisfies the first requirement under the "plus" factor approach because the program compares applicants on equal levels. The program does not hold the applicants to different standards and it does not insulate applicants from comparison with each other. However, the validity of the program becomes more questionable under the second requirement of the "plus" factor approach. As mentioned earlier, the second requirement is that an applicant who loses out on the last available seat cannot be foreclosed from all consideration for admission merely because he or she was not the right race or ethnicity.[160] In *Wessmann*, the court noted that "a designated racial/ethnic group may be passed over in favor of a lower-ranking applicant from another group if the seats allotted for the former's racial/ethnic group have been filled."[161]

In *Wessmann*, the Boston Latin School passed Sarah Wessmann over for admission, in favor of a lower-ranking applicant from another group, because of the proportions of the various racial and ethnic groups in the

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[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *See supra* notes 131-145 and accompanying text.

[160] See supra note 147 and accompanying text.

[161] Wessmann, 160 F.3d at 793. This is not inconsistent with the earlier statement that all of the applicants are not held to different standards in that the admissions program did not hold the groups of applicants to different sets of standards. *Id.* By stating that "a member of a designated racial/ethnic group may be passed over in favor of a lower-ranking applicant from another group if the seats allotted for the former's racial/ethnic group have been filled," the court is merely reiterating the feature of the admissions program that numbers the students taken from each racial and ethnic category and matches it with the proportion of that category in the remaining qualified applicant pool. *Id.*

applicant pool.[162] Thus, under the second "plus" factor requirement, the program did not foreclose her from all consideration for the last place in the entering class because she was not of a particular race or ethnicity. The program in *Wessmann* neither passed over Wessmann nor foreclosed her from gaining a place in the entering class in favor of an applicant who had a racial "plus" factor merely because Wessmann did not have a "plus" factor herself.

The Boston Latin School's system of looking at the number of students taken from each racial and ethnic category and then matching it with the proportion of that category in the remaining qualified applicant pool protects the program from failing this second requirement. The program did not operate to deny admission to Wessmann because an applicant with a racial "plus" factor beat her out solely based on her lack of a racial "plus" factor. Rather, the program operated to deny her a place in the entering class because *that year*, the applications from certain racial and ethnic categories determined the proportions of each group to be granted admission.

It may have been the case that, in a different year, Wessmann would have been the one granted admission over an applicant from another racial or ethnic category because the proportion of that category had already been matched to its proportion in the remaining qualified applicant pool. That is, in any year, depending on the proportions of applicants from all of the racial and ethnic categories that the school considers, Wessmann could have been in the same position as the applicant who beat her out of a place in the entering class. In a different year for example, the racial composition of the remaining qualified applicant pool compared with the allocation of seats to Caucasians may have been such that there would have been a seat available for a Caucasian. In this sense, Wessmann would have been granted admission over an applicant from a different racial category that had already been filled based on its respective allocation in the first part of the allocation process.[163]

Applying the "plus" factor approach to the admissions programs at issue in both *Hopwood* and *Wessmann* illustrates the workability of the approach as a standard to use when determining the constitutionality of a race-conscious admissions program. The approach would have validated the admissions program in *Wessmann* but would have invalidated the admissions program in *Hopkins*. The application of the "plus" factor approach to both programs demonstrates how the approach does not

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[162] *Id.*

[163] *See supra* note 14 and accompanying text.

necessarily favor the race-conscious admissions program. Rather, the program must meet the criteria set forth in the approach; otherwise it will fail and be deemed unconstitutional.

IV. CONCLUSION

Universities have created and currently use race-conscious admissions programs to achieve racial and ethnic diversity within their student bodies. By doing this, universities are creating race-based classifications. The Supreme Court has stated that all race-based classifications are inherently suspect and, therefore, strict scrutiny is the applicable standard. Because of the importance of equal protection, courts are reluctant to allow such programs to pass constitutional muster. However, universities can create and implement race-conscious admissions programs that comport with the requirements of both the Constitution and strict scrutiny.

In *Bakke*, Justice Powell definitively stated that diversity is a compelling interest in higher education, thus satisfying the first strict scrutiny requirement. Justice Powell then offered the "plus" factor approach as a way to narrowly tailor race-conscious admissions programs. Justice Powell's "plus" factor approach is reasonable and fair because it recognizes and balances the importance of equal protection in general and the importance of diversity in higher education. Therefore, courts should use the "plus" factor when determining whether a race-conscious admissions program survives strict scrutiny analysis.