

**GRUTTER v. BOLLINGER (2003)**

**UM LAW SCHOOL ADMISSIONS PROGRAM 1992-2003**

In 1992, UM Law School adopted an admissions policy (UMAP) crafted to implement two goals without running afoul of Bakke:

Academics: Admit students who are academically qualified to succeed in law school and in the practice of law thereafter.

Diversity: Admit a group with the kind of diversity that is likely to “enrich everyone’s education and thus make a law school class stronger than the sum of its parts”.

To achieve the Academic goal, UMAP considered the applicant’s GPA and LSAT score.

To achieve the Diversity goal, UMAP considered a wide range of factors:

- Whether the applicant has lived or traveled widely abroad
- Whether the applicant is fluent in several languages
- Whether the applicant has overcome personal adversity/family hardship
- Whether the applicant has an exceptional record of community service
- Whether the applicant has had a successful career in another field
- Whether the applicant belongs to a racial or ethnic group that has been historically discriminated against

Holistic Approach

In deciding whom to admit, members of the Admissions Committee consider each applicant as an individual, comparing the Academics+Diversity potential of each applicant to the Academics+Diversity potential of each of the others. [Harvard Model]

**GRUTTER’S COMPLAINT**

Barbara Grutter, a white female, applied to UM Law School in 1996, but was denied admission after having been placed on the waitlist.

In 1997, Grutter filed suit in District Court alleging that UMAP’s use of race violated her rights under the EP Clause (and other statutes having the same import as the EP Clause).

## THE DECISION

The Supreme Court, in a 5-4 decision written by O'Connor, upheld the constitutionality of UMAP under the EP Clause.

Standard: Strict Scrutiny

UMAP is a [necessary and] narrowly tailored means of achieving a compelling state interest, namely (the educational benefits of) student body diversity.

## O'CONNOR ON THE STANDARD

After summarizing Powell's opinion in *Bakke* (which O'Connor describes as having served as "the touchstone for constitutional analysis of race-conscious admissions policies" since 1978), O'Connor reviewed precedents (including *Croson* (1989) and *Adarand* (1995)) stating that Strict Scrutiny is the standard for reviewing racial classifications imposed by government.

The main purpose of Strict Scrutiny is to "'smoke out' illegitimate uses of race [e.g., racial classifications motivated by illegitimate notions of racial inferiority, simple racial politics, or stereotypes] by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool".

## STRICT SCRUTINY

The Old Version: A state or federal policy that engages in suspect classification is unconstitutional unless it is NECESSARY to further a compelling end. [See *Bakke*]

The New Version: A state or federal policy that engages in suspect classification is unconstitutional unless it is NARROWLY TAILORED to further a compelling end.

The Mixed Version: A state or federal policy that engages in suspect classification is unconstitutional unless it is both NECESSARY AND NARROWLY TAILORED to further a compelling end.

"When race-based action is NECESSARY to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the NARROW-TAILORING requirement is also satisfied".

## O'CONNOR ON THE END

The Law School claimed that UMAP's use of race was designed as a means of obtaining the educational benefits that flow from a diverse student body.

The Educational Benefits of Student Body Diversity  
Cross-racial understanding, breaking down racial stereotypes  
Livelier and more enlightening classroom discussion  
Better learning outcomes  
Better preparation for diverse workforce and society  
Promotion of a higher level of national security (re: education of military officers)  
Maintaining the fabric of society ("one nation, indivisible")  
Cultivating leaders "with legitimacy in the eyes of the citizenry"

O'Connor's Evaluation: The end of securing these educational benefits is significant enough to count as "compelling".

## O'CONNOR ON THE MEANS

In Section III-A of her opinion, O'Connor argues that UMAP's use of race is a policy that is **NARROWLY TAILORED** to achieve the relevant compelling end (i.e., the educational benefits of student body diversity).

UMAP's use of race is not a quota-system, for it does not insulate one category of applicants from competition with other applicants (contrast with UC Davis Medical School's SAP in *Bakke*).

UMAP does not treat an applicant's race as a "defining feature of his or her application", for it 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".

The Law School seriously, and in good faith, considered workable race-neutral alternatives to UMAP:

Lottery (would sacrifice too much in the way of diversity)

Decreasing the emphasis on undergrad GPA and LSAT scores (would sacrifice too much in the way of academic quality)

Percentage plan (potentially unworkable for graduate and professional schools, and might also threaten overall—not just racial—diversity)

UMAP does not “unduly harm” nonminority applicants, since all applications are weighed fairly and competitively.

PROVISO: “Race-conscious admissions policies must be limited in time”, since they are “potentially so dangerous that they may be employed no more broadly than the [relevant compelling] interest demands”.

Sunset provisions

Periodic Reviews

25 Years: “We expect that 25 years from now [i.e., in 2028], the use of racial preferences will no longer be necessary to further the interest approved today.”

### **THOMAS’S DISSENT: THE STANDARD**

Thomas agrees with O’Connor that the standard for assessing the constitutionality of racial classifications is Strict Scrutiny, but he interprets the standard more restrictively. He cites various precedents for the proposition that there are only two kinds of ends that are sufficiently important to count as “compelling”:

Pressing Public Necessity, such as national security (*Korematsu*)

Remedying Past Racial Discrimination (*Croson*)

### **THOMAS’S DISSENT: THE END**

Thomas emphasizes that the achievement of student body diversity is not the ultimate end of UMAP. Rather, the achievement of student body diversity is but a means to the achievement of the ultimate end, which consists of the educational benefits listed above, within the context of a selective institution.

“The Court upholds the use of racial discrimination as a tool to advance the Law School’s interest in offering a marginally superior education while maintaining an elite institution.”

It is not a ‘pressing public necessity’ (nor, obviously, an attempt to remedy past discrimination) to maintain an elite public law school, nor is it a ‘pressing public necessity’ to make marginal improvements in the education of students at such a school.

Conclusion: The relevant state interest (namely, the achievement of marginal improvements in the education of students in a highly selective professional school) is not sufficiently important to count as “compelling”. Thus, UMAP’s use of race fails the Strict Scrutiny test, and therefore runs afoul of the EP Clause.

## REHNQUIST'S DISSENT: THE MEANS

Rehnquist argues that UMAP's use of race fails the Strict Scrutiny test, not because the relevant end is not sufficiently important to count as "compelling", but because UMAP's use of race is not "narrowly tailored" to achieving racial diversity in the form of a "critical mass" of underrepresented minority students.

According to Rehnquist, means are "narrowly tailored" to an end when they "fit" the end "with greater precision than any alternative means".

Why UM thinks that a critical mass of underrepresented minority students is needed:

- To ensure that these students do not feel isolated or like spokespersons for their race
- To provide adequate opportunities for the type of interaction upon which the educational benefits of diversity depend
- To challenge all students to think critically and reexamine stereotypes

However, UM Law School has applied the concept of "critical mass" differently among the three major underrepresented minority groups (African Americans, Hispanics, and Native Americans). For it appears that, in any given year, the school claims to have achieved "critical mass" with half the number of Hispanics and one-sixth the number of Native Americans as compared to African Americans. Moreover, the numbers suggest that the admission of Hispanics is "capped out" relative to the admission of other underrepresented minorities.

Moreover, from 1995 to 2000, "the percentage of admitted applicants who were members of these minority groups closely tracked the percentage of individuals in the school's applicant pool who were from the same groups".

The only good explanation for these results is "careful race based planning", a "carefully managed program designed to ensure proportionate representation of applicants from selected minority groups".

Conclusion: The Law School's alleged goal of achieving "critical mass" as a way of achieving the educational benefits of racial diversity is a sham, for its real purpose in adopting UMAP is to engage in "racial balancing". So UMAP does not treat applicants as individuals, runs afoul of the "narrow tailoring" requirement, and hence fails the Strict Scrutiny test.