



A “Critical Mass” of One A Personal Perspective on Affirmative Action and *Grutter v. Bollinger*

ERIC BROOKS



I first heard of the Supreme Court’s *Grutter v. Bollinger*¹ decision on the radio on my way into work. As soon as I got into the office, I downloaded the *Grutter* case, and began to read Justice O’Connor’s opinion. Just a few pages in, I came across two words—

critical mass—that stuck in my mind as I continued through the opinion. Justice O’Connor, in reviewing the background of the case, noted that the University of Michigan’s affirmative action policy “aspired to ‘achieve that diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts.’”² And by enrolling a “critical mass of [underrepresented] minority students” the law school sought to “ensur[e] their ability to make unique contributions to the character of the Law School.”³

The Court also noted that during the trial, the Director of Admissions at the law school, Erica Munzel, testified that a “critical mass” was a number that encourages underrepresented minority students to participate in the classroom and not feel isolated.⁴ The Dean of the law school, Jeffrey Lehman, had “indicated that critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race.”⁵ The concept of a need for a critical

mass struck a nerve deep inside of me because at my law school, Boalt Hall, *I* was the critical mass.

I do not remember the exact day when I learned that I would be the only African-American to enroll in the University of California’s Boalt Hall School of Law’s Class of 2000, a class of 270 students, but I clearly remember the circumstances: I was packing to move from Massachusetts to California when the phone rang. On the other end was Herma Hill Kay, the Dean of Boalt Hall. When she said her name and who she was, I was speechless as to why

The concept of a need for a critical mass struck a nerve deep inside of me because at my law school, Boalt Hall, *I* was the critical mass.

she would be calling. A flurry of possibilities ran through my head, none of them good. Finally, after a painfully long pause, Dean Kay informed me that the purpose of the call was to warn me that the *Los Angeles Times* was going to run a story the next day saying that Boalt Hall would have only one African-

Continued on page 9

Background *Grutter v. Bollinger* *Gratz v. Bollinger*

On June 23, 2003, the United States Supreme Court, in a landmark decision, upheld the University of Michigan Law School’s affirmative action program. In *Grutter v. Bollinger*,¹ Barbara Grutter, a white Michigan resident, brought suit after the law school rejected her application. Grutter alleged “reverse discrimination,” arguing that the law school’s affirmative action program used race as a “predominant” factor in admissions and, thus, discriminated against her on the basis of race in violation of the Fourteenth Amendment.²

The Court, in a 5 to 4 ruling, with Justice Sandra Day O’Connor writing for the majority,

found that the law school’s admissions program involved a narrowly tailored use of race in admissions decisions, which furthered the State’s compelling interest in obtaining the educational benefits that flow from a diverse student body and, thus, did not violate the Fourteenth Amendment.

On the same day as the *Grutter* decision, the Supreme Court issued a companion decision in *Gratz v. Bollinger*,³ which struck down the University of Michigan’s undergraduate admissions program that employed a point system. The court found that the point system lacked the “individual considerations” required under the Supreme Court’s previous affirmative action decision in *Regents of Univ. of Cal. v. Bakke*.⁴ In *Gratz*, two white Michigan high school students, Jennifer Gratz and Patrick Hamacher, brought suit

Continued on page 10

Affirmative Action

Continued from page 1

American in its incoming class. Dean Kay and I then discussed the situation and made plans to meet before the first day of school. I hung up the phone and continued packing, the excitement I had just previously felt now replaced with anxiety.

My fate as the only African-American in my class had been sealed two years earlier on July 20, 1995, when the Regents of the University of California voted to end affirmative action by adopting Special Policy 1 (SP-1). It stated that “the University of California shall not use race, religion, sex, color, ethnicity, or national origin as criteria for admissions to the University.” My class would be the first admitted under the University’s new race-blind policy.

After the Regents passed SP-1, Ward Connerly, an African-American Sacramento businessman and University Regent, sought to expand the elimination of affirmative action in California and spearheaded Proposition 209, which was misleadingly entitled, “The California Civil Rights Initiative.” Proposition 209 sought to end affirmative action in all public sectors, including employment and contracting. On November 4, 1996, under the national media spotlight, California voters passed Proposition 209. While I was aware of the passage of Proposition 209 and understood that it would have negative consequences on minorities in the state, I had no idea at that time what a major impact the elimination of affirmative action would have on my life.

On the morning of August 18, 1997, after relocating to California a few weeks earlier, I awoke to a radio news story reporting that today was the first day of law school at Boalt Hall and that only one African-American would be enrolling this year. Needless to say, the fact that I was a news story for the day compounded the anxiety I felt starting my first day of law school. Knowing what lay ahead, I packed up my bag and headed off to school.

Of all the things that happened to me on that day, what will stick with me the most is the memory of my initial arrival. Given my previous visit with the Dean, I knew how to enter the school through the back to avoid the camera trucks and news reporters

in front of the school. After ducking in the back way, I picked up my orientation packet and went to a courtyard where tables had been set out for first years to use before being shepherded to orientation. I found a table off in the corner, sat down, and tried to read through my orientation materials. Unable to concentrate, however, I instead looked around and took in my peers.

“This is an extremely white class,” was the first observation that struck me. I knew from my conversation with Dean Kay that people of color would be lacking, but not until I was present in that courtyard at that moment did I realize how white our class would be. It is possible, however, that I was hypersensitive to this fact, given the situation. Growing up and going to school in Indiana, I was used to being the only person of color in a

At Boalt, it seemed that animosity, not circumstance, created the situation I was in.

room. So, while this was not a new experience for me, this day—and all my days at Boalt—would feel markedly different from my time in Indiana. I have found only one good way to describe it: At Boalt, there was a sense that animosity, and not circumstance, created the situation I was in. It felt different at Indiana University, which had an affirmative action program and seemed to be making an effort to diversify the student body. The University of California, on the other hand, had eliminated affirmative action in favor of a “merit” based system with full knowledge that this would greatly reduce the number of minority students that would be admitted.⁶

At Boalt, I felt the door allowing African-Americans into this elite institution had been closed behind me, in the face of many people who wanted to get in. And because people had consciously closed the door to other people of color, I could not help but feel that those same people (who were not necessarily my classmates) did not want me there. Compounding this sense was the fact that I had been admitted

to Boalt Hall while affirmative action was still in use. I had applied and was accepted in the spring of 1995, before the Regents’s resolution eliminated affirmative action. I had deferred enrollment for a year, setting up my current situation, where I had to wonder whether my teachers and my classmates questioned my right to be there.

When I had met with Dean Kay before school started to discuss the fact that I would be the only African-American in my class, we addressed the issue of how to handle any media attention I would attract. We decided that I would give a brief statement to the media on my first day in an attempt to satisfy any curiosity surrounding me.

When the appointed time came for my press conference, I, along with Dean Kay, walked into one of Boalt’s large lecture halls to a dozen cameras and even more reporters. I gave my brief statement where I said that I was shocked and disappointed at the news that I was going to be the only African-American to matriculate into the program that year and that I indeed placed a high value on diversity. I concluded by saying that I was confident that my classmates and instructors would treat me without bias and as an individual who had earned the right to attend Boalt Hall (although I believed this in my heart, I was not 100 percent sure I was correct).

After I left the press conference, I hid in an associate dean’s office while the media dispersed. While I was sitting there, I thought to myself, “The worst is over. Now it is time to have the best law school experience you can under the circumstances.”

In many respects, I did make it an amazing law school experience. I spoke in favor of affirmative action on the steps of the Capitol Building in Sacramento. I became Third-Year Class President and addressed my peers at graduation. I met political and civic leaders, as well as the foremost scholars on the issue of race in America. In this respect it was a true growing experience. My law school experience was marred, however, by the elimination of affirmative action. In my three years at Boalt, I could never shake the nagging question in the back of my mind as to whether I was wanted there. I found it ironic that one of the arguments for the elimination of affirmative action was that it harmed minority students by stigmatizing them as inferior. While I never felt stigma-

tized at Indiana University where affirmative action was openly practiced, my time at Berkeley, on the other hand, was spent full of self-doubt.

My classmates lost out as well. Without the critical mass alluded to in *Grutter* of certain minority groups, certain points of view and life experiences were simply absent; they were never shared with my classmates. As Justice O'Connor wrote, diversity "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"⁷ Had there been a number of African-Americans in my class, we could have had a collective voice that would have informed and educated our classmates.

ABA & SECTION OF LITIGATION Support Diversity in Law Schools

The ABA Legal Opportunity Scholarship Fund has announced the recipients of this year's scholarships. The fund, which is established within the ABA Fund for Justice and Education, encourages racial and ethnic minority students to attend law school and provides financial assistance to those in need.

The Section of Litigation has provided both financial and member support to the fund since the first year scholarships were offered in 2000-2001 academic year. This year's Section representative on the scholarship selection committee is Burnadette Norris-Weeks, who is also Co-Chair of the Section's Minority Trial Lawyer Committee.

For more information on the scholarship, go to <http://www.abanet.org/fje/losfpage.html>. The 2003-04 scholarship recipients and their law schools are listed below:

Anaya, Vivian R.; *UCLA School of Law*
Barrezueta, Carlos E.; *Yale Law School*
Buskey, Brandon; *New York Univ.*
Duong, Jennifer T.; *Univ. of Minnesota Law School*
Evans, Rashad; *Univ. of Pennsylvania Law School*
Garcia, Efen; *Columbia Univ. Law School*
Lee, Gina K.; *Univ. of Chicago Law School*
Lopez, Michael J.; *Stanford Law School*
Lor, Kou; *Univ. of California-Davis*
Mendoza, Felipe D.; *Harvard Law School*
Molina, Jennifer; *Univ. of Minnesota Law School*
Mosley, Natasha L.; *Univ. of Southern Calif. Law School*
Moua, Dia; *Univ. of California - Davis*
Quilt, Rose M.; *Arizona State Univ. College of Law*
Redmond, Amondo D.; *Howard Univ. School of Law*
Urube, Gladys J.; *UCLA School of Law*
Trinh, Nu Quynh Quyen T.; *Golden Gate Univ. School of Law*
Turnage, Michaele N.; *Harvard Law School*
Valenzuela, Felix; *Yale Law School*
Wilson, Natasha; *Univ. of Wisconsin-Madison*

Instead, only my point of view was shared, and only in those rare circumstances when I felt compelled to share.

As I can attest, Dean Lehman was correct when he stated that without a critical mass, minority students feel isolated or like spokespersons for their race. The isolation was severe. And, even though my classmates endeavored to make me feel included, I could not shake the feeling of isolation and the sense that this situation was created with animosity. This isolation caused me to retreat and not speak up as much as I should have. Also, being the only African-American, I had no doubt that when I spoke in class, it was as *the* spokesperson for my race. Had there been other African-Americans around me, I would have felt more comfortable offering my personal experience, knowing that it would not be taken as The Black Experience. "[W]hen a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students."⁸

I recall numerous occasions where having a diverse body could have enlightened discussions of race. In one contracts class, the teacher wanted to discuss a study that showed that on average, women and minorities pay more for the same type of car than white men. In my criminal law class, the Bernard Goetz/vigilante case could not be discussed without diving into the issue of race. And in my clinical program, race was always an issue given that a majority of the clinic's clients were minorities. But because our class lacked a critical mass of minorities, these discussions were largely theoretical, when they could have been grounded in reality. These discussions represented missed opportunities to eliminate racial stereotypes because my classmates could not experience the variety of viewpoints from amongst a critical mass of minorities.

While the *Grutter* decision will be the topic of discussion and debate for years to come, for me it simply validates the thoughts and feelings I had during my three years of law school. When a law school does not have a critical mass of students of color, not only do those students of color suffer, the entire class suffers. As the *Grutter* Court said, "student body diversity...better prepares students for an increas-

ingly diverse workforce and society, and better prepares them as professionals."⁹

Eric Brooks is an associate in the Securities Litigation Practice Group of Morrison & Foerster's San Francisco office. Mr. Brooks' practice focuses on representing public companies and their officers and directors in securities class actions, SEC investigations, and derivative suits.

Endnotes

1. No. 02-241, 2003 U.S. Dist. LEXIS 4800 (June 23, 2003).
2. *Id.* at *15.
3. *Id.* at *15-16 (emphasis added).
4. *Id.* at *20.
5. *Id.*
6. Whether or not a color-blind admissions policy is a true "merit based" policy is subject to reasonable dispute. See *Silence at Boalt Hall: The Dismantling of Affirmative Action*, pp. 172-175 University of California Press 2002.
7. *Grutter*, 2003 U.S. Dist. LEXIS 4800, at *40.
8. *Id.* at *22.
9. *Id.* at *41.

Background

Continued from page 1

alleging the same constitutional violation as *Grutter*.

Both the *Grutter* and *Gratz* cases were brought by the Center for Individual Rights (CIR) in 1997 in a push for a nationwide elimination of affirmative action from higher education. Prior to the University of Michigan cases, the CIR had successfully eliminated affirmative action at the University of Texas with the *Hopwood v. Texas*⁵ decision. In addition to CIR, other affirmative action foes in the past eight years had abolished affirmative action through ballot measures in California and Washington, and by executive order in Florida. The Supreme Court's approval of the law school's affirmative action program in *Grutter* ensures the constitutionality of race-conscious policies for at least the next quarter century.⁶

—Eric Brooks

Endnotes

1. No. 02-241, 2003 U.S. Dist. LEXIS 4800 (June 23, 2003).
2. *Id.* at *17.
3. No. 02-516, 2003 U.S. LEXIS 4801 (June 23, 2003).
4. 438 U.S. 265 (1978).
5. 78 F.3d 932 (5th Cir. 1996).
6. 2003 U.S. Dist. LEXIS 4800 at *64.