# Bills Committee on Race Discrimination Bill

## Affirmative action

## Purpose

At the last meeting held on 5 February 2007, Members asked the Administration to explain –

> "the policy and legal considerations of the Administration for not imposing an obligation for affirmative action under the Bill".

This paper explains the concept of affirmative action and the Administration's rationale for not making affirmative action a mandatory requirement under the Bill.

## The meaning of affirmative action

2. In broad terms, "affirmative action" refers to the set of proactive measures which are intended to redress past or present discrimination and to promote equal opportunity for the disadvantaged. However, beyond that, the term is often used loosely and has different meaning and connotations to the different people who use it. Thus, to some, it could mean taking appropriate measures to ensure fair competition and a level playing field; to others it would mean offering preferential treatment in favour of a particular sex or racial group.

3. This lack of uniformity in understanding can be traced to the history of the term in the United States, where it originated. The term was first used in Executive Order 10925 signed by President John F Kennedy in March 1961. That Order stated that –

> "(contractors doing business with the Government) will take affirmative action to ensure that applicants are employed, and employees are treated during their employment, without regard to their race, creed, color or national origin."

The Order did not advocate preferential treatment of affected groups. This position was echoed and reinforced by the Civil Rights Act of 1964 which, in Title VII, stated that the act was ***not*** designed "to grant preferential treatment to any group because of race, color, religion, sex or national origin."

4. Over the years, however, the use of the term, and its meaning therefore, has evolved significantly. The key development was in 1968 when the Office of Federal Contract Compliance issued regulations which required, for the first time, that –

> "the contractor's program shall provide in detail for specific steps to guarantee equal employment opportunity keyed to the problems and needs of ethnic minority groups, including, when there are deficiencies, the development of specific goals and timetables for the prompt achievement of full and equal employment opportunity."

It was from these regulations and analogous measures for setting of quotas which the term "affirmative action" derived its present-day meaning. This has also been the root of much debate and controversies over the merits and justifications for affirmative action.

5. The Oxford Dictionary defines "affirmative action" as synonymous with "positive discrimination" which, in turn, means –

> "the practice or policy of making sure that a particular number of jobs, etc. are given to people from groups that are often treated unfairly because of their race, sex, etc."

**UN Study on the concept and practice of affirmative action**

6. The term "affirmative action" does not appear in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). On the other hand, Article 1, paragraph 4, refers to "special measures" which are not to be regarded discrimination –

> "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

7. In 1998, the Sub-Commission on the Promotion and Protection of Human Rights under the UN Commission on Human Rights appointed a

Special Rapporteur to conduct a study on the concept of affirmative action. The report, entitled "Prevention of discrimination: the concept and practice of affirmative action" (E/CN.4/Sub.2/2002/21) was submitted to the UN Economic and Social Council on 17 June 2002. It surveyed the different interpretations of the term and the complexity of the issues involved.

8. As a working definition, the report defined "affirmative action" in a broad sense as –

> "... a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality" *(paragraph 6 of the report)*.

This definition is akin to the definition of "special measures" under ICERD.

9. Within that broad definition, the report further identified two major categories of affirmative action, viz.:

(a) measures of affirmative mobilization or affirmative fairness; and

(b) measures of affirmative preference.

10. Measures of affirmative mobilization and affirmative fairness are explained in the report as follows –

> "The special measures may be called measures of "**affirmative mobilization**" when, through affirmative recruitment, the targeted groups are aggressively encouraged and sensitized to apply for a social good, such as a job or a place in an education institution. This can occur through announcements or other recruitment efforts, where it has been made sure that they actually reach the target groups. An example would be the setting up of job-training programmes to enable members of minorities to acquire the skills that would allow them to compete for jobs and promotion... Affirmative recruitment would, therefore, through remedial interventions such as job-training, out-reach and other skill-building or empowerment programmes, place those who have been disadvantaged in a condition of competitiveness.

> "Special measures may be called measures of "**affirmative fairness**", when a meticulous examination takes place in order to make sure that members of target groups have been treated fairly in the attribution of social goods, such as entering an educational institution, receiving a job or promotion. In other words, have they been judged on merit or has racism or sexism been a factor in the evaluation process ? ... All this is to ensure that the criteria used for hiring or promotion are validated for job-relatedness and did not serve as a mask for racial or gender discrimination.... It boils down to the idea that the "best qualified" ought always to be hired" *(paragraphs 72 and 73 of the report)*.

The report noted that –

> "Affirmative mobilization and affirmative fairness both entail measures dedicated to overcoming the social problems of a target group, but the measures do not themselves entail discrimination against people who are not members of that group.... It is probably for that reason, among others, that affirmative recruitment and affirmative fairness are well received and accepted" *(paragraph 74 of the report)*.

11. On the other hand, "**affirmative preference**" is defined in the report as meaning "that someone's gender or race will be taken into account in the granting or with holding of social goods". This is further explained as follows –

> "First, they can mean that when two equally qualified persons apply for a job, promotion, grant, etc., preference will be given to the person belonging to a designated group that is the beneficiary of affirmative action measures"; and

> "Second, they can also include other more radical measures, such as prohibiting members of non-designated groups from applying for opportunities. Or, they can be allowed to compete, but even if they are better qualified, preference will still be given to designated groups" *(paragraphs 75 – 76 of the report)*.

The report considered affirmative action in the form of preference based on race to be wrong, even if done out of the good intention of repairing the injustice of past discrimination. It particularly pointed out that –

"... a legal rule is not necessarily legitimate because it pursues a legitimate goal. The law as a technique used to attain certain goals has to respect certain inherent requirements. The most fundamental of these is respect of the equality principle, which prohibits the introduction of distinctions based on grounds which are irrelevant for the particular right or freedom" *(paragraph 99 of the report)*;

and that –

"In matters of human rights, a preference may only be justified if it is based on a ground which is relevant to the right at stake. For instance, in matters of employment and education, the principal criterion is competence" *(paragraph 103 of the report)*.

12. The report concluded by highlighting the need for balance and rationality –

"It is quite obvious that no measure intended to favour members of groups which were previously in a disadvantaged position may be justified simply by referring to the intent of the measure taken, however legitimate that intention may be. Everyone is entitled to the enjoyment of fundamental rights and freedoms and nobody may be discriminated against in the enjoyment of his or her fundamental rights and freedoms, regardless of the objective pursued by the discriminatory measures. The discriminatory effect depends on the characteristics of a specific measure used to pursue a given objective and not on the objective itself.

"The prohibition of discrimination would be a principle without any normative value, if any distinction could be justified by qualifying it as a measure of affirmative action. The principle of equality and non-discrimination, the most basic principle of human rights, which applies to all rights, freedoms and guarantees, would become meaningless if measures which clearly and manifestly deprive persons of any right, freedom or guarantees on the basis of a criterion which is not relevant to the right or freedom in question, were justified by labelling such measures as affirmative action measures. A good intention or a legitimate objective is not sufficient to justify any distinction based on whatever ground in any matter. It is not sufficient that the persons favoured by the measures taken belong to a group whose members were previously the victims of exactly the same kind of measures. An injustice

cannot be repaired by another injustice. It is not because the descendants of the victims of the past are substituted for the descendents of the oppressors of the past, that a discriminatory measure ceases to be illegal and becomes consistent with the requirements of the protection of human rights and fundamental freedoms.

"…In general, national authorities should take measures which help those persons to acquire the same qualifications as members of groups which were favoured in the past. Through measures of affirmative action, the former should be helped to acquire the qualifications asked for, rather than by lowering the level of those qualifications…." *(paragraphs 107, 108 and 109 of the report)*.

13. In its final paragraph, the report further reiterated the complexity of the issue by stating –

"…The principle of equality and non-discrimination itself is already a difficult concept which has given rise to much controversy. The concept of affirmative action is even more complex and its practice is not developed to an extent sufficient to allow for a common ground of understanding of its limits…." *(paragraph 114 of the report)*.

**Affirmative action in the UK and the US**

14. In the UK, the Race Relations Act does not impose an obligation on a regulated party to take affirmative action. Depending on the factual circumstances of the case, affirmative action in the form of preference based on race may be unlawful. In other words, an employer who tries to change the balance in racial composition of the workforce by preferring a job applicant because she or he is from a particular racial group may infringe the Race Relations Act. This would constitute direct discrimination under the Race Relations Act.

15. However, the UK law does recognize the value of "special measures" in the sense of "affirmative mobilization" and "affirmative fairness" measures. Hence, for example, where over the previous twelve months no one from a particular racial group, or only very few persons from that racial group, have been doing a certain type of work then it is lawful to offer training only for people from that racial group or to encourage people from that racial group to apply. (Likewise, Clause 52 of the Bill clearly states that such training or encouragement is not

unlawful.) Other than that, however, selection itself must be based on merits and treat all applicants equally irrespective of race. The UK law does not compel employer to take such special measures, but it allows them to do so.

16. At the last meeting of the Bills Committee, it was suggested that affirmative action had been lawfully adopted to help disadvantaged racial groups in the education field and that Hong Kong should consider doing the same. The Annex to this paper, entitled "Affirmative Action in the US", will show –

(a) affirmative action is permitted but not mandatory under American law;

(b) the right to equal protection of law belongs to "persons", not "groups";

(c) all racial classifications are inherently suspect and would be subject to strict judicial scrutiny;

(d) the use of racial quota or the award of extra credits on the ground of race violates the equality guarantee; and

(e) "race" can be a plus factor to be considered as part of an individual's profile but each application must be considered individually.

**The Administration's position**

17. It should be highlighted that in line with our international treaty obligations under ICERD, the purpose of the Race Discrimination Bill is to ensure that people in Hong Kong are protected against discrimination on the ground of race and that they are to be treated equally irrespective of the race, colour, descent, or national or ethnic origin.

18. We are mindful of the need to advance the opportunities of the ethnic minorities while not undermining the rights of other individuals in the community to compete on equal terms. In particular, we are cautious that we should not introduce measures which, while seeking to promote the interest of some, would pose undue hardship on other members of the community or could result in discrimination against those who are not

members of the targetted racial group. We therefore do not propose to impose a mandatory requirement for affirmative action to be taken.

19. On the other hand, we emphasize that legislation must go hand in hand with support measures for those in need. Hence, consistent with the provision in ICERD and in the interest of community harmony and integration, we encourage special measures which are designed to promote equal opportunity for specific racial group. Clause 49 of the Bill therefore permits special measures that are reasonably intended to ensure equal opportunity by meeting the special needs of persons of particular racial groups. It is consistent with the principle of non-discrimination and on application these special measures will be assessed against the guidelines of rationality and proportionality which have been upheld in local courts and by international human rights authority. The standard and approach proposed in the Race Discrimination Bill are also consistent with those enshrined in the existing Sex Discrimination Ordinance and Family Status Discrimination Ordinance.

20. This paper has been prepared in response to Members' request recorded in paragraph 2(d) of the minutes of the Bills Committee meeting held on 5 February 2007.

**Home Affairs Bureau**
**February 2007**

**Annex**

## Affirmative Action in the U.S.

"Affirmative action" also known as "reverse discrimination" or "positive discrimination" is permissible, rather than mandatory under the three anti-discrimination ordinances, i.e. the Sex Discrimination Ordinance, the Disability Discrimination Ordinance and the Family Status Discrimination Ordinance. The same approach is followed in the Race Discrimination Bill (see clause 49). This is also the approach adopted by the Australian legislature and the U.K. Parliament in the race discrimination legislation[1]. Similarly, affirmative action is permissive but not mandatory under European Race Directive. Article 5 of the Race Directive 2000/43 thus provides that:

> "With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin."

2. Neither is affirmative action mandatory under American law. It should be noted that in general American courts view all racial classifications as inherently suspicious[2]. Civil Rights legislation in the U.S. appears to prohibit racial discrimination in any form. For example, s. 703 of Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate because of race in hiring and in the selection of apprentices for training programs. Moreover, s. 703(j) states that nothing in Title VII shall be interpreted to require "preferential treatment" to any individual for reason of race or colour. On the other hand, s. 706(g) authorises a court to order "such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without backpay."

3. The Americans however have for many years sought to rely on affirmative action to promote racial equality. Such attempts must be considered in light of the country's conscious effort to heal the past wounds of racism and slavery[3]. In the U.S., most affirmative action programs are remedial measures, designed to redress the lingering effects of past discrimination against black people and other minority groups in

[1] See s. 8 of the Racial Discrimination Act 1975 (Cth) and s. 35 of the English Race Relations Act 1976.
[2] See for example Powell J's opinion in *Regents of the University v Bakke*, 438 U.S. 265, 304-305.
[3] Prior to the Civil War there was no constitutional safeguard against slavery. In fact Article I of Confederation forbade Congress to restrict the slave trade prior to 1808 and Article V prohibited Amendments which would remove this restriction. The rights of slaveholders were recognized in the fugitive clause of Article IV.

society[4]. The institution of slavery was only abolished after the Civil War[5]. The equal protection clause in the Fourteenth Amendment was passed in the same period as part of a legislative package to grant by constitutional decree equal rights to black persons[6]. The American experience of affirmative action shows that any such programs, whether adopted by a government agency, a private employer or a trade union voluntarily or decreed involuntarily under a court order or mandated by the Congress, are subject to judicial scrutiny[7]. **In the field of education, affirmative action in the form of special admission programs undertaken by universities have been subject to ongoing legal challenges and have produced divided and not easily predictable results**.

## Affirmative action in education

4. The question of affirmative action confronted the U.S. Supreme Court first in 1974. Macro DeFunis, a white applicant to the University of Washington Law School, was denied admission. He claimed that the school's admission policy discriminated against him. Out of 150 openings for first-year students, the school set aside a specific number of places for minority non-white applicants. DeFunis scored higher than most of the minorities accepted. If a minority student was to be considered under the same procedure applied to DeFunis, the minority student would not have been admitted.

5. A state trial court upheld DeFunis' claim of discrimination and he was admitted to the law school. The trial court's decision was reversed by the Washington Supreme Court. The U.S. Supreme Court reviewed DeFunis's appeal when he was in his final year. Knowing that Defunis would be able to continue with his studies whatever conclusion the Court reached, the Supreme Court dismissed the case as moot without deciding the constitutionality of the Law School's admission program[8].

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[4] Aka, P, "The Supreme Court and Affirmative Action in Public Education, with Special Reference to the Michigan Cases", [2006] *Brigham Young University Education and Law Journal*, 1, at p. 3. Demonstrating the entrenched hostility against black people is the U.S. Supreme Court's decision in *Dred Scott v Sanford*, 60 U.S. (19 How.) 393 (1857). There the Court held that Dred Scott, a Negro slave, was not a citizen of the U.S. Chief Justice Taney refused to allow contemporary attitude to change the meaning of the Constitution by making citizens of black.

[5] See the Thirteenth Amendment to the Constitution.

[6] Section 1 of the Fourteenth Amendment provides that:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[7] For a succinct summary of judicial decisions on various voluntary and involuntary affirmative action programs undertaken by different groups, see Nowak, J and Rotunda, R, *Constitutional Law*, 7th ed., West Group: U.S., 2004, 789-803.

[8] *DeFunis v Odefaard*, 415 U.S. 312 (1974).

6. In a quarter century (from 1978 to 2003), the U.S. Supreme Court decided three cases concerning university admission policies designed to promote racial diversity. The *Bakke* case decided in 1978 witnessed a divided court (5 to 4) which invalidated the university's special admission program whilst holding that race can be a legitimate factor in admission decisions[9]. The period ended **in 2003 when, in two separate decisions handed down on the same day, the Supreme Court upheld a race conscious admission program for the University of Michigan Law School on the one hand [10]; and invalidated the University of Michigan's policy of giving minorities students extra points in its undergraduate admission programs on the other hand**[11].

***Regents of the University of California v Bakke***

7. Allan Bakke, a white applicant to the medical school at the University of California at Davis, was twice rejected by the regular admission program. "Disadvantaged" applicants from minority groups (blacks, Chicanos, Asians, and American Indians) were screened by a special admission program. Although these minorities had lower grade point averages from undergraduate school and scored lower in the medical admission test, they were accepted to fill 16 first-year openings reserved for them out of 100 places. Bakke challenged the affirmative action program on the ground that it violated the equal protection clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 and the California Constitution.

8. The Supreme Court in a five to four decision invalidated the special admission program. The Court however could not reach a majority decision. Powell J delivering the plurality decision held that the special admission program operated as a ***quota*** and therefore was invalid. Powell J however agreed that race could be taken into account in admission decisions for purposes of diversity in a public university's student body. In other words, student body diversity is a compelling state interest that can justify the use of race in university admission. Powell J recognized that "race or ethnic background may be deemed a "plus" in a particular applicant's file, yet this does not insulate the individual from comparison with all other candidates for the available seats"[12]. What Powell J advocated is an ***individualized consideration*** of applicant's race as part of the individual's profile. His major complaint was that:

> "…the Davis special admission program involves the use of an explicit racial classification never before countenanced by this Court. It tells

[9] *Regents of the University v Bakke*, 438 U.S. 265 (1978).
[10] *Grutter v Bollinger*, 536 U.S. 306 (2003).
[11] *Gratz v Bollinger*, 539 U.S. 244 (2003).
[12] See note 9 above, 317.

> applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups, for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class."[13]

9. Justice Powell further contended that all racial classifications are inherently suspect and should be subject to strict judicial scrutiny[14]. "Strict scrutiny"[15] was subsequently adopted by the Supreme Court as the proper standard of review to be applied in assessing the constitutionality of affirmative action programs on racial ground[16].

**Maintenance of a racially integrated faculty**

10. Another important case decided by the Supreme Court in the field of education during the same period is *Wygant v Jackson Board of Education*[17]. There the Supreme Court invalidated a redundancy package which sought to lay off more senior white teachers before black teachers with less seniority. The management and the trade union had by a collective bargaining agreement agreed that, if it was necessary to lay off teachers, layoffs would be done on a seniority basis (the last hired would be the first laid off) "except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of laid off". The purpose of such arrangement was to maintain a racially integrated faculty.

11. The Supreme Court, by a five to four vote, held that the layoff of nonminority race teachers solely because of the race of the individual teachers violated the equal protection clause of the Fourteenth Amendment. There was however no majority opinion regarding this ruling. Justice Powell wrote the plurality opinion announcing the judgment of the Court. Justice Powell's opinion was joined by Chief Justice Burger and two other judges. The learned judge found that a racial classification, regardless of whether it aided or burdened the members of a minority racial group, would be invalid unless ***it was narrowly tailored to promote a compelling interest.*** Public employers like the Board must ensure that, before they embark on affirmative action program, they have convincing evidence that remedial action is warranted; that is, they must have sufficient evidence to justify conclusion that there

[13] See note 9 above, 319-320.
[14] Ibid, 287-289.
[15] In the context of school admission policy, this means that racial classifications would only be constitutional if they are narrowly tailored to further compelling governmental interest.
[16] See *City of Richmond v J.A. Croson Co.*,488 U.S. 469 (1989).
[17] 476 U.S. 267 (1986).

has been prior discrimination[18]. Justice Powell's plurality opinion found that a layoff plan that imposed burden of achieving racial equality on particular nonminority individuals, (who were to be laid off despite their seniority) was not narrowly tailored to the promotion of racial equality and diversity.

**The Michigan cases**

12. The Supreme Court had another chance to review the constitutionality of university admission programs employing racial classifications in 2003. In *Grutter v Bollinger*[19], a white applicant sought to challenge race-conscious admission program of the University of Michigan Law School, alleging that the law school's consideration of race and ethnicity in its admission decision violated the equal protection clause of the Fourteenth Amendment. The Supreme Court, by a five to four majority, endorsed the view taken by Powell J in *Bakke*. Not only did the Court find that law school had a compelling interest in attaining a diverse student body, it held that the law school's race-conscious admission program was narrowly tailored to serve its compelling interest in obtaining the educational benefits that flow from a diverse student body.

13. One of the proclaimed goals of the law school's admission policy was to have "a mix of students with varying backgrounds and experiences who will respect and learn from each other". The law school however did not use quota or special admission tracks to achieve this goal. The admission program emphasized applicants' academic ability and a flexible assessment of their talents, experiences, and potentials. It required admission officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, an essay describing how the applicant would contribute to law school life and diversity, and the applicant's undergraduate grade point average and law school admission test score. The policy also required officials to look beyond grades and scores to so-called "soft variables", such as recommendaters' enthusiasm, quality of undergraduate institution[s] attended, the applicant's essay, and the areas and difficulty of undergraduate course selection[20].

14. The admission policy did not define diversity solely in terms of racial and ethnic status and did not restrict the types of diversity contributions eligible for substantial weight. However, it reaffirmed the law school's longstanding commitment to one particular type of diversity, namely, "racial and ethnic diversity with special reference to the

[18] Ibid, 275-276.
[19] 539 U.S. 306 (2003).
[20] Ibid, 315-316.

inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics, and Native Americans, who without this commitment, might not be represented" in the law school's student body in critical mass or meaningful number[21].

15. Justice O'Connor, delivering the judgment of the Court, endorsed Powell J's view that student body diversity is a compelling state interest that can justify the use of race in university admission. The learned judge however pointed out that the equal protection clause protects ***persons***, ***not groups***. Thus all governmental action based on race, a group classification, should be subject to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed[22]. In holding that the law school's admission program was narrowly tailored to promote the goal of a diverse student body and therefore constitutional, O'Connor said[23]:

> "We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities ***cannot establish quotas*** for members of certain racial groups or put members of those groups ***on separate admissions tracks.*** … Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission … Universities can, however, consider race or ethnicity more flexibly as a "plus" factor ***in the context of individualized consideration*** of each and every applicant." (Added emphasis)

16. In *Gratz v Bollinger*[24], a decision made on the same day as *Grutter*, the Supreme Court by a six to three majority held that the affirmative action program adopted by the University of Michigan in its undergraduate programs was unconstitutional as it violated the equal protection clause of the Fourteenth Amendment. The university's undergraduate admission program awarded twenty points to under-represented minorities made up of African-Americans, Hispanics and Native Americans. Two Caucasian applicants were denied admission into the program and challenged this race-conscious admission program. The Supreme Court held that the Constitution did not categorically preclude the use of race but it found that the University's use of race in its admission program was not narrowly tailored to achieve the educational goal of diversity. Delivering the judgment of the Court, Chief Justice Rehnquist said[25]:

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[21] Ibid, 313-316.
[22] Ibid, 326.
[23] Ibid, 334.
[24] 539 U.S. 244 (2003).
[25] Ibid, 269-270.

> "We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program. …
>
> Justice Powell's opinion in *Bakke* emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education. The admission program Justice Powell described, however, did not contemplate any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity. …
>
> The current LSA policy does not provide such individualized consideration. The LSA's policy automatically distributes 20 points to every single applicant from an "underrepresented minority" group, as defined by the University. The only consideration accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups. Moreover, unlike Justice Powell's example, where the race of a "particular black applicant" could be considered without being decisive, see *Bakke*, 438 U.S., at 317, 98 S. Ct. 2733, the LSA's automatic distribution of 20 points has the effect of making "the factor of race … decisive" for virtually every minimally qualified underrepresented minority applicant."

**Summary**

17. The following points can be summarized from the above discussion of American case law on affirmative action:

(a) Affirmative action is permissive but not mandatory under American law.
(b) The right to equal protection of law belongs to "persons', not "groups".
(c) All racial classifications are inherently suspect and would be subject to strict judicial scrutiny.
(d) The setting of racial quota or award of extra credits on ground of race violates the equality guarantee.
(e) "Race" can be a plus factor to be considered as part of an individual's profile but each application must be considered individually.

Human Rights Unit
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