Supplementary note for Bills Committee on Race Discrimination Bill

Affirmative action in the United States

Purpose

At the meeting held on 28 February 2007, Member considered LC Paper No CB(2) 1152/06-07(01) on the subject of affirmation action. In connection with the Annex to the paper, which summarised the judgment in relevant US cases, Members asked that in addition to the majority judgment of the courts, the views of the dissenting judges should also be reflected.

2. This paper provides the additional information requested by Members.

Minority judgment in *Regents of the University of California v Bakke*, 438 U.S. 265

3. In *Bakke*, four Justices, Justices Brennan, White, Marshall and Blackmun voted to uphold the University's admission program both under Title VI of the Civil Rights Act 1964 and the equal protection clause of the Fourteenth Amendment. They joined Justice Powell to form a majority in holding that some affirmative action programs are both constitutional and legal under Title VI, but they differed from Justice Powell in that they would have found that the University's program met the relevant constitutional and statutory standards. These four Justices joined in an opinion written by Justice Brennan[1], although each of the other three judges added additional comments in separate opinions[2].

4. Justice Brennan noted that he and the three Justices who joined in his opinion agreed with Justice Powell only to the extent of finding that neither the Fourteenth Amendment nor Title VI prohibited the use of race in an affirmative action setting. For two reasons Justice Brennan believed that classifications which burden white persons incident to remedial programs should be subjected to a standard of review similar to

[1] 438 U.S. at 324.

[2] 438 U.S. at 379 (separate opinion of White J; 438 U.S. at 387 (separate opinion of Marshall J); 438 U.S. at 402 (separate opinion of Blackmun J).

that employed in the gender cases. First such classifications might often be used to "stereotype and stigmatize" a small, powerless segment of individuals. Second, these racial classifications were based on "immutable characteristics which its possessors are powerless to escape or set aside."

5. Brennan J opined that when a government program could be described as "benign" to racial minorities, it would be subjected to a form of intermediate standard of review that allows for independent judicial evaluation of both the importance of the articulated purposes of the program and whether there was a real and substantial relationship between the means employed and that purpose. To be a valid benign racial classification program, in the view of the four Justices, a program must:

(1) be justified by an articulated purpose of demonstrably sufficient importance to justify burdening members of the racial majority; and

(2) be substantially related to that purpose to avoid stigmatizing any racial group or singling out powerless persons to bear the burden of the program.

6. The four Justices found the University's remedial purpose to be sufficient to meet the first part of the two part test. The plurality opinion went on to determine whether the program met "the second prong of our test – whether the Davis program stigmatizes any discrete group or individual and whether race is reasonably used in the light of the program's objective[3]." The four Justices found that the University's program met this test and, therefore, that it was consistent with the equal protection guarantee.

Minority judgment in *Grutter v Bollinger*, 539 U.S. 306

7. Four Justices joined in the dissent that was written by Chief Justice Rehnquist[4]. The Chief Justice found that reference to "race" as a

[3] 438 U.S. at 373 – 374.
[4] 539 U.S. at 306 (Rehnquist C.J., joined by Scalia, Kennedy and Thomas JJ, dissenting).

consideration in government decision-making might be allowed in some circumstances; the Chief Justice did not specially endorse or reject the majority's conclusion that diversity in education might be a compelling interest and under certain circumstances would support a race conscious admission policy for a state operated institution of higher learning. The Chief Justice believed that the majority had failed to scrutinize thoroughly the University of Michigan's Law School admission program because a close scrutiny of the program would demonstrate, that the law school was in fact operating an admission policy that simply set aside some places for minority race applicants by giving those applicants admission based solely upon their race. The dissenters believed that the majority had not used a true "strict scrutiny" test, because the majority had not demanded that the government should show that its Law School admission policy was necessary to promote a compelling interest. Chief Justice Rehnguist set out facts regarding the University of Michigan Law School's admissions from the years 1995 through 2000 to demonstrate why the dissenters believed that **the Law School in fact was operating a program that set quotas based on race**[5].

8. Justice Kennedy wrote a separate dissenting opinion in *Grutter*, in part indicated agreement with Justice Powell's method of analysis in *Bakke*[6]. Justice Kennedy took the view that a university's admission policy that had numerical goals for enrolment of minority race students could never be considered narrowly tailored to a compelling interest.

9. Justices Scalia and Thomas, in their two dissenting opinions, held that the University of Michigan **was using a quota system** that could not be considered to be "narrowly tailored to a compelling interest". The two Justices however differed in that Justice Thomas seems to accept the fact that in accordance with the principle of *stare decisis*, the Justices have to consider diversity in education to be a compelling interest that might support some types of race conscious admissions policies for state operated institutions of higher education[7].

Minority Judgment in *Gratz v Bollinger*, 539 U.S. 244

[5] 539 U.S. at 383 – 386 (tables 1, 2 and 3 in the dissenting opinion of Rehnquist C.J., joined by Scalia, Kennedy, and Thomas JJ, dissenting).
[6] 539, U.S. at 386 – 394.
[7] 539 U.S. at 349 – 379.

10. Justice Ginsburg dissented in *Gratz* in an opinion that was joined by Justice Souter and, in part, by Justice Breyer[8]. Justice Breyer agreed with Justice Ginsburg to the extent that she found government programs that were designed to undo the harmful effects of a racial caste system that existed for much of the history of the U.S. would comply with equal protection principles[9]. Justice Ginsburg, joined only by Justice Souter, would have ruled that the undergraduate admission policy was narrowly tailored to remedying the effects of racial discrimination in the American society by the creation of a diverse student body. She believed that the University of Michigan system was of necessity somewhat mechanical because of the great number of applications for admissions to an undergraduate program that would be received by a popular state operated institution in a large state. Justice Ginsburg noted that the University of Michigan did not save a particular number of places in the class for minority race persons; the University was honestly striving to achieve diversity, rather than using a system that involved some quick look at the thousands of applications received by the University and then operated as a way of granting preferences to some racial groups. Chief Justice Rehnquist, in the majority opinion in *Gratz*, commented that Justice Ginsburg was taking the position that the Court should alter constitutional principles merely to allow large universities to achieve diversity[10]. Justice Ginsburg responded that she did not believe the Constitution should be altered by the Court based on the needs of large universities but, rather, that "the Constitution, properly interpreted," would allow the government to openly attach importance to racial factors to eliminate the results of past societal and governmental discrimination, so as to allow the U.S. to put behind it the effects of a long history of racial inequality[11].

11. In a separate dissenting opinion, Justice Souter expressed the view that parties in the case did not have standing to litigate the constitutionality of the University's undergraduate admission policy. He held that the decision should not go beyond a recognition that diversity could serve as a compelling state interest justifying race-conscious

[8] 539 U.S. at 296 – 300.
[9] 539 U.S. at 282.
[10] 539 U.S. at 274, note 22.
[11] 539 U.S. at 304, note 11.

decisions in education[12].

12. Justice Ginsburg joined Part II of Justice Souter's opinion which dealt with the constitutionality of the University's admission policy. Justice Souter thought that the record in this case did not justify the Court finding that the program did not give **individualized consideration** to all applicants. He believed that the record, though not clear, lent support to the University's claim that it attempted to give individualized consideration to virtually all of the applicants who were anything more than minimally qualified for admission to the University[13]. Justice Souter's view of the record was rejected by Chief Justice Rehnquist, in the majority opinion. The majority in *Gratz* found that there was **no real individualized consideration of applicants** in the University's admission system[14].

13. Justice Stevens, in an opinion joined by Justice Souter, took the view that the Court should dismiss the case as not being within the jurisdiction of federal courts because the plaintiffs in the case did not have a personal stake in the outcome which should give them standing in the litigation[15]. He refused to comment on the merits of the claim that the University's undergraduate admissions policy violated the equal protection clause[16].

Concluding observations

14. As can be seen from the recent cases of *Grutter* and *Gratz*, both the majority and minority opinions emphasized the importance of giving individualized consideration to applicants. The two camps however differed in their assessment of the facts of the cases. Our assessment is that a quota system based on race is likely to be condemned by both the majority and minority.

15. This supplementary note should be read in context with the Annex to LC Paper No CB(2)1152/06-07(01), which contains summaries

[12] 539 U.S. at 293, see Part I of Justice Souter's dissenting opinion.
[13] 539 U.S. at 293 – 296.
[14] 539 U.S. at 274.
[15] 539 U.S. at 282.
[16] The above summary closely follows the discussion in Nowak, J. & Rotunda, R., *Constitutional Law*, 7th ed., U.S.: West Group, 2004, 807 – 826.

of the facts as well as the majority judgment in the cases under discussion.

Home Affairs Bureau
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