Defending the Defenders of Affirmative Action in Higher Education

Jason Blokhuis
Roehampton University

While Clifton Tanabe states his key arguments in a number of places, they can be stated most succinctly as follows:

> P1: For the past thirty years or so, the American voting public has accepted the use of affirmative action in higher education admissions.
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> P2: More and more states are now voting to ban affirmative action.
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> C: The persuasive power of the Supreme Court's justification for affirmative action based on student body diversity has begun to fade.

Tanabe then restates this conclusion in a baffling way:

> C: The general public no longer seems to agree with the argument that universities ought to be allowed to suspend the Equal Protection Clause of the Fourteenth Amendment in order to discriminate among applicants according to race, solely for the purposes of increasing student body diversity.

I doubt that the general public has ever agreed that universities should be allowed to suspend the Fourteenth Amendment in order to engage in racial discrimination. The Supreme Court has *never* permitted this. It certainly did not do so in either *University of California v. Bakke* or *Grutter v. Bolinger*.[1] Tanabe describes the Supreme Court's task in these cases as determining "exactly how harmful and illegal the [affirmative action] program is, so that it can effectively decide whether or not it violates the Constitution." This is misleading. When the Supreme Court considers the constitutionality of a state action, it applies a test in order to determine whether an alleged infringement amounts to a violation. In equal protection cases, if the impugned state action involves a suspect criterion, it is presumed unconstitutional, unless the state meets the strict scrutiny test.[2] If it does, then the impugned law or policy is constitutional. If not, then the impugned law or policy is unconstitutional. There are no *degrees* of illegality, such that a finding of unconstitutionality is predicated on an exact determination of *how illegal* a policy or program is.

Even if we were to accept Tanabe's claim that the American voting public supported affirmative action until recently, it is a stretch to suggest that this erstwhile consensus rested on broad public acceptance of Justice Clarence Powell's reasoning in *Bakke*. Yet, in his view, ballot initiatives in a number of states prove that people are not buying the Supreme Court's arguments anymore. Thus, new and better arguments are urgently needed to "save" affirmative action in higher education. "One of the *first things* that proponents of affirmative action need to do," Tanabe declares, "is to recognize that the legal arguments offered in support of affirmative action [in *Bakke* and *Grutter*] are politically unpersuasive" (emphasis added).

Once the scales have dropped from their eyes, scholars will see that the time has come to *start* developing "a new approach to supporting affirmative action that is based on arguments that move beyond the legal reasoning offered by the Supreme Court." Tanabe credits Robert K. Fullinwider and Judith Lichtenberg, the authors of *Leveling the Playing Field*, for unwittingly advancing his aims. "While [they] may not have intended it," he writes, "their individualism and integration arguments point to a new approach for defending affirmative action: an approach built on a wider and more aggressive focus on bold and creative arguments that are unconstrained by legal reasoning." He outlines Fullinwider and Lichtenberg's integration argument as follows:

> P1: For the good of the state, the university must graduate integrated classes.
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> P2: To achieve integrated classes, the university must employ racial and ethnic preferences.
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> C: Therefore, the university is justified in giving such preferences.

Tanabe insists "the Court cannot make this move" because justifying affirmative action as a benefit to the state would stray "from the legal tightrope created by *stare decisis*." I disagree. This doctrine does not bind the Supreme Court: it has often overruled its own precedents.[3] Were this not so, "separate but equal"[4] would continue to guide our jurisprudence, and affirmative action as we know it would not exist.

Indeed, in *Grutter*, the Supreme Court did *precisely* what Tanabe insists it could not do. Justice Sandra Day O'Connor worked the integration argument into her reasoning: "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that…all members of our heterogeneous society…participate in the educational institutions that provide the training and education necessary to succeed in America."[5]

This seems to have escaped Tanabe's notice. "So the integration argument [of Fullinwider and Lichtenberg] does not strengthen the legal arguments that are used by the Court to justify affirmative action," he laments. "However, this is not a crime for our purposes, as long as it works to make the legal arguments more *politically persuasive*" (emphasis in original). Kudos to Fullinwider and Lichtenberg! Even though they have stumbled upon a moral argument of "questionable legal significance," Tanabe wants scholars to develop new justifications for affirmative action, and he thinks that Fullinwider and Lichtenberg's integration argument is "a good start toward this end."

Affirmative action is rooted in Equity, the branch of Anglo-American jurisprudence that provided discretionary remedies in situations where the rigid application of common law rules would yield manifestly unjust results, and it has been traced to Congressional debates on the desirability of race-conscious remedies for freedmen in 1866.[6] In short, people have been talking about race, justice, and desert for a very long time.[7] The modern use of "affirmative action" stems from a 1961

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executive order that required government contractors to exercise good faith in employment practices. Thus, in response to employment discrimination suits under the 1964 Civil Rights Act, the federal courts issued "affirmative action" orders.[8]

In 1976, Ronald Dworkin argued that race, like intelligence, was a proper criterion in university admissions, and that "in certain circumstances, a policy which puts many individuals at a disadvantage is nevertheless justified because it makes the whole community better off."[9] Just as intellectual standards are justified because we are better off with intelligent lawyers, racial considerations are justified because having more black lawyers is an ideal social policy objective.[10] Bernard Boxill agreed. "The purpose of higher learning is to train people to serve the society, not to reward the highly intelligent," he wrote, and "the qualifications for admission…are understood with this purpose in mind."[11] Dworkin, Boxill, and many other scholars had been working on moral justifications for affirmative action long before their contributions to the integration argument were applied by Justice O'Connor in *Grutter*, and brilliantly expounded by Fullinwider and Lichtenberg in *Leveling the Playing Field*.[12] Simply put, universities can and must predicate admissions on indices of merit that are linked to their institutional missions. Merit is relative to the particular ends at stake, however, and applicants who claim a right of admission based on grades or test scores alone overlook this.

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1. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

2. T. R. van Geel, *Understanding Supreme Court Opinions* (New York: Pearson, 2009), 82.

3. See *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) at 518; see also *Smith v. Allwright*, 321 U.S. 649 (1944) at 665: "This Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions." See also van Geel, *Understanding Supreme Court Opinions*, 95–99.

4. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

5. *Grutter* at 336, quoted in Fullinwider's supremely competent legal analysis of that case. The phrase "nominally Powell-like" is his. See Robert K. Fullinwider, "Affirmative Action," in *The Stanford Encyclopedia of Philosophy (Summer 2009 Edition), ed. Edward N. Zalta*, http://plato.stanford.edu/archives/sum2009/entries/affirmative-action.

6. See James E. Jones, Jr., "The Rise and Fall of Affirmative Action," in *Race in America: The Struggle for Equality*, eds. Herbert Hill and James E. Jones, Jr. (Madison: University of Wisconsin Press, 1993), 348–349.

7. See Walter Feinberg, *On Higher Ground: Education and the Case for Affirmative Action* (New York: Teachers College Press, 1997).

8. Jones, "The Rise and Fall of Affirmative Action," 350. See also Bernard Boxill, "Affirmative Action in Higher Education," in *A Companion to the Philosophy of Education*, ed. Randall Curren (Malden, Mass.: Blackwell, 2006), 593; and Gertrude Ezorsky, *Racism and Justice: The Case for Affirmative Action* (Ithaca, N.Y.: Cornell University Press, 1991), 28–29.

9. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978), 232.

10. Ibid., 225–228.

11. Boxill, "Affirmative Action in Higher Education," 597. See also Robert K. Fullinwider and Judith Lichtenberg, *Leveling the Playing Field* (Lanham, Md.: Rowman and Littlefield, 2004), 17–38. The "Michigan Mandate" outlined in *Gratz v. Bollinger*, 135 F. Supp. 2d 790 (2001) at 796–797, closely

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resembles the integration argument; see Fullinwider, "Affirmative Action": "1. The leadership of the state ought roughly to represent the state's population.… 2. The University ought to graduate…future leaders that conform to this representational goal. 3. To graduate such rising generations, it needs to admit racially and ethnically representative classes."

12. See Boxill, "Affirmative Action in Higher Education," 603; see also Kenneth A. Strike, "Discussion of Fullinwider and Lichtenberg's *Leveling the Playing Field*," *Theory and Research in Education* 4, no. 2 (2006), 190. Strike argues that the legitimacy of American society depends on not unfairly excluding people from positions of leadership. Since universities are the primary gateway to such positions, the diversity argument (as articulated by Powell in *Bakke*) contributes to the legitimacy argument (as articulated by O'Connor in *Grutter*). See also William G. Bowen and Derek Bok, *The Shape of the River* (Princeton, N.J.: Princeton University Press, 1998).

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