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Claremont McKenna College

**Fair Equality of Opportunity: Reconceiving Affirmative Action through a Rawlsian
Lens**

SUBMITTED TO

PROFESSOR RAJCZI

AND

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BY

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Abstract

This paper examines common and past applications of affirmative action, including arguments for and against the application; presents John Rawls' theory of justice, and proposes a framework using Rawls' theory for future applications of affirmative action. The proposal relies heavily on the principle of fair equality of opportunity, both as an indicator for when using affirmative action is appropriate as well as a tool to help identify the people that affirmative action programs should target. Using this framework, the public education system is identified as a sector of society that fails to provide fair equality of opportunity for all citizens, and an example of how the Rawlsian conception of affirmative action should be used in practice to help address the inequalities and help restore equality of opportunity within the public education system is given. Objections to affirmative action, both in general and more specifically tailored to the model proposed in this paper, are raised and responded to. This paper comes to the conclusion that affirmative action programs, when targeted towards individuals who are denied fair equality of opportunity and have low rates of social mobility, will help create a more just society.

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Introduction

Affirmative Action is a term used to describe giving a candidate for an open position preferential treatment of sorts based on a quality that is not directly related to his or her ability to competently fill that position. Affirmative Action can be formulated in many different ways and implemented in several different areas: it can be formulated so that its beneficiaries are men, women, or people of a certain race regardless of gender; it can be implemented in hiring practices and in higher education practices. Perhaps because Affirmative Action has come to be such a broad concept in our society, it is sometimes hard to have discussions about it, including if and how it should be implemented and for what reasons. The aim of this paper is to understand the historical context of Affirmative Action and to understand how we should look at Affirmative Action in a Rawlsian framework.

The first section will provide an overview of Affirmative Action, including the history, common justifications for it, and notable Supreme Court cases surrounding Affirmative Action. The second section will provide an overview to John Rawls' theory of justice. The third section will examine the status of the Principle of Fair Equality of Opportunity in current society and offer a formulation of Affirmative Action that should be used to address the failings of Fair Equality of Opportunity that also adheres to the Rawlsian Framework.

1. An Overview of Affirmative Action

Affirmative action programs in the United States gained popularity after World War II, during the expansion of civil rights in the 1950's and 1960's. Perhaps most significantly, the Civil Rights Act of 1964 proscribed various forms of affirmative action in order to ensure that employers behaved in accordance with the Act (Fullinwider). This encouraged employers and educational institutions to set goals for the number of racial minorities employed or enrolled (Fullinwider), which necessitated the use of affirmative action in order to reach these goals. Even when affirmative action was no longer needed to ensure compliance and to ensure diversity and antidiscrimination, the concept had become so popular that it was still used both in hiring practice and admissions decisions in higher education.

Current Justifications for Affirmative Action

There are several justifications for affirmative action, and it can take many different forms. Though the beneficiaries and the methods may vary depending on which justification is being used, affirmative action usually aims to give opportunities to individuals from marginalized groups that might not otherwise be afforded a certain opportunity. Of course, other types of affirmative action do exist in which an institution aims to give benefit to individuals that we would not reasonably consider to be marginalized. Examples of this would include giving weight to students whose parents might provide financial incentive, or perhaps to a student athlete that has the potential to

drastically improve the school's team. While these types of affirmative action that target non-marginalized individuals are worth discussing, that discussion would be drastically different than the one surrounding affirmative action as it targets marginalized individuals. For this reason, I will be focused on and only consider affirmative action as it is aimed at marginalized individuals. This next section will examine several common arguments for why affirmative action can be justified through certain means and also explore some common objections to these arguments.

I. The Need for Role Models

One justification for affirmative action is that it provides better role models for individuals from marginalized groups. In a case where affirmative action is invoked for the purpose of providing role models, a well qualified candidate's membership in a marginalized group "[seems] to be, itself, a qualification" (Thomson 366). This type of affirmative action may be particularly useful in academia, as displayed by Judith Jarvis Thomson's *Preferential Hiring*; when a student from a marginalized group is exposed to professors only from dominant groups, they may feel as though a person like themselves cannot be successful in that field. Having a professor that "looks" like them, or being able to identify with a person who has found success, would help encourage the student by showing them that it is indeed possible for members of their marginalized group to have that kind of success. "[Members of marginalized groups] do need concrete evidence that those of their race or sex can become accepted, successful, professionals," (Thomson 368), and by giving more members of marginalized groups opportunities to enter the academic world as professionals would provide those students with that evidence.

One objection to this argument might be that if we are to accept that affirmative action should be utilized in order to provide better role models for individuals from marginalized groups, we must also accept that a white male might also need other white males as role models. However, if a white male insisted on having another white male for a teacher, or a boss, “we would feel that this was due to prejudice, and that it was precisely to be discouraged, certainly not encouraged by establishing hiring ratios” (Thomson 368). To provide similarly identified role models for minorities but not for non-minorities is a double standard, and if we can see that the white male’s desire for a role model that looks like him stems from prejudice, we should also see that providing role models for minorities based on the fact that they look the same is perpetuating prejudice. As Louis P. Pojman argues, moving past this prejudice will be more beneficial to the individuals and to society, stating that “more important than having role models of one’s own type is having genuinely good people, of whatever race or gender, to emulate” (190).

While this counter argument does raise some valid concerns, namely that we shouldn’t condone any type of prejudice, it seems to be ignorant of the actual circumstances where this type of Affirmative Action might be employed. For example, if there is a particular field that is dominated by white men, such as chemistry, a white male student does not need to look very hard to find role models in the field, even if he does not have that role model in the classroom with him. A female student, if she is placed in a classroom with a male professor, might be unable to find a female role model elsewhere in the field, signaling to her that this is not a field for women. This does not mean that necessity alone justifies the marginalized individual’s need for a role model that shares

the same race or gender; marginalized individuals will often times hear a societal narrative that believes them to be inferior. Women will often hear that they are less capable as scientists than men, regardless of the actual amount of women that currently have found success in scientific careers. Therefore, it is necessary to look at the societal narrative as well as the current demographics when deciding whether or not it is permissible for an individual to want a similarly identified individual as a role model.

II. The Need to Better Serve Communities

Similar to the need for role models, a type of affirmative action could be justified by the need for professionals that can better serve a community. This differs slightly from the need for role models; as Thomson points out, it is possible for a member of a marginalized group to learn successfully from someone who is not a member of the same marginalized group (368), so affirmative action that aims to provide role models goes above ensuring that the students have access to an professor they can effectively learn from, and thus, an education. However, there are some cases where a member from the dominant group may not be able to adequately serve the needs of members of the marginalized group. This could stem from prejudices coming from either side. Thomson mentions that women, in particular, might be deemed by professors as ‘not serious’, and as a result, their grades may suffer (365-366), demonstrating how prejudice against the person receiving the service can be harmful towards members of marginalized groups. Similarly, in his evaluation of the Davis Medical School’s application process, Dworkin remarks that a candidate’s race may serve as a qualification “in view of society’s present needs for medical services” (299). This ‘need’ does not stem from the inherent value of a doctor

with a certain skin color, but the fact that some patients may not feel comfortable seeing a doctor from a dominant group, demonstrating how prejudice coming from the marginalized group can prevent those individuals from getting the services they need. In these types of situations, affirmative action would serve to choose individuals that would be less likely to pass judgment on the people receiving services, as well as less likely to be avoided by people seeking out services because of a similar judgment.

As the need for role models and the need for people that can better serve communities made up of marginalized groups justifications were similar in reasoning, the counter arguments are also similar. If there is a community that is primarily made up of African Americans that is underserved medically, those in favor of affirmative action might propose admitting more African Americans into the local medical school in order to produce doctors to serve the community. Now imagine that there is a community consisting mainly of white people that is underserved medically; if a nearby medical school proposed to recruit white medical students to eventually serve the community, it is not unreasonable to assume that we would presume they were being prejudiced in their assumption that African Americans could not adequately serve their community. As allowing for similarly identified role models for minorities and not for non-minorities is a double standard, and as allowing similarly identified role models for both groups perpetuates prejudice, allowing for affirmative action to more selectively choose people to serve a community based on race or sex is also allowing for prejudice to survive in those communities.

Again, this type of objection, one that hinges on the double standard, fails to take into account the current social climate. Perhaps if we set aside medical professionals as

an example, and instead use police officers as an example, this makes more sense. If a community is currently made up of mostly African Americans who have been targeted, perhaps unjustly, by a police force made up mostly by white people, they may feel as though they are being victimized by the police, which could lead to resentment¹. If affirmative action is utilized in order to choose police officers that better represent the local demographic, it is likely that there will be less resentment and distrust, leading to a better community for those who live in it.

III. The Need for Diversity

Another justification for affirmative action, similar to the need for role models in that it allows for one's race (or sex, or religion, etc.) to act as a qualification, is the need for diversity within the classroom or the workplace. By allowing people from marginalized groups the opportunity to enter the same space as the dominant groups, it is believed that the increased diversity creates a more enriched environment, benefiting both types of individuals. Individuals from the dominant group are able to sympathize with their peers from the marginalized groups, and as a result, some of the stigma surrounding the marginalized group is removed. Society as a whole also benefits from this diversification; in terms of college admissions, if students are able to access this enriched learning environment, they will have an increased capability to give back to society. If we look back at the defense of the need for role models and the need to better serve communities as justifications for affirmative action, we see the role that the social climate

¹ The shooting of Mike Brown, and the subsequent unrest, that took place in Ferguson, MO in August, 2014 is a strong example of this kind of racial tension, if one needs a concrete example.

plays in creating and perpetuating stereotypes that may limit how marginalized and non-marginalized groups can interact. Diversity in certain settings, such as in the classroom or in the office, can help to reshape the social climate to better facilitate interactions.

It is difficult to oppose to the alleged good that diversity creates, but one does not necessarily need to deny that diversity is good in order to oppose diversity as a justification for affirmative action. While those who reject the need for role models as a justification for affirmative action might deny that having someone who looks like you actually creates a better role model, one can reject the need for diversity as a justification by opposing the ramifications of choosing candidates based on their belonging to a marginalized group. The objection does not stem from the objective ‘goodness’ or ‘badness’ of diversity, but from balancing the benefits of diversity against the right of the candidates to be judged solely on their merit. Pojman argues that unless the candidates are adequately qualified and competent, the benefits of diversity will be overpowered by the lack in quality; “I do not care whether the group of surgeons operating on me reflect racial or gender balance, but I do care that they are highly qualified” (196), Pojman offers.

Perhaps this objection can be answered by the practical application of affirmative action. If affirmative action is applied in such a manner that it only provides the minority applicant with the barest of advantages over the non-minority applicant, diversity can be achieved without sacrificing any competence, or by only sacrificing a minimal amount of competence. There are some situations where every bit of competence counts, such as with a brain surgeon, so we still might object to the most seemingly negligible decrease in competence. In these situations, perhaps we might not want to pursue diversity at that

cost. However, we can still use the need for diversity as a justification for affirmative action at other levels; if we want the most competent surgeon, perhaps we don't employ affirmative action at the hiring phase, but at the phase where the potential surgeon is applying to medical school.

IV. The Need to Compensate for Past Discrimination and Injustice

Affirmative action is often justified using the need for compensation for past discrimination. Certain groups have been denied entrance to certain institutions or denied employment at certain places simply in virtue of them being a member of a marginalized group. The denial can be a result of unofficial (or, in particularly flagrant cases, official) policies that bars members from marginalized groups from being accepted in an institution or hired by a company, which appears to be a clearer case of discrimination. However, the denial can be a result of life-long social disadvantage, which is still discrimination, but may be a little less obvious. A strong example of this kind of denial is the education received by African Americans in the south before World War II; in the south, African Americans were only able to attend overcrowded schools for a shorter period of time that was afforded to their white counterparts (Bok and Bowen 2). As a result, their chances of receiving any type of higher education were severely limited. In order to compensate for this past discrimination, affirmative action might be invoked to give members of the marginalized group an opportunity that they might have had if it had not been for the discrimination. In these kinds of cases, where affirmative action is used as a compensatory tool, it can take two forms: one's membership in a marginalized group

can count as a qualification that is added to her other qualifications, or her membership in a marginalized group give her priority over candidates that are as equally qualified.

Those who oppose affirmative action might object to the compensation for past discrimination might do so because the argument “involves a distorted sense of compensation” (Pojman 193). The distortion can arise from either the failure to correctly identify who owes compensation or because the amount of compensation owed has been incorrectly calculated. In the case of the false compensator, affirmative action places a burden on individuals that have not acted unjustly. To demonstrate this, Pojman offers the following example: my parents buy me growth hormones to ensure that I will be tall and can therefore be a good basketball player, but the hormones are stolen by the parents of another child, who then grows up to become a famous (and wealthy) basketball player (195). While it seems obvious that I have had something taken away from me, namely my opportunity at a lucrative basketball career, the person that has the career at my expense is not the one who owes me compensation; his parents are, as they are the ones that committed the wrong doing. Similarly, the people who denied African Americans fair education in the past are not the ones who shoulder the burden of affirmative action; it is shouldered by individuals that have not played any part of the past discrimination, even if they have benefited from it. Therefore, it is wrong to demand compensation from them.

In the case of the miscalculated amount of compensation owed, affirmative action is to be opposed because it fails to adequately address the suffering of those who have been discriminated against in the past. For example, an African American student fails to receive an education on par with her white peer, and down the line, she is unable to meet

the enrollment requirements at the local University. Proponents of affirmative action as a means to rectify for past discrimination will argue that had the African American student received the same education as her peer, she would have been able to meet the enrollment requirements, but those who oppose Affirmative action will point out that this claim cannot be proved. If this claim cannot be proved, Affirmative Action is unjustified because it is used to give the African American something that is not rightly hers.

V. Equality of Opportunity

Equality of Opportunity is the basic principle that there are no limitations, sometimes formal, and sometimes informal, on who can be chosen to fill an open position². If there has been some limitations preventing a group of people from obtaining certain positions, affirmative action might be used to make up for the failure to provide equality of opportunity by deliberately choosing candidates who have been denied the opportunity to pursue a position. An example of affirmative action driven by the previous failure equality of opportunity might involve choosing the least qualified candidate in order to give them in depth training to enable them to competently fill the position. While some might raise objections similar to the ones raised in opposition to diversity driven affirmative action, namely that we want people to be competent, the response would be similar to the one given earlier; it depends on which phase is employing affirmative action. If a candidate wants to become a surgeon, there are three major levels during which affirmative action could be applied: at the undergraduate level, at the graduate

² A more nuanced definition of equality of opportunity will be discussed and used in Chapter 2.

level, and at the hiring level. In this case, affirmative action would be best applied at the undergraduate level; at the graduate level, it would be much harder for the candidate to bridge the knowledge and competency gap caused by the failure to provide equal opportunity for all, and at the hiring level we run into the pressing concern of whether she is competent enough for her patients to trust her work.

This objection, one that questions the candidate's competence, might find the above solution unsatisfactory. The Mismatch Hypothesis³ could help to further this objection; even if the potential beneficiary of the proposed affirmative action application has been denied the opportunity to develop her ability, placing her in an institution that does not fit her skill level will still not allow her to develop her skills. If the potential surgeon benefits from affirmative action in the form of getting into an elite college for her undergraduate degree, she might not be able to keep up with the rigorous demands and that could cause her to drop out, or at least switch to a less demanding career track. Surely this gets her further away from her ultimate goal of becoming a surgeon than her going to a less elite college as a result of there not being an affirmative action program in place.

Equality of opportunity can also fail due to informal factors, including certain biases that negatively impact members from marginalized groups and societal prejudice against members of marginalized groups. In this case, an individual may have been able to develop their abilities, but not the extent that others have. Or, they might have been in a situation where, as they tried to develop their abilities, they were dissuaded from doing so. An example of that might be a woman trying to enter a male dominated field; she is

³ The Mismatch Hypothesis is further discussed in Chapter Three.

able to attend class, and assuming that she has a professor that takes her serious (as proposed by Thomson as a reason why some marginalized students would benefit from affirmative action in hiring practices), she is able to develop her ability just as the men in her class are. But, suppose that the men in her class are deeply misogynistic, and they create an unhealthy learning environment for her, causing her grades to not adequately reflect her ability or effort. Her lack of academic achievement, though not caused by an absence of fair equality of opportunity, is a result her not being able to fully take advantage of her opportunity. This aligns with a notion proposed earlier, that the societal climate can affect how a candidate performs. Affirmative action, should it be used when she applies for a job or for further education, would take into account that she was unable to fully develop her skills and she would not be penalized for it, as it was not her fault.

However, this kind of negative pressure can be attributed to the perhaps juvenile behavior of a few individuals, and may not warrant a response that is as extensive as affirmative action. Similarly, using affirmative action to remedy the alleged wrongdoing would be an over-reaction, especially if it was an isolated incident. Further, if affirmative action is used in these types of scenarios, we would run into similar problems as those that the need for past compensation argument presents: it would place the burden on individuals that have not necessarily done anything wrong.

Notable Supreme Court holdings regarding Affirmative Action

Ever since affirmative action gained popularity, there has been public backlash, which has resulted in several Supreme Court cases, the rulings of which have helped to shape and reshape how affirmative action is and can be used.

The first major case in the affirmative action debate was *The Regents of University of California v. Allan Bakke* in 1977. In this case, Bakke was applying for a spot at University of California at Davis' Medical School. The University had previously adopted an affirmative action program that aimed to increase the enrollment of minority students. The program "[set] sixteen places [for enrollment] aside for which only members of 'educationally and economically disadvantaged minorities' compete" (Dworkin 293). When Bakke's application for enrollment was rejected, he believed that, had those sixteen spaces not been set aside, he would have been offered a space for enrollment. Because Bakke had been systematically denied the opportunity to apply for one of those sixteen spaces, and because the University "[had] conceded that it could not prove that [Bakke] would have been rejected if the sixteen places reserved had been open to him" (Dworkin 293), the Supreme Court ruled that these kinds of explicit quotas do violate constitutional rights.

In 2003, the Court heard the cases *Grutter v. Bollinger* and *Gratz v. Bollinger*. In both cases, students challenged the affirmative action programs adopted by the University of Michigan; *Grutter* challenged the use by the University of Michigan Law School, which "[provided] an un-quantified general racial [preferences] in admissions in order to promote diversity" (Paulsen 1454), while *Gratz* challenged the affirmative action program adopted by the University in undergraduate admissions. In the undergraduate admissions, the University "gave a quantified 20-point bonus in an applicant's

admissions ‘score’ based (out of 100 points total) on an applicant’s racial minority status” (Paulsen 1454). In both cases, the Court found the University to be violating constitutional rights with their affirmative action programs. Although the University sought to pursue diversity, which was confirmed to be a compelling interest, the affirmative action programs it adopted failed to pass strict scrutiny; the way that the University considered and weighed one’s race in the admissions process was not ‘narrowly tailored’ to achieving a more diverse student body.

In 2013, the Court heard the case *Fisher v. University of Texas*. In this case, Fisher was denied enrollment at the University, which had adopted an affirmative action program that used race as a “plus factor” when weighing all of a candidate’s qualities; it was weighed against many other factors and was not overly determining. When the Fifth Circuit court heard the case, it was decided that the University had not acted wrongly with its affirmative action program. However, the Supreme Court found that the lower court had not held the University up to the strict scrutiny standards as established by earlier cases, and the case was remanded. Once the case was heard once again by the lower court, it was decided that the use of race as a factor was acceptable, as long as it was used in a ‘holistic’ manner.

2. An Overview of Rawls' Theory

In his theory of justice, Rawls offers a political theory that attempts to grant all members of society an agreed upon minimal set of rights and liberties, which ensure that they are able to participate in society as full members. The theory of justice has three principles: equal basic liberties, fair equality of opportunity, and the difference principle.

The first principle, that of equal basic liberties, is fairly straightforward. As per Rawls' own definition, "the basic liberties of citizens are, roughly speaking, political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law" (Rawls 61). All of these basic liberties help enable the individual to create who they want to be, and allows them to participate in society; through the freedom of thought and political liberty, the individual is able to formulate a conception of the good and act on it through political means. Combined with freedom from arbitrary arrest, the individual is able to feel secure in acting on his own beliefs, and is not constrained to acting in certain ways or adopting certain beliefs out of fear of the repercussions of not doing so. When all of these liberties are combined, they give the individual the potential of participating in society. Whichever scheme of these liberties is decided upon must be granted to all people equally. The first requirement of Rawls' theory that must be fulfilled is this principle of equal basic

liberties; a society will still fail to meet the standards of justice if it meets the second two principles but fails to fulfill equal basic liberties.

Rawls presents the second and third principles together as follows: “social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all” (Rawls 60). Clause (b) is what we have deemed to be the principle of fair equality of opportunity. Rawls goes on to clarify that “those with similar abilities and skills should have similar life chances [...]. The expectations of those with the same abilities and aspirations should not be affected by their social class” (Rawls 73). The implication of this principle is clear; wealth should not be a limiting factor in one’s success. In order for wealth or, perhaps more accurately, the absence of wealth, to not act as a limiting factor, goods that provide the individual with a basic foundation for success must be provided to all individuals at either no cost or a minimal cost. The best and most widely used example of this would be education; an education, at least at a very basic level, is commonly thought of as being necessary for one to be successful later on in life. Therefore, a basic education must be made available to all students, regardless of their ability to pay for it; we see this enacted through the public school system. Some might argue that the presence of private schools undermine the worth of a public education; if the quality of a private education is so much better than that of a public one, the public education becomes comparatively worthless, so the absence of wealth does act as a limiting factor. However, that is not exactly the case. A minimal level of education, which provides the individual with at least the knowledge needed for future success, is provided by the public school; it just so happens that the private school provides the students with more than the minimum. In

this case, the lack of wealth is not acting as a limiting factor, but the presence of wealth is acting as a maximizing factor. Additionally, Rawls' first principle, that of equal basic liberties, entitles individuals to hold private property, which can include wealth to an extent; therefore, if a person has enough wealth that they can afford a private education, it could be seen as a violation of their basic liberties to prevent them from doing so in order to ensure that everybody received an education of exactly equal quality.

This principle of fair equality of opportunity differs from the principle of formal equality of opportunity in at least one significant way; when dealing with formal equality of opportunity, there must simply be no formal, or regulated, limits on who may be granted an opportunity. This does not rule out informal limits. Imagine that there is an opening for employment, and that the opening must be filled with someone who has qualification A. The principle of formal equality of opportunity has been met, even if society is arranged that the only people who can acquire qualification A are the wealthiest members of society. In order for Rawls' principle of fair equality of opportunity to be fulfilled, "chances to acquire cultural knowledge and skills should not depend on one's class position, and so the school system, whether public or private, should be designed to even out class barriers," (Rawls 73). In other words, no individual should be barred from seeking out qualification A by financial means. Under formal equality of opportunity, wealth can operate as an informal limit. Fair equality of opportunity takes an active role in providing all individuals with the necessary qualifications, and, in doing so, prevents wealth from operating as a limit, either informally or formally.

Some form of equality of opportunity is needed in part to help secure equality of basic liberties; if opportunities were not open to all in either the formal or the fair sense,

one's merits would be completely discounted. All positions would be determined by factors individuals could not possibly control, such as which socio-economic class they were born into. Without equal opportunity, people are predestined to become certain things. Without any equality of opportunity, there is the possibility that people will have to be born into certain positions. For example, think of a president as compared to a king; a person must be the son of the current king in order to have the chance to become a king in the future, while anybody can become president¹. If there were fair equality of opportunity, anybody who was significantly determined and worked hard enough could have a chance of being president; even if an individual was born into an impoverished family, they would still be able to get an education that would enable them to be successful². Under formal equality of opportunity, there are no such guarantees that an individual would receive a quality education or that, with enough hard work and determination, she would reach any level of success; all that is guaranteed is that she is not prevented from becoming president by any formal rule. While formal equality of opportunity prevents formal limitations from being placed, fair equality of opportunity actually provides individuals with the fundamental tools of success in order to help them

¹ There are some restrictions on who can become president, namely nationality and citizenship requirements, along with a minimum age requirement. However, one does not have to be related to a former president in order to be eligible for the presidency, and it is in that sense that the position is 'open'.

² Being 'successful' might not always entail an individual reaching his or her intended goal; in the example above, the individual might not be able to become president due to the amount of competition involved in gaining a position of that high esteem, but perhaps she is able to become a leader on a smaller, more communal level. Even though she didn't reach the intended goal, she has achieved something of a similar merit, although on a different scale.

be successful. For this reason, the principle of fair equality of opportunity is preferable to its alternatives.

Clause (a) has come to be known as the difference principle. The inequalities that Rawls' refers to in this principle do not include basic liberties, but rather the inequalities that result from various social and economic institutions. Rawls states that the difference principle makes sure that the inequalities are "reasonably expected to be to everyone's advantage" (60), but perhaps this is misleading. Given the constraints of reality, and the natural limits of various resources, it may be difficult to give everyone an advantage. Therefore, it is more useful to look at the difference principle as acting to maximize the minimum position. "The intuitive idea is that the social order is not to establish and secure the more attractive prospects of those better off unless doing so is to the advantage of those less fortunate" (Rawls 75), and so the lower class must have priority. This could be seen as being to everyone's advantage, as it ensures a higher minimum than might otherwise be offered to anyone who might occupy the worst off class, including people who might experience a downgrading of socioeconomic status from a higher class. An experience of the difference principle in action might be found in tax policies; by taxing those with more wealth at higher rates, and using those taxes to support public institutions, such as public schools and libraries, this advantages the lower class, as they might have to rely on those public institutions because they lack the economic resources to access those types of resources on their own.

3. An Ideal Formulation of Affirmative Action

Under a perfect or ideal implementation of Rawls' theory of justice, there would be no need for affirmative action. However, we do not live in a society where all the requirements of Rawls' theory are met. While the first principle of his theory might be satisfied, the second two have not been. Admittedly, because it is difficult to define what constitutes giving someone a 'fair shot', it is hard to determine what exactly our society would look like if the principle of fair equality of opportunity were to be fully implemented. Since the fair equality of opportunity principle prevents wealth, or the lack thereof, from acting as an overly determinate factor in one's success, an individual's success should be heavily influenced by how motivated and determined one is, as well as how hard they work to achieve their goals. This would mean that there would be a great deal of social mobility, as the socioeconomic status one was born into could be overcome with a certain amount of hard work. It wouldn't matter if an individual had been born into the lowest socioeconomic class; if she worked hard enough, she could move into a higher socioeconomic status. Even though we don't have a clear picture of what perfect fair equality of opportunity would look like, we can still determine that we currently do not operate under a perfect implementation of the principle by looking at the amount of social mobility in our society. The rates of social mobility have remained relatively stable over a period of several decades. Despite the stability of the rate of social mobility, the rate of social mobility in the United States is lower than it is in countries with comparable economic development.

One potential cause of this lack of social mobility can be found in the inadequate public education system, and the inequalities that exist within that system. Public education can be seen as an attempt to fulfill the principle of fair equality of opportunity; it helps to ensure that everyone is able to access an education and to prevent education from being restricted to only people who can afford it. However, there are great inequalities in the public education system. Public education in America is funded in part by property taxes of the surrounding communities, meaning that neighborhoods with more expensive houses will have higher budgets than communities that do not. The obvious implication of this is that students that attend public schools in wealthier districts, who will more often than not be a child of wealthier parents, that will be able to provide a lower student to teacher ratio, higher salaries for teachers, which may give them more incentive to be invested in their performance, both of which have the potential to result in a higher quality of education. This is problematic because the base level of education and, as a result, the rate of social mobility that one receives is still dependent on the socioeconomic status of their family.

The wealth of the community, as well as the family's individual wealth, may be the biggest factor in the quality of the public education that a student may receive, but race also plays a factor in determining the level of education one is likely to receive, as well as playing a factor in determining one's likelihood of moving into a higher socioeconomic class. Schools are no longer formally segregated, but given the current demographics of our society, schools are still not heavily integrated; in the 2007-2008 school year, for example, 87 percent of white students attending a public school were enrolled in a school where the student body was at least 50 percent white (Aud, Fox, and

KewalRamani iv). There are benefits to attending a school with a majority of white students, even for non-white students; in the 2007-2008 school year “about 25 percent of secondary mathematics teachers who taught in schools with at least half Black enrollment had neither a certification nor a college major in mathematics, compared to 8 percent of secondary mathematics teachers who taught in schools with at least half White enrollment” (Aud, Fox, and KewalRamani iv). Even within schools in similar settings (i.e. Rural or urban), there is a wealth imbalance between white students and students of color. In 2009, the percentage of white students qualifying for reduced lunch programs was lower than the percentage of any other students of any other ethnicity regardless of the school’s setting (Aud, Fox, and KewalRamani 36). This means that, generally, white students are able to attend schools where they are the majority and that they are wealthier than their non-white peers. While this doesn’t concretely prove that the public education system fails to provide an adequate education to all students, it does show that the quality of education that many non-white or socioeconomically disadvantaged (and in particular, non-white students who are also economically disadvantaged) students receive is different, and arguably worse, than the education received by white students.

Furthermore, there is evidence that “areas that are more residentially segregated by race and income have lower levels of [social] mobility” (Chetty, Hendren, Kline, and Saez 3)¹. When we take into consideration the effect that wealth plays in determining the quality of public education alongside the observation that there is a shift in quality of the education based on the amount of non-white students enrolled in a school, it becomes apparent that socioeconomically challenged students from communities with a high

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percentage of minorities are not being granted fair equality of opportunity. They are denied fair equality of opportunity because they are not receiving an education that adequately prepares them to be successful later on in life.

In order to address the inequalities of the public education system, which is supposed to act as an equalizer, the standards must be raised. However, that is a different discussion, and one that likely does not have an easy solution. Even if there was an obvious solution on how to reform the public education system, and we could implement these new standards immediately, there would still be an entire generation of students who have failed to receive fair equality of opportunity. Affirmative action can serve as a tool to address the failure of fair equality of opportunity in the meantime, and can help to mitigate the lack of achievement that results from the current racial and socioeconomic inequalities that exist in the public education system. Since one result of the lack of fair equality of opportunity in the public education system can be the reduced likelihood of students pursuing higher education, affirmative action programs can be used to address this and increase the amount of these students who do pursue a higher education. Therefore, affirmative action, as it is used to address the inequality of opportunity in the public education system, can be used in college admissions processes.

This means the ideal form of affirmative action should primarily use the principle of fair equality of opportunity as a means for determining whom it should benefit. Affirmative action programs should target individuals that have had the least equality of opportunity, as demonstrated by the lowest rates of social mobility. Given the realities of the current public education system, this means that students of a lower socioeconomic status from communities with large populations of minorities should be the beneficiaries

of affirmative action programs in the higher education admissions process. When affirmative action is used in this way, it prevents an individual's race and socioeconomic status, and the previous lack of opportunity caused by these attributes, from counting against them. By doing so, affirmative action programs allow the same results that likely would have occurred had there not been a previous failure of the principle of fair equality of opportunity.

Now that we've identified who affirmative action programs should benefit, it needs to be decided how affirmative action programs should operate: a quota system, the 'holistic' approach used by the University of Texas, or some other method. Quota systems have already been discredited, and therefore, I will not consider it here. The more holistic approach, where one's socioeconomic status and minority status is factored in alongside all of their other merits, and thereby becoming only one factor of several, would enable affirmative action programs to reach the intended targets while minimizing any appearance of diminishing the merits of students that the programs do not benefit. By giving these marginal considerations to socioeconomically disadvantaged, we are able to give them advantages in gaining admission to colleges or providing them with other opportunities while also not significantly disadvantaging others; it is important that affirmative action programs do not create insurmountable obstacles that prevent a significant amount of students that are not targeted by these programs from gaining admission, as that undermines the very principle it seeks to serve. However, when one's race and socioeconomic status is considered in conjunction with the amount of effort they have made, and what they have accomplished, it becomes easier to imagine what they might have accomplished had there not been that earlier failure of fair equality of

opportunity. Under this system, colleges would examine the admissions qualifications of students who have not been denied fair equality of opportunity as they are and the admissions qualifications of students who have suffered from a denial of fair equality of opportunity as they would have been had it not been for the denial. By using this holistic approach, affirmative action programs are able to help those it seeks to help without systematically preventing those students who are not targeted by affirmative action programs from gaining admissions. It also benefits students who have worked hard and would have likely succeeded without the help of an affirmative action program had their circumstances been different while not giving those same benefits to others just by the virtue of their circumstances.

It seems reasonable to assume that after a few generations of affirmative action programs, the rates of social mobility would increase, even if only marginally. However, this does not mean that there should be an expiration date of sorts for affirmative action programs. Under the model I have proposed, individuals from low-income areas highly populated by minorities would experience an increase in social mobility. Once their rates of social mobility were comparable to the rates for communities that are comprised of a majority of white individuals, it would no longer be suitable to use racial demographics to determine potential beneficiaries of affirmative action programs. However, communities with public schools offering low-quality education, namely low-income communities, will likely still suffer from decreased rates of social mobility. In this case, affirmative action programs should shift its criteria and then focus on low-income areas regardless of the racial demographics. There will also be the reality that students from wealthy families will be able to afford better quality education outside of the public

school system, as well as other enrichment programs that will allow them better opportunities later in life; on the opposite end of the wealth spectrum, there will always be students from low-income families and schools who won't be able to afford such opportunities, and so there will always be a need for socioeconomically based affirmative action. Considering that a college education is becoming more and more important in regards to one's future socioeconomic status, affirmative action should be used during the college admissions process in order to ensure that students from lower socioeconomic statuses are not further disadvantaged by not being able to attend.

Objections to Affirmative Action

One potential objection to affirmative action programs in general is the reverse discrimination. The first challenge in examining whether or not the reverse discrimination objection does any damage to this Affirmative Action debate is to determine what reverse discrimination actually is. In order to do this, it may be helpful to first clarify the different types of discrimination that exist.

Fred L. Pincus proposes three different types of discrimination: individual discrimination, institutional discrimination, and structural discrimination (2-3). Individual discrimination operates on the individual level and "refers to the behavior of individual members of one group that is intended to have a differential and/or harmful effect on members of another group" (Pincus 2). Examples of individual discrimination could potentially include things like a prejudiced shop manager following an individual around the store because she believes him to be a shoplifter and, on perhaps a more severe level, things like hate crimes. Institutional discrimination operates on a more legislative, or

legal, level and “refers to the policies of majority institutions and the behavior of individuals who implement these policies and control these institutions that are intended to have a differential and/or harmful effect on less powerful groups” (Pincus 2). Any type of policy (whether it be a federal policy, or a state policy, or even just a corporate policy) mandated segregation could be considered a display of institutional discrimination, including Jim Crow laws (Pincus 2). Structural discrimination is similar to institutional discrimination in that it refers to the policies of major institutions, but it differs in that the policies are not intended to be harmful; rather, “the individuals who implement those policies...are intended to be race/gender neutral but which have harmful effects on people of color and women” (Pincus 3). Structural discrimination may be well intended, but it ignores biases that are already present in our society, and then leaves us with no way to address and correct them. Pincus gives several examples of structural discrimination, including “the use of white-male-biased SAT tests for college admission” (3); the implication of having a race/gender neutral policy implemented at a point after the bias has been allowed to manifest itself in lower scores for racial minorities and women is that they will automatically be disadvantaged during the college admissions process because their test scores do not accurately represent their ability.

When we discuss reverse discrimination in terms of the affirmative action debate, it is often “used to describe a situation in which a white male does not get something (a job, promotion, contract, college admission) that he may have gotten if there were no affirmative action policy in place” (Pincus 3). Opponents of affirmative action will argue that they are committing reverse discrimination by negatively impacting their ability to secure the position they are applying for. At the same time, affirmative action programs

are seeking to correct the preexisting biases that negatively impact the minority candidate's ability to secure a position, whether it be the same or different. This leads to a complicated situation in which we cannot help the minority without 'injuring' the non-minority. The opponent to Affirmative Action's suggestion that we not intervene in order to not negatively impact those not targeted by affirmative action programs means that we must allow for the biases' continued presence. This seems unfair because it means that the non-minorities opportunity is contingent of the lack of opportunity for the minority. Pincus suggests the concept of "reduced opportunity" (85) that can be used in place of reverse discrimination. Under affirmative action programs, the non-minority applicant will surely suffer from reduced opportunity, but this does not necessarily mean that something unjust or unfair has occurred. Since their original capacity for opportunity was contingent on denying opportunity to minorities, this new 'reduced opportunity' is simply a reflection of the scales being righted; it allows for the non-minority applicant and the minority applicant's opportunity to become more equal. This shows that reverse discrimination as it is used in the affirmative action debate is not strong enough to damage the argument in favor of affirmative action programs.

Another objection that is also raised against affirmative action programs is the 'Mismatch Hypothesis', which states affirmative action programs place the beneficiary at an institution that does not match her skill level. In terms of affirmative action in college admissions, a beneficiary of affirmative action would be accepted into a college that has a much higher SAT score and GPA than her own. Additionally, the college has a performance standard that the student is unable to meet, in part due to her abilities. One potential outcome of this 'mismatch' effect is that the student struggles much more than

she would at a school that was better suited to her ability and her struggle is reflected in her GPA; another potential outcome is that the pressure causes her to drop out.

Opponents of Affirmative Action will use the Mismatch Hypothesis to argue that affirmative action will actively harm those it intends to help, and therefore should be abandoned. There is evidence that suggests that affirmative action does not actually have the negative effects that the Mismatch Hypothesis claims it does, but even if some students who are targeted by affirmative action programs do initially have a hard time adapting to the new increased academic standards, that alone is not enough to discredit affirmative action. It just means that institutions need to offer more support to these students as they acclimate to their new settings. These new support systems could include financial support in the shape of need based scholarships, emotional support in the shape of spaces for students to connect with others coming from similar circumstances, and academic support in the shape of tutors and workshops. By supporting the students, the institution enables them to succeed.

Finally, one might object to this proposal by arguing that it is too speculative; it is only fair for college admissions to take in account one's socioeconomic status and race if they have actually caused a failure of fair equality of opportunity which resulted in a reduced performance. If not, we are giving them an undue advantage. It may be true that once these types of affirmative action programs are used, they do end up benefiting some individuals who would not have achieved more had their circumstances been different, but this does not damage this sort Rawlsian approach to affirmative action. As long as some of the individuals benefited by affirmative action programs would have achieved more had their circumstances been different, the principle of fair equality of opportunity

is being met, even if we can always be working towards perfecting our employment of it. In this case, we should then turn our focus to the difference principle to guide us in deciding whether an individual is an acceptable candidate for affirmative action. Considering that the difference principle instructs us to increase the position of the least advantaged, and that the individuals who would be targeted by affirmative action programs are among the least advantaged, benefiting individuals that meet the socioeconomic and racial profile who may not have achieved more had their circumstances been different is permissible under the Rawlsian conception of affirmative action I have proposed.

Conclusion

There are several areas in our society other than education where there is a failure of fair equality of opportunity, including, but not limited to, housing and employment. Though the example of how the Rawlsian conception of affirmative action given in the last chapter focuses on how to remedy the failure of fair equality of opportunity in the education system, the same type of affirmative action can and should be used to address the other failures of fair equality of opportunity. In different areas, the specifics on who should be considered a candidate for affirmative action might differ slightly, but all uses of affirmative action, regardless of what sector it is being applied in, should follow the same structure: it should identify those individuals who have not received a fair chance, or those that are the least advantaged (as reflected by lower rates of social mobility), in that sector and serve them by using the same process as the affirmative actions programs in higher education admissions processes. When affirmative action programs are utilized in all sectors of society that fail to provide fair equality of opportunity, we will become a more just society for all.

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