

# Can affirmative action be justified?

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## Abstract

This essay argues that affirmative action, defined in terms of ‘strong’ versions such as those that come at the expense of other groups, cannot be justified owing to its arbitrary and even counterproductive nature. Arguments for affirmative action will be explored and refuted, in particular the argument from compensation which states that it is not unjust to give preference to someone over an equally qualified other if society has wronged the group that the first belongs to. Other arguments for affirmative action, including the utility that can be gained from diversity for diversity’s sake, will also be challenged.

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In this paper, I will argue that affirmative action (AA) cannot be justified. I will first set out the definition of AA, drawing a distinction between weak and strong AA. I will then go on to outline arguments in favour of AA based on compensation and demonstrate the arbitrary nature of this approach. Finally, I will refute arguments based on utility, such as diversification and point out that AA can paradoxically harm the preferred groups through the internalisation of a victim-based identity. A victim-based identity, which will be discussed in more

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\* I would like to express my gratitude to Dr Marie Milofsky for reviewing this essay and for always going out of her way to answer my questions. My deepest thanks also go to David Loo, for always listening and being a source of immense support.

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depth later, refers to a loss of confidence suffered by the preferred groups as a consequence of facing renewed discrimination.

AA is the policy of favouring the qualified candidates of one group for positions over the qualified candidates of other groups, on the basis of minority status, gender or economic disadvantage.<sup>1</sup> The aim of AA is to increase the representation of historically disadvantaged groups (also referred to as minorities within this essay) in certain areas like employment and education. For the purposes of this essay, weak forms of AA that involve encouraging minorities to strive for the highest positions, without jeopardising the rights of majorities,<sup>2</sup> will not be discussed. Weak AA typically involves the dismantling of segregated institutions as well as outreach activities to make disadvantaged groups more aware of opportunities – these are generally seen as uncontroversial. This essay will instead focus on the more contentious strong forms of AA, which entail preferential treatment that may come at the expense of the majorities.<sup>3</sup> Examples of strong AA include preferential hiring in the workplace and quotas in university admissions.

One of the chief arguments in support of AA, which I will refute, is the argument from compensation. This states that it is not unjust to give preference to someone over an equally qualified other if society has wronged the group that the first belongs to.<sup>4</sup> This argument assumes that firstly, someone is owed compensation in virtue of his group membership and that secondly, members of the group that perpetuated the injustice owe the person compensation, though they may not have personally done it. On the first count, it is difficult to generalise about all members of a group due to the different circumstances affecting each. By implementing an AA policy that offers preferential treatment to women or

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<sup>1</sup> Sterba, *Affirmative Action for the Future*

<sup>2</sup> Pojman, 'The Case Against Affirmative Action'

<sup>3</sup> Ibid.

<sup>4</sup> Thomson, 'Preferential Hiring'

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historically wronged minority groups, we risk selecting an un-deprived member of a preferred group over a more disadvantaged member of a non-preferred group e.g. a black upper-middle class boy over a white working class boy in the United States. Intuitively, this seems contrary to the principle of compensation since the black upper-middle class boy suffered less injustice than the white working class boy,<sup>5</sup> insofar as the former had better access to education and resources than the latter. If our reason for giving someone preference is because they suffered due to an unjust practice, then we should give preference to anyone who was victimised to a similar degree. This would entail assessing people as individual victims, rather than simply as members of a specific ethnic or gender category.<sup>6</sup> The assumption that someone is owed compensation in virtue of his group membership therefore seems questionable.

Proponents of AA might respond that all individuals in a group have a shared identity that leads to them being classified and responded to in certain ways.<sup>7</sup> Even if efforts to halt discrimination have improved, these individuals still suffer the negative consequences ('downgrading') of being a minority. Either they have been denied an equal chance at the benefits generated by the community or their starting positions have been made worse because the effects of injustice extend across generations. Other members of the group, who might not have been directly targeted, also feel the effects of 'downgrading' via a loss of self-esteem and respect.<sup>8</sup> In short, almost all members of the group, with the exception of a lucky few, have been affected by the historical injustice, thus justifying some form of compensation.

Even if we accept this empirical premise, the conclusion that AA is the appropriate response does not follow. AA, as characterised by preferential selection, does not address the concerns of collective redress because it compensates

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<sup>5</sup> Simon, 'Preferential Hiring: A Reply to Judith Jarvis Thomson'

<sup>6</sup> Ibid.

<sup>7</sup> Appiah, "'Group Rights" and Racial Affirmative Action'

<sup>8</sup> Thomson, 'Preferential Hiring'

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only selected members, not the group as a whole. The ones who are compensated, i.e. by being selected for jobs or university places, often already have the ability and qualifications to be considered. These usually tend not to be the most badly affected by unjust practices, thus compensating them appears arbitrary.<sup>9</sup> Conversely, AA may also overlook certain more disadvantaged members within the group. The concept of intersectionality, which states that different forms of discrimination often interact to reinforce each other, is relevant here. Individuals who are black and female, for instance, are usually worst off because of the multiple ‘disadvantageous’ labels attached to their identity. AA, which compensates on the basis of group membership, often neglects these individual nuances. Again, this does not seem consistent with the principle of compensation. The onus lies on those who believe in AA to launch a moral argument proving that particular claims should be overridden by generic group-based ones.

A proponent of AA might argue that even if some undeserving members who fail to accomplish the desired outcomes are awarded, it is still better to have AA if it means that other deserving members are admitted into the system.<sup>10</sup> Given the existence of strong anti-discrimination laws, surely a better way of acquiring such deserving members – without the taint of the undeserving – is to assess them all as individuals for what they can bring, rather than to sift them out first by ethnicity or gender. A further reason why candidates should be assessed on their own individual merits is because diversity for diversity’s sake can lead to problems, such as the selection of incompetent individuals. Where important positions with outcomes that affect others are at stake, e.g. the job of a heart surgeon or university professor, competence is a strong *prima facie* consideration to achieving the most optimal outcomes.<sup>11</sup>

The second assumption that the argument from compensation makes is that current members of a group responsible for the past injustice should compen-

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<sup>9</sup> Simon, ‘Preferential Hiring: A Reply to Judith Jarvis Thomson’

<sup>10</sup> Appiah, ‘“Group Rights” and Racial Affirmative Action’

<sup>11</sup> Pojman, ‘The Case Against Affirmative Action’

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sate someone from a disadvantaged group. In order to justify compensation that harms one group in society, we need some kind of principled justification as to why they are morally responsible. One such justification, supplied by Thomson, suggests that current members have benefitted from the past wrongs of their community. The problem with this approach is that it advocates moral responsibility without intentionality. If someone knowingly and willingly perpetuated the injustice, then it would be reasonable to expect him to pay for the wrong. In this case, however, many members from the less disadvantaged group are simply lucky beneficiaries of previous actions over which they had no control. In the same way we would not hold a person morally responsible for someone else's death if they were to be lifted up by a tornado and flung at another person,<sup>12</sup> we also have no grounds for holding current generations responsible for situations over which they could not exercise any agency. As such, it is unfair to impose costs on them for circumstances that they were not morally responsible for.

Proponents of AA have tried to argue that the issue is not about how the present-day institution or group is connected with past wrongs, but rather about how it can contribute to restoring the situation of the disadvantaged.<sup>13</sup> This argument, however, does not make sense because it assumes a counterfactual where the current generation could have led better lives. However, if circumstances had been different, an entirely non-identical set of individuals would have benefitted because the identities of the current generation are contingent on historical circumstances bringing specific parents together.<sup>14</sup> Hence, the idea of making currently disadvantaged people 'better off' is flawed because in a world with alternative policies, these people would not have existed. This response does not seek to justify the historical wrongs suffered by disadvantaged groups, but it does aim to show that any arguments that justify AA by playing

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<sup>12</sup> 'Otsuka, Killing the Innocent in Self-Defence'

<sup>13</sup> Appiah, "'Group Rights' and Racial Affirmative Action'

<sup>14</sup> Parfit, *Reason and Persons*.

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on society's guilt at letting people be 'worse off' do not hold any traction.

Next, I will turn to arguments in support of AA that are based on utility and show why these are wrong. Proponents of AA claim that diversification can be achieved through AA.<sup>15</sup> Diversity is seen as an instrumental good that improves the quality of education and research, helps us challenge longstanding preconceptions that favour the privileged and in some cases, makes it easier to gain the trust of individuals (e.g. Hispanic policemen patrolling a Hispanic neighbourhood). In cases like the last, where diversity is clearly a qualification, there is little contention that individuals can justifiably be employed on these grounds. This is perfectly consistent with the meritocratic principles that our society advocates. However, in a majority of other cases, it is less clear that diversity is a qualification or that it can achieve the outcomes it is meant to. For instance, offering someone tenure as a university professor on the basis of his skin colour does not necessarily mean that he will advocate for minority rights or represent views that reflect what those of a shared ethnicity believe in. On the contrary, there are other variable factors that influence a person's identity, including his upbringing, education and socioeconomic circumstances. It is too simplistic to assume that a person's views and identity are predominantly shaped by his ethnicity alone.

Even where all candidates are equally qualified, AA might bring concrete harms to those that it seeks to help, which will lead to decreased utility for the preferred groups. (For the sake of clarity, equal qualifications refer only to equal academic qualifications because these are the most incontrovertible benchmarks that institutions first assess.) In this instance, a new form of discrimination might arise, where people that are preferentially selected are looked upon with scepticism and disdain, because others perceive them to be chosen as a result of their membership in a particular group. These perceptions might also affect the pre-

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<sup>15</sup> Sterba, *Affirmative Action for the Future*

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ferred individuals when they internalise the belief that they were only chosen because of their ethnicity or gender, and suffer a loss of confidence in their abilities as a result. Proponents of AA might argue that this should not arise if the candidates are equally qualified. In reality, however, it is difficult to determine what it means to be equally qualified, given that qualifications can take many forms. In such cases, societal perceptions can play a major role and as demonstrated above, not work to the advantage of the preferred individuals. Moreover, with preferential selection, quotas will exist and it is sometimes inevitable that someone less qualified from the preferred group gets chosen over another more qualified individual from the non-preferred group. These cases may be in the minority, but they are enough to cast doubt on all the candidates chosen from the preferred group.

In conclusion, AA as it is currently practiced cannot be justified. I have shown that the two types of arguments that it is premised on ultimately fail. Both the argument from compensation and the argument based on utility rely too heavily on the assumption that group membership is an adequate indicator of individual circumstances or claims. I have shown that it is not. Even if we accept the empirical premise that all members of a group have been harmed and deserve compensation, it does not logically follow that AA is the appropriate response to apply. There is the question of whether responsibility can be attributed to current members of the dominant group, which I argue cannot be the case. Moreover, AA might result in the decreased utility of the preferred group by distorting societal perceptions of them and/or by undermining their own confidence. If AA were to be defined differently e.g. with greater emphasis on the weak forms of AA, then perhaps it could be justifiable. However, as it stands, AA as defined by the strong versions like preferential selection, cannot be justified.

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