Chapter 6: Equality and Social Justice

Case Study: Affirmative Action

Understood in its broadest sense, 'affirmative action' refers to any policy designed to correct an under-representation of disadvantaged groups, such as racial and ethnic minorities, women, or LGBT people, in some key area—for instance, politics or university education. Hardly anybody would object to forms of affirmative action that merely involve the removal of formal and informal discrimination against members of these groups in the application process for jobs and university places. However, the term affirmative action is more commonly associated with the controversial practice of *positive* or *reverse* discrimination: in other words, with giving candidates from disadvantaged groups a certain amount of priority in the application process for jobs or university places, or reserving a portion of the available places for them.

Affirmative action—particularly with regard to university admissions—is a notably heated topic of public debate in the United States. In the 1970s, many American university governing bodies began adopting policies aimed at increasing the representation of women, African Americans, and Hispanics, among other groups, on campus. Those policies were scrutinied in *Regents of the University of California v. Allan Bakke,* 438 U.S. 265 (1978), heard by the US Supreme Court in 1977. Briefly, the facts of that case were as follows (see Dworkin, 2002). Bakke, a white male prospective medical student, had applied to the medical school at the University of California at Davis, and been rejected. The school was then in the practice of reserving a quota of places for disadvantaged minorities, and, given that he had applied with high test scores, Bakke sued when he failed to secure admission.The Supreme Court found that affirmative action in the form practised at Davis was unconstitutional: a violation of the Fourteenth Amendment clause guaranteeing equal protection under the law. The Court's objection was specifically to the use of a quota system. However, it found that affirmative action was acceptable under the Constitution if it took the form of according a certain amount of positive weight to applications from women and minorities, with race, ethnicity, or gender being considered as merely one among many factors that might mark out a desirable candidate. Such finely tuned affirmative action programmes were a legitimate way, the Court concluded, for universities to further a goal of racial diversity in the student body.

Following a period in which it was widely suspected that the Court was preparing to overturn the ruling in Bakke, owing to a pattern of decisions hostile to affirmative action outside of the educational context, it in fact eventually upheld its earlier decision in 2003 in the case of Grutter v. Bollinger, 539 U.S. 306 (2003). But even if, for the time being, the constitutionality of affirmative action is secure, it remains no less controversial for it. In September 2011, for instance, a group of Republican students at UC Berkeley provocatively expressed their opposition to affirmative action in college admissions by holding a bake sale on campus in which the price charged for a cupcake varied depending

upon the race and sex of the customer, with white males being charged the most (Asimov, 2011). Moreover, in 2014, the Supreme Court ruled that, while affirmative action is permissible under the US Constitution, it is also permissible for the states democratically to ban the practice, as several have done.[1] The American dispute over affirmative action is set to continue via the ballot box as well as the courtroom, then.

Supporters and opponents of affirmative action alike regularly invoke the idea of social justice in making their case.[2] In this case study, we shall examine some of the key arguments.

<A>Affirmative action and equality of opportunity

One of the principal arguments put forward in favour of affirmative action appeals to the idea of equality of opportunity. It points to the fact that anti-discrimination laws, which lay down penalties for discrimination in employment and admissions processes, have not on their own been sufficient to eliminate discrimination. Rather, many hiring and admissions panels still continue to covertly discriminate, whether deliberately, or due to an unconscious reliance on culturally-ingrained negative stereotypes about women, racial minorities, or members of other disadvantaged groups. And even where prejudice is not at work, panels may (again, subconsciously) be more positively disposed towards candidates who match the demographic profile of previous and existing incumbents of the role or office—which is likely to mean, given their longstanding advantages, heterosexual white males. Against this backdrop, then, affirmative action is sometimes defended as a means of promoting equality of opportunity, by counteracting the effects of lingering prejudicial attitudes, and other informal factors that continue to work to the detriment of candidates from disadvantaged groups despite the passing of formal anti-discrimination legislation. In Elizabeth Anderson's words (2010, p. 149), this argument sees affirmative action as 'an application of Aristotle's point that to do the right thing in the face of a contrary inclination, we must drag ourselves in the opposing direction, as an archer must aim against the wind to hit the bull's-eye.'

Now, the claim that affirmative action can serve equality of opportunity will undoubtedly strike many as counter-intuitive, insofar as what equality of opportunity is traditionally said to require is that hiring and admissions decisions be blind to characteristics like gender and race—that is, that they ignore them altogether, rather than

[1] *Schuette v Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014).

[2] *Rather than appealing to considerations of social justice, some defenders of affirmative action appeal to rectificatory (or corrective) justice, arguing that preferential treatment in admissions is an appropriate form of compensation for the contemporary members of groups who, like African Americans, have historically been subject to rights-violations. Perhaps the best-known philosophical exponent of this argument for affirmative action is Judith Jarvis Thomson (1973). The argument is controversial primarily insofar as the cost of affirmative action will be borne by a group (today's white male applicants) who are not responsible in any historic wrongs, and so appear not to be liable to compensate their victims' descendants. The topic of responsibility for historic wrongdoings is addressed by Gosseries in the 'Generations' chapter of the textbook.*

evaluate candidates on the basis of them, whether positively or negatively. And, indeed, for opponents of affirmative action, all preferential hiring and admissions policies are unjust, precisely because they involve giving weight to features of candidates that are beyond their control, and thus (to use John Rawls's well-known phrase) arbitrary from the moral point of view. Moreover, critics of affirmative action aver, the flipside of a policy whereby preference is given to candidates who are, say, black or female is that white males are being discriminated against on grounds of their race and sex. And therefore, they conclude, the only just criteria for ranking applicants for some job or role should be their qualifications.

How might a defender of affirmative action reply to this apparently powerful argument? Ronald Dworkin (2000), one of the most influential of liberal egalitarian philosophers, has done so by questioning what counts as a qualification. First, he points out, few of us really believe that all forms of preferential treatment for individuals of a certain race, ethnicity, gender, etc. are necessarily pernicious. Rather, we distinguish between uses of these categories for purposes that betray malice, and those that are compatible with equal concern and respect. Hardly anyone would think, for example, that it is unacceptable for a police station to ensure that a certain number of its rape counsellors are women, so as to better meet the needs of victims. And this suggests, second, that opponents of affirmative action may take too narrow a view of what counts as a qualification for a particular post. In fact, Dworkin argues, race, gender, etc. can, under some circumstances, represent qualifications in themselves. For instance, if the state identifies as a priority the training of more female doctors to work with women who find it difficult to trust men then the gender of medical school applicants can be legitimately considered to constitute a qualification. Individuals such as Allan Bakke who are passed over as a result of affirmative action may indeed have the highest test scores among a given set of applicants—for Dworkin, however, this does not indicate that they are the most qualified in the respects that matter.

<A> Diversity and desegregation

We have just seen that affirmative action has been defended on grounds that it promotes equal opportunity for candidates from disadvantaged groups. However, some arguments for affirmative action point to benefits that are also said to accrue to others, beyond the candidates themselves. Indeed, it is argued that businesses, universities, and communities as a whole benefit from affirmative action. Consider, for example, Dworkin's case for affirmative action in university admissions, which appeals to the value of diversity in the student body (Dworkin, 2000). Diversity on campus is desirable, on Dworkin's view, for at least two reasons—the first pedagogical, and the second related to justice. In a nutshell, Dworkin's argument is that academic establishments in which individuals from a multiplicity of different backgrounds are brought together to live and study will provide the most fertile grounds for continual intellectual stimulation and robust debate. Moreover, in engaging with peers whose experiences and perspectives diverge in various respects

from their own, individuals, will be better equipped for life as mature democratic citizens, and to accord their contemporaries equal concern and respect.

Social justice also plays a key role in Elizabeth Anderson's case for affirmative action (Anderson, 2010), which concentrates on the importance of neutralizing the harmful effects of segregation in the community, and promoting integration. Her argument points to the following sorts of processes. First, when universities, say, practise affirmative action, they thereby open up new training opportunities and thus career choices to individuals from disadvantaged groups. For example, places on medical programmes may become accessible, by means of affirmative action, to black candidates from poor urban areas, who, whilst possessing talents on a par with those of their white competitors, would fail to secure the grades needed for a scholarship in the absence of preferential treatment, owing to their having attended one of the ill-equipped and failing local schools. Many of these individuals, once they become licensed medical practitioners, will use their qualifications to serve their community, and so often increase access to essential services in black neighbourhoods previously under-served by healthcare professionals. Access to a local black doctor may also encourage some individuals to seek medical help who would have been reluctant to visit a white practitioner. Meanwhile, these newly qualified doctors will be able to share information about job vacancies in hospitals and clinics with their friends and family, which the latter may not otherwise have come by. Thus, on Anderson's view, affirmative action represents a remedy (albeit a gradual one) for the various unjust effects of segregation, which include (but are not limited to) poor access among racial minorities to professional services, and isolation from the 'grapevines' on which news of desirable employment opportunities travel (and to which whites often have readier access).

Of course, whether or not social justice is indeed compatible with affirmative action depends on whether the practice also has any additional, less helpful consequences. Opponents of affirmative action sometimes suggest, for example, that it is stigmatizing to its beneficiaries (and to other members of their group), insofar as it casts them as either not sufficiently competent to compete with their contemporaries on merit, or as free-riders whose success comes at the expense of the hardworking. And others argue that affirmative action is divisive, insofar as it encourages citizens to think of themselves primarily as segmented into racial and other groups, rather than as members of the same society or nation. If either of these theses are true, then notwithstanding its positive effects, affirmative action may in fact set back the goal of social justice overall. For justice requires, so many philosophers would emphasize, that citizens be able to see themselves as part of the same scheme of social cooperation, and trust others to do their fair share within it.

Whether or not those theses are true, however, is in large part a matter for empirical investigation. Some important studies into the long-term impact of affirmative action have been already been carried out (see especially Bowen and Bok, 1998), which show, in particular, that the policy has produced significantly more black graduates and

professionals in the US than would have been possible in its absence. But more remains to be done, especially when it comes to understanding the effects of the practice on people beyond the direct beneficiaries of preferential hiring and admissions policies*. In the meantime, both among political theorists and the general public, the debate continues.*

References

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