

Affirmative Action without Competition

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Abstract: Affirmative action is standardly pursued in relation to admissions to prestigious universities, in hiring for prestigious jobs, and when it comes to being elected to parliament. Central to these forms of affirmative action is that they have to do with competitive goods. A good is competitive when, if we improve A's chances of getting the good, we reduce B's chances of obtaining the good. I call this Competitive Affirmative Action. I distinguish this from Non-competitive Affirmative Action. The latter has to do with non-competitive goods, e.g., being granted early parole or freedom from arbitrary arrest. I argue that some of the most prominent objections against affirmative action—in particular, the reverse discrimination objection and the merit objection—speak less against Non-competitive Affirmative Action. And that some of the most prominent arguments in favor of affirmative action, insofar as they justify Competitive Affirmative Action, also justify Non-competitive Affirmative Action.

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1. Introduction

We are all familiar with standard forms of affirmative action. Affirmative action is usually pursued when it comes to admissions to prestigious universities (Anderson, 2010: 135; Appiah, 2011; *Grutter v. Bollinger*; *Regents of the University of California v. Bakke*), hiring for prestigious jobs (Anderson, 2010: 135; Fullinwider, 2014; *Sheet Metal Workers v. EEOC*), and being elected to parliament (Gulzar et. al. 2020). Central to these forms of affirmative action is that they have to do with *competitive goods*. A good is competitive when, if we improve A's chances of obtaining the good, we reduce B's chances of obtaining it. We may thus refer to such forms of affirmative action as *Competitive Affirmative Action*. In the recent Supreme Court case, *Students for Fair Admissions, Inc v. President and Fellows of Harvard College*, such forms of affirmative action have been struck down as unconstitutional qua violating the Equal Protection Clause of the 14th Amendment, in effect threatening, if not undermining, affirmative action in American universities.

Now, my aim in this paper is not to analyze the Supreme Court's decision. Instead, I want to show that there is a relevant distinction which has not been properly acknowledged in both legal and philosophical discussions of affirmative action. This has to do with the fact that Competitive

Affirmative Action is not our only option when it comes to pursuing affirmative action. Whereas Competitive Affirmative Action has to do with competitive goods, *Non-competitive Affirmative Action*, as I will call it, has to do with non-competitive goods. A good is non-competitive when, if we improve A's chances of obtaining the good, we do not reduce B's chances of obtaining the good. One example of Non-competitive Affirmative Action, which I will discuss below, would be to make it easier for members of disadvantaged groups to be granted early parole relative to members of advantaged groups. The good of being granted early parole is non-competitive since we can increase a minority individual's chances of being granted parole without decreasing a majority individual's chances of being granted parole.

It is surprising that this distinction—between Competitive and Non-competitive Affirmative Action—has not been acknowledged before, at least for three reasons. First, we should expect that the injustices which affect members of disadvantaged groups when it comes to receiving competitive goods—such as places at prestigious universities and jobs—also affect them when it comes to receiving non-competitive goods, such as being granted early parole or being free from arbitrary arrest.¹ Indeed, I will point to reasons why this is likely the case. Second, which forms of affirmative action we have in mind may make a difference when it comes to justifying affirmative action. By discussing several arguments pro et contra affirmative action, I show that it does make a difference. I argue that prominent arguments against affirmative action—in particular, the reverse discrimination objection and the merit objection—have less force against Non-competitive Affirmative Action compared to Competitive Affirmative Action. At the same time, I argue that prominent arguments in favor of affirmative action—including the equality of opportunity argument and the compensation argument—also speak in favor of Non-competitive Affirmative Action insofar as they speak in favor of Competitive Affirmative Action. Thus, by distinguishing the two forms of affirmative action, I show that it would not be sufficient for opponents of affirmative action to argue

¹ I borrow the latter example from Shiffrin (2004: 1670-1671).

that Competitive Affirmative Action is objectionable. This would not show that affirmative action *as such* is objectionable. In this sense, the paper should be of interest to both defenders and opponents of affirmative action. Third, the distinction is also of practical importance. If I am right, it will often be easier to justify Non-competitive Affirmative Action than Competitive Affirmative Action. This means, for instance, that if we need to compensate victims of (historical) injustice, it may often be preferable to do so through Non-competitive Affirmative Action, instead of through Competitive Affirmative Action. Of course, there will be further considerations that must be taken into account when making political decisions. But the paper shows that Non-competitive Affirmative Action may be a useful tool in the political toolbox. If we were to rethink affirmative action—say, in light of *Students for Fair Admissions, Inc v. President and Fellows of Harvard College*—Non-competitive Affirmative Action should be considered.

The plan is as follows. In the next section, I define affirmative action. In Section 3, I lay out the distinction between Competitive and Non-competitive Affirmative Action and show why it is different from other distinctions drawn in the affirmative action literature. In Section 4, I discuss Non-competitive Affirmative Action in relation to several arguments pro et contra affirmative action. I consider objections to Non-competitive Affirmative Action in Section 5. In Section 6, I conclude that we must not forget that Competitive Affirmative Action is not our only option when it comes to pursuing affirmative action. Non-competitive Affirmative Action may be a good alternative, or supplement. Indeed, my discussion suggests that it may sometimes, perhaps even often, be easier to justify this latter form of affirmative action.

2. *What Is Affirmative Action?*

I should first say something about what affirmative action is. I will understand affirmative action as follows:

A policy, an act, etc. amounts to affirmative action if, and only if, in a particular site of justice (i) the agent of the policy, etc. ultimately aims at reasonably increasing the representation of minorities in the relevant area or aims at reasonably addressing the disadvantages they suffer in the relevant area in at least some, but presumably not all, ways other than by boosting their representation, or (ii) the relevant policy, etc. will in fact, or is believed to, address a disadvantage of a certain minority group in the relevant area using certain means, e.g., quotas, that go beyond eliminating direct discrimination against the group but not beyond eliminating the relevant disadvantages (Lippert-Rasmussen, 2020: 12).

How to define affirmative action is a difficult issue. One might think, for instance, that Lippert-Rasmussen's definition is overly broad. It seems that any measure to correct for a disadvantage that does not fully address it but goes some way to remedy it would count as affirmative action. Under this definition, even measures like economic reparations, targeted 'get out to vote' campaigns and reforming the curriculum to recognize the contribution of Black Americans would count as affirmative action. But that seems too inclusive. It does not seem to leave room to distinguish affirmative action from measures that fall within the broader category of corrective or remedial justice. In short, adopting such a broad definition is not uncontroversial.

I have the following responses to this concern. First, even if we assume that Lippert-Rasmussen's definition is as broad as suggested in the objection, it is by no means idiosyncratic in this respect. For instance, Khaitan (2015: 216) understands affirmative action as "a measure designed to benefit any members of one or more protected group(s) qua such membership." And Cohen defines it as "policies that *employ* race preference rather than eliminate it" (Cohen and Sterba, 2003: 279). These definitions are even broader than Lippert-Rasmussen's definition. Second, Lippert-Rasmussen (2020: ch. 1) argues that narrower definitions, such as those provided by Anderson (2010: 135) and Fullinwider (2014), are too narrow in some respects, e.g., by limiting affirmative

action to particular sites.² What we should take from this, I think, is that it will be difficult to find a definition of affirmative action with which everyone agrees (cp. Cohen and Sterba, 2003: 279). But, in any case, I think that Non-competitive Affirmative Action (which I will say more about shortly) will count as affirmative action even on, say, Anderson’s narrower definition, according to which affirmative action amounts to “any policy that aims to increase the participation of a disadvantaged social group in mainstream institutions, either through ‘outreach’ (targeting the group for publicity and invitations to participate) or ‘preference’ (using group membership as criteria for selecting membership)” (Anderson, 2010: 135; cp. Fullinwider, 2014). It will at least do so if we assume that one aim of Non-competitive Affirmative Action is to increase the participation of disadvantaged groups in mainstream institutions. Third, in any case, I am not primarily interested in definitional matters in this paper. It is important to distinguish the question, “what is affirmative action?” from the question, “what makes affirmative action (un)objectionable?”. In this paper, I am primarily interested in the latter question. So even if Non-competitive Affirmative Action were to not qualify as affirmative action on a given definition, we might simply refer to Non-competitive Affirmative Action as *affirmative action**. In that case, the question with which I am concerned is whether *affirmative action** is less objectionable than affirmative action. So, let me now say some more about the difference between Competitive and Non-competitive Affirmative Action.

3. Competitive and Non-competitive Affirmative Action

Affirmative action is usually pursued in relation to goods. Affirmative action, as mentioned, is pursued in relation to admissions to prestigious universities (Anderson, 2010: 135; Appiah, 2011; *Grutter v. Bollinger*; *Regents of the University of California v. Bakke*); hiring for prestigious jobs (Anderson, 2010: 135; Fullinwider, 2014; *Sheet Metal Workers v. EEOC*); and being elected to parliament (Gulzar et. al. 2020). What is special with these usual forms of affirmative action is not only that they are

² See Segall (2013: 193-206) for why affirmative action should be extended to health.

concerned with goods. They are concerned with *competitive* goods. A good is competitive when, if we improve A's chances of obtaining the good, we reduce B's chances of obtaining the good. Take the case of hiring for a prestigious job. If we improve A's chances of getting the job, we thereby decrease B's chances of getting the job (Kolodny, 2023: 224).³ Strictly speaking, hiring for jobs does not have to be competitive. There could, for instance, be more jobs than applicants (Kolodny, 2023: 214; see also Sachs, 2012: 340). I return to this point below. Still, for practical purposes, the goods at stake in standard forms of affirmative action are competitive. Thus, we standardly pursue:

Competitive Affirmative Action. Pursuing affirmative action in allocating competitive goods.

Suppose we pursue affirmative action in admissions to a prestigious university, e.g., by granting bonus points to candidates from a minority group. By doing so, we increase the minority candidate's chances of getting a spot while decreasing the majority candidate's chances of getting a spot. This is the case precisely because it is an instance of Competitive Affirmative Action. We cannot pursue this form of affirmative action without lowering the majority candidate's chances of getting the good.

It is, in some sense, natural that discussions of affirmative action have focused exclusively on Competitive Affirmative Action. After all, competitive goods are advantageous, and it is access to advantages that members of disadvantaged groups, precisely because they are disadvantaged, lack. But not only competitive goods are advantageous. Non-competitive goods are also advantageous. To give an example provided by Shiffrin (2004: 1671), the right to freedom from arbitrary arrest is valuable. But it is a non-competitive good: increasing my chances of enjoying freedom from arbitrary arrest does not decrease your chances of enjoying it. A good is non-competitive

³ Competitive goods, as I define them, are also commonly referred to as "scarce goods."

when, if we improve A's chances of obtaining the good, we do not reduce B's chances of obtaining the good (cp. Kolodny, 2023: 224). Given this, we could also pursue:

Non-competitive Affirmative Action: Pursuing affirmative action in allocating non-competitive goods.

I take affirmative action when it comes to granting parole—one of the cases I mentioned in the introduction—to be a paradigmatic instance of Non-competitive Affirmative Action. Thus, I will, for the most part, focus on this case going forward. But it is important to make clear that Non-competitive Affirmative Action is by no means limited to this case. I already pointed to freedom from arbitrary arrest as another non-competitive good in relation to which we could pursue Non-competitive Affirmative Action. A related non-competitive good is procedural safeguards against wrongful conviction (Scanlon, 2018: 15-16). And there are others. As I explained above, hiring for jobs does not have to be competitive. There could, for instance, be more jobs than applicants (Kolodny, 2023: 214; see also Sachs, 2012: 340). For instance, there is a lack of nurses in many countries (Smyth and Neville, 2022). The same goes for engineers (Graddick, 2023; Matuszak, 2023). This means that hiring nurses and engineers is, for practical purposes, non-competitive. These are thus areas where we could pursue Non-competitive Affirmative Action: we could make it easier, in some sense, for minority individuals to be hired as nurses and engineers (e.g., in the same way as is done when it comes to affirmative action in university admissions). And nursing and engineering are just two examples. When there is a shortage within a given job sector, the jobs will be, for practical purposes, non-competitive goods, which means that we could pursue Non-competitive Affirmative Action. The same goes for education where there are more spots than applicants. Yet another example is the opportunity to exercise one's right to vote. Consider the following: "A nationwide study of validated voter data from 2017 found that gaps between Black and white turnout and Latino and white turnout were significantly wider in states with strict voter

ID laws, where a voter must cast a provisional ballot and take more steps to prove their identity for their vote to count than in states with non-strict voter ID, which allow voters without proper ID to cast a ballot if they sign an affidavit affirming their identity or have a poll worker vouch for them” (Panetta, 2020). Given this, we could pursue Non-competitive Affirmative Action in states with strict voter ID laws, e.g., by allowing that Black people may vote if they sign an affidavit. We could thereby increase Black people’s opportunity to exercise their right to vote. And we could do so without decreasing white people’s opportunity to exercise their right to vote. The opportunity to exercise one’s right to vote is a non-competitive good in this sense. Of course, if we do so, it may decrease white people’s chances of being decisive in the election. But being decisive in an election is a different good than the good of having the opportunity to exercise one’s right to vote. Granting more voting power to Black voters compared to white voters would be an example of the former, and it would be competitive. But opportunity to exercise one’s right to vote need not be competitive. As this illustrates, there are several non-competitive goods in relation to which we could pursue Non-competitive Affirmative Action.⁴

At this point, one may point out that even if the good at stake in Non-competitive Affirmative Action is non-competitive, there will still be competition in the sense that some will be preferred through affirmative action (minority individuals), and others will not be (majority individuals). In this sense, affirmative action is necessarily competitive. I do not mean to deny this. Non-competitive Affirmative Action is non-competitive in the sense that the goods at stake are non-competitive. This is why it is different from Competitive Affirmative Action: minority and majority individuals are not competing for the same goods. I think we should say that affirmative action, whether competitive or non-competitive, is *asymmetric*: it targets some groups, and not others (cp. Khaitan, 2015: 219). This is in the nature of affirmative action. I am interested in whether it makes

⁴ One might question whether all the mentioned goods are necessarily non-competitive for practical purposes. I discuss this in Section 5.

a difference to the permissibility of affirmative action if it is concerned with non-competitive, as opposed to competitive, goods.

Before I turn to this question, it is useful to distinguish Competitive and Non-competitive Affirmative Action from related, but ultimately different, distinctions. First, a good is *rivalrous* if and only if A's consumption of it diminishes others' ability to consume it (Reiss, 2021). If I eat a banana, I make it impossible for you to eat the banana. The banana is a rivalrous good. A good is *non-rivalrous* if and only if A's consumption of it does not diminish others' ability to consume it. If I enjoy Mendelssohn's Schwanenlied, I do not diminish your ability to enjoy it as well. Enjoying Mendelssohn's Schwanenlied is a non-rivalrous good. Although the distinction between rivalrous and non-rivalrous goods is closely related to the distinction between competitive and non-competitive goods, they are different. Participating in a lottery is a competitive good—me participating decreases your chances of winning the lottery—but it is not rivalrous. That I participate does not diminish your ability to participate (Kolodny, 2023: 214). We could pursue affirmative action in relation to both rivalrous and non-rivalrous goods. Although such forms of affirmative action are different from Competitive and Non-competitive Affirmative Action, they will in practice to a large extent be extensionally equivalent because most competitive goods are also rivalrous goods, and most, if not all, non-competitive goods are also non-rivalrous goods.

Another distinction is between *entry-based* and *exit-based* affirmative action (Lippert-Rasmussen, 2020: 18). Take the job context. In that context, entry-based affirmative action pertains to hirings, e.g., making it easier, in some sense, for a minority candidate to get hired. Exit-based affirmative action in that context, on the other hand, has to do with firings, e.g., making it more difficult, in some sense, for a minority candidate to get fired. This distinction cuts across the distinction between Competitive and Non-competitive Affirmative Action. We could pursue entry-based competitive affirmative action, e.g., when it comes to hiring for a prestigious job. And we could pursue exit-based competitive affirmative action, e.g., when it comes to firing someone from a prestigious job. We could also pursue entry-based non-competitive affirmative action, e.g.,

decreasing the chances of a minority member getting a fine (a fine is non-competitive; decreasing my chances of getting a fine does not increase your chances of getting a fine). And we could pursue exit-based non-competitive affirmative action, e.g., by making it easier for a minority candidate to be granted parole. Thus, the distinction between entry-based and exit-based affirmative action should not be confused with the distinction between Competitive and Non-competitive Affirmative Action.

Now, it is surprising that this distinction between Competitive and Non-competitive Affirmative Action has not been acknowledged before in the literature (as far as I am aware). After all, which form of affirmative action is at stake might make a difference when it comes to justifying affirmative action. I will argue in the next section that this is indeed the case. Some of the most prominent objections to affirmative action speak to a lesser degree against Non-competitive than Competitive Affirmative Action. But before I make this argument, let me point to a couple of reasons why we have good reason to pursue Non-competitive Affirmative Action insofar as we have good reason to pursue Competitive Affirmative Action. First, as with standard forms of Competitive Affirmative Action, the goods at stake in Non-competitive Affirmative Action—such as being granted (early) parole—are beneficial to the potential recipients. Since the potential recipients are members of disadvantaged groups, it should be good that they get to enjoy more competitive and non-competitive goods. This points me to the second reason. Some of the same considerations which make Competitive Affirmative Action pertinent also make Non-competitive Affirmative Action pertinent. Consider the following quote from Appiah (2011: 276; see also Alexander, 2010; Cholbi and Madva, 2018):

on average, a black person enters most public contexts with a serious risk of paying higher psychic and material costs than otherwise identical white people ... Police officers are more likely to stop you and more likely to arrest you after stopping you. Indeed, you are more likely to be racially profiled in criminal justice contexts. Prosecutors are likely to give you

worse plea deals and ask for longer sentences. Juries are more likely to convict you and judges are likely to give you longer sentences than similarly accused whites.

The racial discrimination to which Appiah points is likely at play both when minority individuals apply for a prestigious job (competitive good) and when they apply for early parole (non-competitive good).

Another way of illustrating this is the following. Goldberg (2022) argues that, in racist, sexist, and other -ist societies, the evidence itself will be stacked against members of the groups targeted by these -isms. As he points out, “it can happen that, unbeknownst to one, the body of evidence one has was itself shaped by the distorting factors of racism or sexism (or some other pernicious -ism) prevalent in one’s community, such that to disbelieve (or reject) a Black or female speaker’s say-so on the basis of that evidence is to treat them unjustly” (Goldberg 2022: 387). The evidence will be stacked such that it is easier for members of disadvantaged groups to receive negative judgments, and harder to receive positive judgments, than members of non-disadvantaged groups. And that should be the case both when it comes to evidence pertaining to obtaining competitive and non-competitive goods. So, if such forms of disadvantage are reason to pursue Competitive Affirmative Action, they are also reason to pursue Non-competitive Affirmative Action. Third, Competitive and Non-competitive Affirmative Action are not mutually exclusive. Nothing, at least in principle, precludes us from pursuing both. So, saying that we are pursuing one is not an argument against pursuing the other.

What I have said here is not meant to be a full defense of Non-competitive Affirmative Action. Instead, I have pointed out that if we have reasons to pursue Competitive Affirmative Action, we have some of the same reasons to pursue Non-competitive Affirmative Action. A further reason—which is the one I am primarily interested in pursuing—is that some of the objections posed against Competitive Affirmative Action seem to have less force against Non-competitive

Affirmative Action. In other words, I want to situate Non-competitive Affirmative Action in relation to common arguments pro et contra affirmative action. This is the aim of the next section.

4. Non-competitive Affirmative Action and Common Arguments

Let us start by discussing Non-Competitive Affirmative Action in relation to common objections put forward against affirmative action (by which I mean Competitive Affirmative Action since this is the type of affirmative action considered in the literature).

4.1. The reverse discrimination objection

According to Lippert-Rasmussen (2020: 159), “the reverse discrimination objection is the most common objection to affirmative action.” Thus, let us start by exploring what this objection says about Non-competitive Affirmative Action. Hook (2002: 227; see also Cohen and Sterba, 2003: 25; Chief Justice Roberts in *Parents Involved in Community Schools v. Seattle School District No. 1; Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*) puts forward the objection as follows,

If X and Y are competing for a post, my decision to hire X is in the nature of the case a decision not to hire Y. And if my decision is based on X’s sex or race, and not on merit, then it is a case of racial or sexual discrimination *against* Y, which is morally wrong.

Affirmative action is objectionable, according to this objection, because it amounts to racial or sexual discrimination *against* the majority candidate. If we pursue affirmative action in hiring, and hire Y, the female candidate, partly because of her gender, then we discriminate based on gender against X, the male candidate. This is why affirmative action is objectionable: it amounts to reverse discrimination.

In relation to the reverse discrimination objection, the distinction between Competitive and Non-competitive Affirmative Action becomes important. It is clear that, when it comes to

Competitive Affirmative Action, affirmative action lowers the majority candidate's chances of getting the good, e.g., the job. This is why, according to the reverse discrimination objection, Competitive Affirmative Action discriminates *against* the majority candidate. But Non-Competitive Affirmative Action seems relevantly different in this respect. Take the parole case again. If we pursue affirmative action in relation to the black person applying for parole, we do not lower the chances of the white person being granted parole. But then it seems that we do not, in the same sense, discriminate *against* the white person applying for parole.⁵ And even if we do discriminate, this seems much less objectionable than in the case of Competitive Affirmative Action precisely because it does not lower the majority candidate's chances of getting the good. Given this, the reverse discrimination objection seems to speak less against Non-competitive Affirmative Action than Competitive Affirmative Action.

Might the defender of the reverse discrimination objection push back and say that Non-competitive Affirmative Action still discriminates against the white candidate because race is taken into account when it comes to granting the black candidate parole, but not when it comes to granting the white candidate parole? I doubt it, but even if a rejoinder along these lines could be pushed, it is immaterial given my dialectical purposes. I am interested in whether common

⁵ One may think that this is true only if we assume a *non-discrimination baseline*: the majority candidate's chances of getting the good would not have been better but for the affirmative action. But, one might think, this is not the case assuming a *moralized baseline*: if the baseline is equal access, then the majority candidate's chances do seem to be worse when we pursue affirmative action. But that is only true if there were equal access to begin with between the majority candidate and the minority candidate. And that is not the case: it is precisely because the minority individual's chances of getting the good are unfairly low, due to injustice, that we pursue affirmative action (nothing in my argument precludes doing the same for disadvantaged majority individuals). It is in such circumstances—when there is unfair unequal access—that affirmative action becomes (particularly) relevant (see, e.g., Adams, 2021; Taylor, 2009; but for an argument that affirmative action may be pertinent even under ideal circumstances, see Meshelski, 2016).

objections put forward against Competitive Affirmative Action have the same force against Non-competitive Affirmative Action. And in relation to the reverse discrimination objection as laid out by Hook, the answer is “no” precisely because Non-competitive Affirmative Action has to do with non-competitive goods. In relation to this modified version of the objection, it seems to me that Competitive and Non-competitive Affirmative Action are similarly situated: if, in relation to the latter, it is discrimination against the white candidate simply because race is taken into account when a decision is made, that is true of the former as well. But this is not necessarily to say that it is a good rejoinder against any form of affirmative action (Eidelson, 2020; Lippert-Rasmussen, 2020: 164-167). And it is still the case that Non-competitive Affirmative Action is different from Competitive Affirmative Action in that we can increase the minority candidate’s chances of getting the good without decreasing the majority candidate’s chances. When it comes to non-competitive goods, that is, we can discriminate in favor of a candidate without thereby discriminating against another candidate in the sense implied by the reverse discrimination objection. In sum, the reverse discrimination objection has less force against Non-competitive Affirmative Action precisely because this form of affirmative action has to do with non-competitive goods.

4.2. *The merit objection*

Another prominent objection to affirmative action is the *merit objection*. According to this objection, affirmative action is objectionable because it clashes with the meritocratic principle that the best qualified candidate be selected (Pojman, 2014: 440-441; Walzer, 1983: 132).⁶ When, in competing for a job, the better qualified majority candidate loses out to the lesser qualified minority candidate because of affirmative action, the majority candidate’s claim to being selected qua being the best qualified candidate is violated. This is, at its core, the merit objection.

⁶ For discussion of merit and meritocracy, see, e.g., Cavanagh (2002); Daniels (1978); Mason (2006); Mulligan (2018); (2023); Segall (2012).

Whatever the merits of this merit objection,⁷ it does not have the same force against Non-competitive Affirmative Action. The reason is that the objection assumes that the goods at stake in affirmative action are competitive goods, such as a job, a place at a prestigious university, or a seat in parliament. The objection assumes a competitive framework, as it were. But Non-competitive Affirmative Action is not competitive in this sense.⁸ When it comes to Non-competitive Affirmative Action, majority and minority candidates are not pitted against each other: they are not fighting for the same goods. So, for example, if we pursue Non-competitive Affirmative Action when granting parole, the minority candidate who is the recipient of affirmative action is not selected over the majority candidate. The chances that the majority candidate is granted parole are independent of whether the minority candidate is granted parole. So it does not violate the majority candidate's claim to be selected over those with lesser merit (or if it does, the violation is less objectionable than in the competitive case where they are competing for the same good). This nicely illustrates the importance of the distinction between Competitive and Non-competitive Affirmative Action. It has been assumed that affirmative action *necessarily* has to do with competitive goods. And in relation to such goods, it is the case that if we improve the minority candidate's chances of receiving the good, we decrease the majority candidate's chances of receiving the good. In this way, meritocracy concerns may arise (or be more potent). But it is not, as I have shown, a necessary feature of affirmative action that it is concerned with competitive goods. Non-competitive Affirmative Action is not. And so the merit objection does not seem to threaten Non-competitive Affirmative Action in the same way that it threatens Competitive Affirmative Action. This

⁷ For critical discussion, see, e.g., Dworkin (2002a: 109); Lippert-Rasmussen (2020: 241-245); Mason (2017).

⁸ Of course, even if non-competitive goods need not be allocated according to merit (in the sense that the best qualified has a claim to the good), this is not to deny that there may be unjust ways of allocating non-competitive goods. A comparative claim suffices for my purposes: merit concerns do not arise to the same extent when it comes to non-competitive goods (Non-competitive Affirmative Action) as when it comes to competitive goods (Competitive Affirmative Action).

is significant since I suppose that the merit objection has some intuitive appeal to many people (Miller, 1999: 176; Mulligan, 2018: 97).

4.3. *The mismatch objection*

A third prominent objection to affirmative action is the *mismatch objection*. In the words of Cohen (Cohen and Sterba, 2003: 31),

It is one of the great ironies of “affirmative action” that those among minority groups receiving its preferences are precisely those least likely to deserve them.

According to the mismatch objection, when we pursue affirmative action, there is a mismatch between those who ought to benefit—those suffering from disadvantage—and those who will actually benefit (Fullinwider, 1980: 53-56; Mulligan, 2018; Pojman, 2014: 438; *Richmond v. J. A. Croson Co*; Sher, 2002). There are two mismatches. Affirmative action is *underinclusive* when it comes to the recipients of affirmative action. When we pursue standard forms of affirmative action—such as when it comes to places at prestigious universities, hiring for prestigious jobs, etc.—it will likely be the best off within the disadvantaged group who will benefit (Khaitan, 2015: 224; Simon, 2003: 53). After all, they will be placed to actually apply and compete for such spots, whereas the worst off within the group will not. But it is the worst off within the group who are likely the most disadvantaged. Thus, when it comes to recipients, affirmative action is underinclusive according to the mismatch objection. When it comes to those who have to bear the costs, affirmative action is *overinclusive*. The worst off within the advantaged group, such as the poor white male from Appalachia (Lawrence and Matsuda, 1997: 190-191), have to bear some of the costs of affirmative action, although they may have suffered relevantly similar disadvantages as the recipients of affirmative action (Lippert-Rasmussen, 2020: 191). Because of these mismatches, affirmative action is objectionable according to the mismatch objection.

Compared to standard forms of Competitive Affirmative Action, I am not sure there is a clear answer as to whether Non-competitive Affirmative Action is less susceptible to the underinclusiveness worry. There are clearly some instances of Non-competitive Affirmative Action which seem less susceptible to the worry. Take Non-competitive Affirmative Action in relation to granting parole—what I have been taking to be a paradigmatic example of Non-competitive Affirmative Action. Those who will be the likely recipients of this form of affirmative action are among the worst off within the disadvantaged group (cp. Alexander, 2010; Cholbi and Madva, 2018). After all, they will more likely be placed in circumstances—namely, in prison—in which they can apply for this benefit. Of course, it may be the better off within the worst off who will make the most of the opportunity in this case. But we are still within the most disadvantaged part of the group (i.e., those in prison). This is different when it comes to standard forms of Competitive Affirmative Action—such as when it comes to admissions to prestigious universities or hiring for prestigious jobs—where it will often be the better off within the disadvantaged group who will be placed to benefit from affirmative action (they will be positioned such that they can benefit from affirmative action when applying for prestigious universities or jobs).

But, then again, there might be other instances of Non-competitive Affirmative Action where it is less clear that it does better than Competitive Affirmative Action in relation to underinclusiveness. Earlier I mentioned the example of Non-comparative Affirmative Action in hiring engineers (when there is a shortage). This might not do much for the worst off within the group, who might not be placed to take advantage of the opportunity, or even if they are placed to take advantage of the opportunity, they might not have the resources to do so. The same underinclusiveness worry that applies to standard forms of Competitive Affirmative Action might apply to such forms of Non-competitive Affirmative Action as well. So again, as I said, I am not sure there is a clear answer as to whether Non-competitive Affirmative Action is less susceptible to underinclusiveness concerns than Competitive Affirmative Action. But I think we can say, at least, that we do not have reason to believe that it is more vulnerable to such concerns.

Let us turn to the overinclusiveness concern. It seems that, when it comes to Non-competitive Affirmative Action, there are fewer costs to bear for majority members, including the worst off, than when it comes to Competitive Affirmative Action. One reason is that, when it comes to the former, majority individuals are not competing with minority individuals. And so the cost to majority individuals of not getting the good if we pursue affirmative action in relation to minority individuals is not present in such cases of affirmative action. But it is present when it comes to Competitive Affirmative Action. As Lippert-Rasmussen (2020: 191) says, “many find problematic the fact that the costs of gender-based affirmative action in hiring are imposed primarily on younger and typically less sexist males, who to a much lesser degree than older, more sexist males bear any responsibility for the disadvantages women face in the job market.” So, at least when it comes to a central cost pointed to in the mismatch objection, Non-competitive Affirmative Action is less susceptible to being overinclusive. Opponents of affirmative action might have other costs in mind as well. But if such costs exist, I suspect that, at least, they will not be more present in Non-competitive Affirmative Action than in Competitive Affirmative Action. Thus, we have reason to believe that Non-competitive Affirmative Action may be less vulnerable to overinclusiveness concerns, and at least not more vulnerable to underinclusiveness concerns, than Competitive Affirmative Action.

Before moving on, let me shortly point to an objection which I do not have the space to discuss in detail, but where I suspect the distinction between Competitive and Non-competitive Affirmative Action may also make a difference, namely the *stigma objection*. According to this objection, affirmative action is objectionable because it stigmatizes its recipients (Beauchamp, 2002: 216; Cohen and Sterba, 2003: 121; Thernstrom and Thernstrom, 2002: 187). The stigma may result from majority members, including those who lose out, but also from the recipients of affirmative action, who may question whether they got the position because of affirmative action, with threats of damages to their self-esteem (Lippert-Rasmussen, 2020: 173). I suspect that majority members would be less inclined to stigmatize in cases of Non-competitive Affirmative Action, because they

do not lose out in the same way in such cases as they do in Competitive Affirmative Action (recall the quote from Hook in Section 4.1; cp. Hook, 2002: 229). But whether this is the case is ultimately an empirical question.

4.4 The equality of opportunity argument

We have now seen that common arguments put forward against (Competitive) affirmative action speak less against Non-competitive Affirmative Action (this is particularly the case for the reverse discrimination objection and the merit objection). This is precisely because Non-competitive Affirmative Action does not involve competition between recipients (minority individuals) and non-recipients (majority individuals) in the way that Competitive Affirmative Action does. But this lack of competition might, at the same time, also weaken some of the arguments in favor of affirmative action. I now want to explore whether this is the case, starting with the equality of opportunity argument in favor of affirmative action.

Sher (2002: 61) lays out the argument as follows,

the key to an adequate justification of reverse discrimination [affirmative action] [is] to see that practice, not as the redressing of *past* privations, but rather as a way of neutralizing the *present* competitive disadvantage *caused* by those past privations and thus as a way of restoring equal access to those goods which society distributes competitively (see also Beauchamp, 2002, 214; Cohen and Sterba, 2003: 231; Harris and Narayan, 2014; Lippert-Rasmussen, 2020: ch. 4; Sotomayor's dissent in *Schutte v. Coalition to Defend Affirmative Action*; Taylor, 2009: 478).

In short, we should pursue affirmative action because this brings us closer to a level playing field in which minority individuals do not have worse opportunities than majority individuals.⁹

Now, it seems reasonable that, when it comes to competitive goods, it is important that there is a level playing field (Kolodny, 2023: 225; Sachs, 2012; Shiffrin, 2004). If there is not, that is unfair to those with worse opportunities. But, one might think that, when it comes to non-competitive goods, a level playing field is not important. As Sachs (2012: 338; see also Kolodny, 2023: 225) says,

there appear to be some goods for which there is no playing field—goods for which there is no competition. This being the case, the level playing field *only sometimes* favors equalization of opportunity. For instance, some of the components of welfare, such as, perhaps, happiness and knowledge, are such that one person can under certain circumstances gain more of it without thereby depriving someone else of it. This explains why in our earlier thought experiment [where we could only secure equality by levelling down], we did not see any reason to equalize opportunity for welfare.

⁹ Typically, proponents of this argument understand equality of opportunity as *substantive equality of opportunity*, and not as *formal equality of opportunity*. In Rawls's (1999: 63) words, the latter requires that "careers [be] open to talents," whereas the former requires that "those with similar abilities and skills should have similar life chances." It is substantive equality of opportunity that I have in mind in this section. Also, it is important to keep the dialectical context in mind here. I am exploring whether the equality of opportunity argument in favor of affirmative action is weaker when it comes to Non-competitive Affirmative Action (compared to Competitive Affirmative Action). Some equal opportunity proponents oppose affirmative action because they believe "that the proper remedy is bolstering equal opportunity rather than quotas / preferential treatment" (Mulligan, 2023). It is not the latter that I consider in this section.

If this is true, the equality of opportunity argument, even if it could justify Competitive Affirmative Action, cannot justify Non-competitive Affirmative Action since, when it comes to non-competitive goods, there is no reason to secure a level playing field.

What should we think of this argument? It might be, for the reasons pointed out by Sachs, that non-competitive goods should not be distributed in accordance with equality of opportunity. After all, as Sachs says, there is not in a relevant sense a playing field when it comes to such goods. But then the question arises, how should we distribute such goods? It seems to me that *priority* of opportunity is a good candidate: we grant those most in need a better opportunity to receive such goods precisely because they are more in need.¹⁰ By doing so, we avoid leveling down (what Sachs objected to above). One way of being more in need of being granted parole is if one faced injustice in the criminal justice context. So, even if equality of opportunity does not speak in favor of Non-competitive Affirmative Action, priority of opportunity might.

A related point can be made in relation to *sufficiency* of opportunity.¹¹ If black people do not have, in absolute terms, a good enough opportunity to being granted parole, sufficiency of opportunity would give us a reason to pursue Non-competitive Affirmative Action in relation to granting parole.

In sum, it might be that there is not a requirement that non-competitive goods be distributed in accordance with equality of opportunity. If so, whereas the equality of opportunity argument can justify Competitive Affirmative Action, it cannot justify Non-competitive Affirmative Action. There is, thus, a difference between the two forms of affirmative action. But it is a difference without much importance in the present context since we might still justify Non-competitive

¹⁰ On priority, see Parfit (1997).

¹¹ For a defense of sufficiency of opportunity in hiring, see Cavanagh (2002). For a pluralist view including both equality and sufficiency, see Mason (2006). For more on sufficiency as a distributive view of justice, see Axelsen and Nielsen (2015); Casal (2007); Frankfurt (1987); Huseby (2010).

Affirmative Action by an opportunity argument appealing to priority or sufficiency (cp. Lippert-Rasmussen, 2020: 99-100).

4.5 The role model argument

Another prominent argument in favor of affirmative action is the *role model argument*. According to this argument, we should pursue affirmative action to secure role models for minority individuals (Allen, 2002; Appiah and Gutmann, 1996; Lippert-Rasmussen, 2020: ch. 5; Sher, 2002). As an example, consider higher education. That higher education is filled with white men might result in a lack of role models for, say, black women. But this is a problem since, as is widely accepted, role models boost the motivation of those looking up to them (Lippert-Rasmussen, 2020: 103). If so, this puts those with a lack of role models, say, black women, at a disadvantage compared to those with role models, say, white men. Affirmative action can change the distribution of role models by providing more role models for minority individuals. This is, in short, how the role model argument for affirmative action is usually laid out.

Now, one might think that role model concerns are more present in the cases with which Competitive Affirmative Action is concerned: when it comes to admissions to prestigious universities, hiring for prestigious jobs, etc. In those cases, when it comes to seeking to achieve such goods, role models are important. They make the candidate aim higher and encourage them to put in more effort (Lippert-Rasmussen, 2020: 103). But when it comes to Non-competitive Affirmative Action, one might think that since this often has to do with less prestigious goods (e.g., being granted parole), role models are less important. If so, it suggests that the role model argument speaks more in favor of Competitive than Non-competitive Affirmative Action. Again, it seems that the lack of competition which weakened the objections usually put forward against affirmative action might at the same time weaken the arguments usually put forward in favor of affirmative action.

I think matters are more complicated than the previous paragraph suggests. The role model argument, as it is presented in the literature, is one-sided. It focuses on what we might call *positive role models*: persons having a good influence in the sense of motivating those they influence to pursue valuable ends. This is what is at stake in higher education: successful scientists that minority students can look up to and who can motivate them to pursue valuable careers. But not all role models are valuable. *Negative role models* are persons having a bad influence in the sense of motivating those they influence to pursue disvaluable ends. For an admittedly clichéd case, think of the son who looks up to his criminal father, wanting to be like him. When it comes to role models, we should not only focus on positive role models: on how benefits stemming from having such role models are distributed. We should also focus on negative role models: on how disadvantages stemming from having such role models are distributed. It is likely that those who are disadvantaged when it comes to positive role models are, at the same time, disadvantaged when it comes to negative role models: they have fewer positive role models and more negative role models compared to others (cp. Alexander, 2010; Goldberg, 2022; Tadros, 2020). The disadvantage which affects the distribution of positive role models is likely to affect the distribution of negative role models as well. If so, we should not necessarily think that the role model argument speaks more in favor of Competitive than Non-competitive Affirmative Action. After all, the disadvantage that minority individuals face when it comes to negative role models can be addressed through Non-competitive Affirmative Action, e.g., when it comes to granting parole. In that case, we can lower the presence of negative role models. An earlier release removes the parent working as a negative role model from prison, thereby reducing their opportunity to serve as a negative role model and, additionally, providing the parent with a chance of serving as a positive role model, e.g., showing that obstacles can be overcome and that people can change. So the role model argument, once suitably modified to include not only positive but also negative role models, might speak as much in favor of Non-competitive Affirmative Action as Competitive Affirmative Action.

4.6 The compensation argument

Another prominent argument in favor of affirmative action is the *compensation argument* (Anderson, 2010; Lippert-Rasmussen, 2020: ch. 2; Sher, 2002; 2005; *United Steel Workers of America v. Weber*). According to this argument, affirmative action is a way of compensating members of groups that are victims of past injustice. The members may be direct victims, where they themselves have been subject to injustices in the past, or indirect victims, where their ancestors have been subject to injustices in the past. Common examples include slavery and the Jim Crow laws.

This argument might speak as much in favor of Non-competitive as Competitive Affirmative Action. After all, the injustice has, in many cases, resulted in a lack of both competitive goods (e.g., jobs, places at universities, seats in parliament) and non-competitive goods (e.g., early parole, freedom from arbitrary arrest, self-respect). In this sense, they should be compensated in relation to both. This is reason to pursue both Competitive and Non-competitive Affirmative Action. Of course, there may be other ways of compensating them for such past injustices as well, i.e., non-affirmative action policies. I do not want to deny this. My point here is comparative. *If* Competitive Affirmative Action is required as compensation for past injustice, Non-competitive Affirmative Action is also required as compensation for past injustice. In this sense, the compensation argument might speak as much in favor of Non-competitive as Competitive Affirmative Action. It is just that the two arguments compensate for different reasons. Whereas Competitive Affirmative Action compensates in relation to competitive goods, Non-competitive Affirmative Action compensates in relation to non-competitive goods.

5 Objections

Before offering some final observations, let me consider some objections to what I have argued in this paper. Throughout the paper, I have pointed to several non-competitive goods in relation to which we could pursue Non-competitive Affirmative Action, such as granting parole, freedom from arbitrary arrest, the opportunity to exercise one's right to vote, hiring in job sectors in which

there is a shortage, decreasing the chances of receiving a fine, and procedural safeguards against wrongful conviction. The first objection consists of practical challenges to some of these examples. Addressing these challenges will thus also help to delineate the practical scope of my argument.

In relation to the examples of parole and arbitrary arrest, one might object that they are, in practice, competitive. The institution of granting parole is constrained by various institutional factors. Most obviously, there is only a finite number of parole officers. Thus, if parole is granted more easily to members of a minority group, this may make it less likely that members of a majority group will gain parole, making the good competitive in practice. The same may be said in relation to facing arbitrary arrest: if we reduce the likelihood that a minority group will face arbitrary arrest, this might increase the degree to which members of a majority group will face arrest as less resources will be wasted on the practice of arbitrarily arresting members of a minority group.

In relation to the parole case, first, I acknowledge that this is a possibility. But I also want to stress that there is no reason to think that it will necessarily be the case in practice. That parole is granted more easily to minority members may simply affect the time at which they apply for parole—that they may apply earlier than they otherwise would have done—but it may not affect the number of times they apply for parole. Of course, how such an affirmative action scheme would affect the parole institution is ultimately an empirical question. But insofar as the scheme mostly affects *when* minority members will apply for parole, it may not strain the system more than the status quo. Second, the objection is important because it illustrates that it may be helpful, at least for practical purposes, to think of competitive and non-competitive goods as falling on a continuum where competition increases as we move along the continuum from non-competitive to competitive goods. So, the more the institutional factors constrain in the parole case—e.g., the fewer parole officers are available—the closer we move toward the case being competitive. And, as I have shown, the less competitive a given case of granting parole is, the less an affirmative action scheme when it comes to granting parole will be vulnerable to prominent objections to affirmative action. So, the practical scope of my argument will depend on where actual cases of granting parole

fall on the continuum. The more cases fall on the non-competitive side of the continuum, the more this form of Non-competitive Affirmative Action will be a significant practical alternative, or supplement, to Competitive Affirmative Action. But it is important to emphasize, again, that this, at most, affects the practical scope of my argument (the same goes for the other examples considered below). It does not threaten my theoretical argument that we should distinguish between Competitive and Non-competitive Affirmative Action because they are not similarly situated in relation to common pro et contra affirmative action arguments.

In relation to the arbitrary arrest case, the objection points out that the scheme may increase the degree to which majority members will face arrest. But it is important to be clear on the good at stake here. The good is freedom from arbitrary arrest. We can increase minority members' freedom from arbitrary arrest without decreasing majority members' freedom from arbitrary arrest. Now, it is true that when fewer resources are spent doing arbitrary arrests, these resources can be spent on other police tasks, such as doing non-arbitrary arrests. In this sense, the scheme might increase the extent to which majority members are subject to non-arbitrary arrests. But that is not the good at stake. And it is hard to see why the resources saved in relation to minority members would simply be spent increasing the extent to which majority members face *arbitrary* arrests. But if we assume, for the sake of argument, that it would be the case, then we can say that the more it would be the case, the more we would move toward the competitive side of the continuum, thereby narrowing the practical scope of my argument.

One might object to the non-competitive job market case (my examples of nursing and engineering) that affirmative action is usually used to allocate valuable goods. The opportunity to access these goods is what helps redress the injustice. But if a particular job market is non-competitive, i.e., if many people do not actually want to do these jobs, it is not clear that favoring the

allocation of these goods to minority members should count as a form of redress.¹² That a particular job market is non-competitive might not imply that people do not want to do those jobs. It might be due to other factors, e.g., that a large cohort of workers has just retired. Or there might be a lot of growth within the sector, suddenly increasing the demand for workers (cp. Sachs, 2012: 340). Of course, some might not want to work, say, as a nurse or as an engineer. But perhaps, instead of assuming that minority people do not want, or would not benefit from, these jobs, it is more reasonable to let minority individuals decide whether they would prefer affirmative action in non-competitive job markets to the status quo. If they would prefer that, then perhaps there is good reason to count it as a form of redress. To deny that it could count might seem overly paternalistic. But this is not necessarily to say that this alone would redress the injustice. We could supplement this form of Non-competitive Affirmative Action with other initiatives, including some of the other forms of Non-competitive Affirmative Action discussed above.

The final worry that I want to consider goes as follows. Non-competitive Affirmative Action would stoke racial animus, it might be argued, and it would be viscerally abrasive if we were to treat two convicted criminals differently, because of their races, when deciding on their parole.

¹² There is another complication which is particular to Non-competitive Affirmative Action in relation to non-competitive jobs. If employers have job openings they need filled, they will raise wages to attract applicants. By hiring minority applicants (who otherwise would not be hired) through affirmative action, you reduce the demand for employees, thereby lowering wages. Thus, a majority applicant could complain about Non-competitive Affirmative Action on the ground that it makes their wage lower than it otherwise would be. Space precludes me from going too far into this issue, but one response would be to say, again, that we might think of the competitive/non-competitive distinction as a continuum for practical purposes such that the more the affirmative action scheme affects wages, the more we move to the competitive side of the continuum. In any case, even if we were to assume the truth of the objection, it would still not threaten the other forms of Non-competitive Affirmative Action that I have discussed (again, it is a matter of the practical scope of my argument).

After all, an important theme in the opposition to affirmative action is that people should be judged on the basis of their merit (or lack thereof), and not their race.

The important question in our dialectical context is whether this objection has more force against Non-competitive Affirmative Action than Competitive Affirmative Action. I doubt that this is the case. At least this objection has also been raised against standard forms of affirmative action (i.e., Competitive Affirmative Action). Consider:

The flip side of affirmative action is its potential to express a negative message: that the interests of the dominant group do not count, or that they do not count as much as that of the protected group. Persistent and festering resentment among its dominant groups can be very dangerous for any society, possibly resulting in ‘balkanisation’ and other dire and unforeseen consequences (Khaitan, 2015: 236; see also Justice O’Connor’s dissent in *Metro Broadcasting, Inc. v. Federal Communications Commission*).

And as I pointed out in relation to the stigma objection, perhaps Non-competitive Affirmative Action may generate less resentment because majority and minority members are not pitted against each other in the same way as in Competitive Affirmative Action. In any case, I cannot see why we should expect the objection to have *more* force against Non-competitive Affirmative Action, generally speaking. Perhaps the parole case is special (as hinted at in the objection). But I doubt it. Reserving seats in parliament based on race (Competitive Affirmative Action) does not necessarily seem to be less viscerally abrasive than the parole case (especially not when we consider that the rules for granting parole could be amended politically; cp. Bengtson, 2024; Kolodny, 2014: 305-307). And even if the parole case is special, it is not an objection to other ways of pursuing Non-competitive Affirmative Action, such as in relation to freedom from arbitrary arrest and hiring in non-competitive job contexts.

6 *Final observations*

I have discussed Non-competitive Affirmative Action in relation to six prominent arguments in favor of affirmative action. We have seen that prominent objections to affirmative action—in particular, the reverse discrimination objection and the merit objection—seem to have less force against Non-competitive Affirmative Action precisely because this form of affirmative action has to do with non-competitive goods. At the same time, we have seen that prominent arguments in favor of affirmative action, at least once suitably modified, may speak in favor of Non-competitive Affirmative Action (and, indeed, in many cases to the same extent as they speak in favor of Competitive Affirmative Action). Of course, there are some arguments which I have not had the space to discuss here, e.g., the *diversity argument* (Dworkin, 2002b; *Grutter v. Bollinger*; *Regents of the University of California v. Bakke*) and the *integrationist argument* (Anderson, 2010; Kim and Walton, 2023). Perhaps there are reasons why they speak less to Non-competitive Affirmative Action, e.g., because it is less important to secure diversity when it comes to areas involving non-competitive goods. I doubt that this is true, but future research will have to determine whether this is the case. But, in any case, I have shown that we must not forget that Competitive Affirmative Action is not our only option when it comes to pursuing affirmative action. Non-competitive Affirmative Action may be a good alternative, or supplement. Now, as I said in the introduction, this should have policy implications as well. For instance, if we need to compensate victims of (historical) injustice, it may often be preferable to do so through Non-competitive Affirmative Action (as opposed to Competitive Affirmative Action). Moreover, even if the parole case (which I have treated as a paradigmatic example) may be controversial, politically speaking, we have seen other examples of Non-competitive Affirmative Action that should be less controversial, e.g., when it comes to hiring in job sectors where there is a shortage, such as when it comes to nurses and engineers. Pursuing Non-competitive Affirmative Action may be a useful policy in such cases. Indeed, my discussion suggests that it may sometimes, perhaps even often, be easier to justify such instances of affirmative action. This is important to remember, not least here in the aftermath of *Students for Fair*

Admissions, Inc. v. President and Fellows of Harvard College. If we are to rethink affirmative action, Non-competitive Affirmative Action should be considered.¹³

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