Please see published version at: https://global.oup.com/academic/product/ethics-left-and-right-9780190882785?cc=us&lang=en&

Ethics: Left and Right

Chapter 17: Affirmative Action

*Kristina Meshelski*

The Civil Rights Act of 1964 established that discrimination based on race, gender, religion or national origin was illegal in the United States. The term “affirmative action” first appeared around this time to describe any policy or law that the US government might impose upon federal contractors in order to ensure their compliance with the Civil Rights Act. Under President John F. Kennedy, federal contractors were encouraged to actively recruit black employees. Later, under President Lyndon B. Johnson, affirmative action was expanded so that construction firms, public hospitals, and universities were required to establish goals for hiring women and racial minorities, as well as timetables to meet those goals. In 1978, the Supreme Court outlawed the use of racial quotas in college admissions, though universities may still consider an applicant’s race in their admissions decisions, as long as this is the only way the campus can achieve racial diversity, and as long as the consideration does not amount to a quota system. However, in some states, race-based affirmative action is banned entirely; these are California, Washington, Michigan, Nebraska, Arizona, Oklahoma, and Florida. Among the universities that are allowed to consider the race of applicants as one factor among many in their admissions decisions, very few actually do, and these tend to be the most elite institutions.

Given this history, we must note that accepting a non-white applicant to a college only because of their race, the most talked about and controversial kind of affirmative action, was legal for an extremely brief period in the US and may have never actually been practiced. Meanwhile rejecting non-white applicants only because of their race has a long history.

Nevertheless, I will argue that if we had used a strict racial or gender quota system in our college admissions that would be morally permissible. I will say it is *prima facie* morally permissible, to indicate that it is permissible on its own, considered apart from other countervailing factors about the particular circumstances that may make some instances impermissible. (For example, where the quota system may have the effect of increasing, rather than decreasing, racial disparities.)

There are many moral arguments one can make on behalf of affirmative action. Philosophers have argued for the permissibility of affirmative action as a method of achieving racial diversity[[1]](#endnote-1), as a proxy for achieving other kinds of diversity, as a form of reparations for past injustices[[2]](#endnote-2), as a way to mitigate against other forms of disadvantage that people of color face[[3]](#endnote-3), as a means of achieving racial integration[[4]](#endnote-4), or as a means of achieving equality of opportunity[[5]](#endnote-5).

I will not make this kind of positive argument for affirmative action, rather I will claim that the arguments against affirmative action rest on a false premise that is so pervasive it has even many supporters convinced. This is the idea that procedures for awarding jobs and college placements have an independent value and we should avoid rigging them to achieve particular outcomes. This is why many believe that instituting a quota system for college admissions should be avoided, because it unfairly tampers with the admissions procedures that ideally should be left alone. I argue to the contrary that this idea is a conceptual mistake. The outcomes of these procedures are not something we should judge separately from the procedures themselves. The college admissions or job search process cannot be considered fair unless their outcomes are also fair. Exposing this conceptual mistake reveals that affirmative action is by itself morally innocuous.

First, I’ll walk through the argument that there is something morally wrong with affirmative action. I can’t address all possible arguments against affirmative action, but I believe this one is extremely common. Essentially, it is the argument that it would be unfair to allow someone’s race or gender to determine that they would be awarded a job or college placement, or that someone else would not be awarded those things. I think the core of the argument for this is a mistaken idea of procedural justice, but first I will have to tease apart a few related ideas that may contribute to confusion.

Job Qualifications and Meritocracy as an Ideal

One might think that it is unfair to elevate an unqualified candidate over a qualified candidate only because of their race. Even if this were true, it is irrelevant to the discussion. It is irrelevant because there is no one that seriously wants to hire someone who is unable to do the job they are being hired for. Affirmative action, when it is used, merely elevates some qualified candidates over other qualified candidates. In the case of college admissions, there is always some minimum threshold of qualification, and more than enough applicants meeting that threshold. In a job situation, if we were to for some reason purposely hire someone unqualified, this wouldn’t be unfair to the qualified person who is passed over, so much as it would be unfair to the people who might be relying on that unqualified person’s work.

Now, putting aside the spurious case of the completely unqualified candidate, one might think that it would be unfair not to elevate the most qualified candidates above the less qualified candidates. I’m not sure why this would be true unless one is committed to a thoroughgoing meritocratic world view, in which coveted jobs or college placements, and therefore one’s chances in life generally, should be awarded as prizes to only the most deserving. This, to me, is a horrifying ideal. Some particular competitions surely should be decided mostly by merit, but to the extent that jobs and college placements are extremely valuable and also scarce, a fully meritocratic society would also be one in which those who were not found sufficiently meritorious would not have a chance. This is especially bad to the extent that the jobs that exist are the ones that happen to be profitable for someone with capital and are not determined by social need. Think for example what kind of life and social status a disabled person would have in such a society.

This is all to say that I do not see the desirability of a society that is capitalist, experiences at least moderate scarcity, and is purely meritocratic. This would mean that your life chances are highly dependent on what kind of college and what kind of job you have, and yet there is not enough of either of those things for everyone. So some people would be seriously deprived, and the others face the anxiety that they might be deprived if they do not measure up. Equal opportunity, sometimes thought to be obviously good, is of course only valuable in this type of already bad situation. If resources were already available to most people, we would not be so concerned with our opportunity to get them.

But even if we do not independently value meritocracy, or equal opportunity, there remain ethical questions about how things should be done in the non-ideal situation in which we currently find ourselves. In this situation, given that there are scarce resources that are awarded on the basis of competition among many qualified applicants, what would it take for these procedures to be fair? I will refer to this as a question about *procedural justice*. We are now back to considering the original question of whether awarding these resources on the basis of race or gender would be fair. In order to answer this question, I must say something about procedural justice in general.

Procedural Justice

Procedural justice, I maintain, has different referents in different contexts. One context, probably the most familiar one, is in the legal system. In this context, procedural justice refers to the fairness of the process itself, as opposed to the fairness of the outcome. So, for example, this allows us to say that the defendant had a fair trial, even when they were wrongly convicted. There are certain contexts in which we want to consider the fairness of the process entirely apart from the fairness of the outcome of the process. We can, following the philosopher John Rawls, call this *imperfect procedural justice*.[[6]](#endnote-6) It is so-called because a just procedure in this case does not reliably lead to a just outcome. The trial procedures aim to convict all and only guilty people, but they are an imperfect means to this end.

Sometimes, we are lucky enough to find procedures that are perfectly designed to achieve particular outcomes. As for example when two greedy people are splitting a dessert. The perfect procedure dictates that the one who cuts the dessert in half should not be the same person as the one who chooses the piece. This Rawls calls *perfect procedural justice*, but it has of course a limited application, and I offer it here as an example of another way that procedure may relate to outcome.

The third and final type of procedural justice was what Rawls called *pure procedural justice*. In this type of procedural justice, we don’t have a truly independent way to evaluate what outcome is fair. When splitting the dessert, we know before we begin that equal pieces would be fair. In the criminal trial, we know before we begin that convicting guilty people and acquitting innocent people would be the fair outcome. However, in pure procedural justice we don’t know what a fair outcome of the procedure would be because these are cases in which the substance of the procedure is determining the fairness of the outcome.

For example, imagine two cooperatively owned factories. In factory A, the workers agree that anyone who works over 40 hours a week will receive a bonus paycheck that amounts to their equal share of the extra profits made. By instituting this pay rule, the factory increases their production and increases their profits. In factory B, the workers decide to prohibit working more or less than 40 hours a week and agree to all equally share in the profits they make. Workers in factory B may receive lower paychecks than workers in factory A because they may make less profit overall. But we cannot really say whether it is unfair that workers in B get less money than workers in A, or that workers in A work more hours than workers in B. Each factory chose their own procedure for dividing up their profits, and in each factory, what counts as a fair outcome is determined by the pay rule – that is, which procedure – their workers chose to institute.

This type of pure procedural justice is not to be confused with the case of imperfect procedural justice, in which the procedure itself is given independent value. Nor is it like the case of perfect procedural justice in which the procedure of one person cutting the dessert and the other person choosing their piece has no importance at all, outside of the fact that it leads to the fair outcome. Rather, in pure procedural justice, the procedure itself produces the outcome and thus cannot be evaluated independently from the outcome it produces.

Our intuitions about the two factories should track this. If workers in factory A started to feel worn out by the implicit pressure to work overtime, or perhaps found that competition for higher bonus pay was making their workplace atmosphere uncomfortable, they might see that the procedure they had previously voted for is leading to an outcome they no longer find fair, and call for a new vote on overtime and bonus pay to make their procedures more like factory B. Conversely, if workers in factory B found that their profits could not keep up to meet their needs without some workers working overtime, they might call for a change in procedure to make themselves more like factory A. Both are instances of people seeing that a procedure leads to an outcome that they don’t like and changing their procedures so that they can achieve different outcomes. There seems to be nothing particularly unfair about factory A voluntarily becoming more like factory B, or factory B becoming more like factory A. We can even take this intuition one step further and say that in cases of pure procedural justice like this, we are required to continually evaluate both outcomes and procedures to ensure their fairness.

This is the sense of procedural justice we should apply to instances of affirmative action. The first thing we must acknowledge is that disparities in wealth between whites and every other racial group are disturbingly high, as is the continued existence of a pay gap between men and women. It is my view that explicit and significant discrimination is still very common, but even someone who doubts this must see that we are a highly unequal society and that this inequality is correlated with race and gender. We are also a society that does not attempt to secure employment for everyone, so we have a large labor surplus, and we use our higher education system as a gatekeeping mechanism for many of the most desirable jobs. Since racial and gender inequality is so bad, we can confidently say that this is not the outcome that we want. Any instinct that such inequality might not be unfair, must be based on the idea that women or people of color either do not want or do not deserve anything close to parity.

If we take it as a given that current outcomes are not fair, then I submit that pure procedural justice allows us to design procedures to achieve the outcomes we do want, including using racial and gender quotas when hiring for desirable jobs or admitting to colleges. This is in contrast to the commonly held view that though current disparities are bad, we are somehow doing something wrong by trying to fix them directly. This can only be based on a mistaken idea of procedural justice, one which believes the hiring or admissions procedures to be independently fair. One reason someone might think this is that they might value meritocracy for its own sake, but as I’ve previously suggested, this is in fact an extreme view. In order to believe that any deviance from meritocracy is unfair, one would have to believe both that it is possible to ascertain which college and job applicants are more meritorious than others at a fairly fine-grained level, and also that fairness requires that we always order ourselves that way.

Another reason someone might believe this is that they might be inappropriately applying the notion of imperfect procedural justice to these instances that I have argued are best understood as pure procedural justice. How can we tell when a procedure should be judged by an independent notion of fairness (as in the criminal trial) versus judged in part by the procedure’s outcome? In fact, very few procedures can be evaluated according to independent notions of fairness that do not involve their outcomes. The criminal trial may be fairly unique in this respect. Further, when the procedures are so central to determining one’s economic prospects, it is especially important to realize that their outcomes are at least partly determinant of their fairness.

Returning to the factory example, we cannot say that it is unfair that a worker earns more money in factory A than a worker in factory B. Nor can we say that the system that forbids overtime is less fair than the system that incentivizes it. Since these procedures are evaluated along with their outcomes, we cannot judge either the outcomes or the procedures against each other in isolation. Since the paychecks were different because of different procedures, and those procedures were adopted knowing they would yield different levels of profits, the procedures are tied up with the outcomes.

While we can know that current levels of racial and gender disparities in wealth and income are not fair, we can’t say exactly who should have what amount of money or exactly who should have which job. These things will be determined by procedures that we must consider when we are evaluating the fairness of each outcome. But current procedures for determining these things are not special in the way that the procedures of a criminal trial are. They do not deserve to be protected from interference and given a status above their outcomes. Being admitted to college or given a job are not prizes that distinguish the person who is best at something, they are valuable resources that determine one’s economic standing, and often the economic standing of one’s children. So to the extent that we agree that the current amount of racial and gender disparities in economic success are not desirable outcomes, there is nothing wrong with awarding desirable jobs and college places according to a quota system for those applicants that meet qualifications.

Affirmative Action is not Morally Wrong

Perhaps you now agree that these procedures do not have a value independent of their outcomes. Still, you might object that this particular type of interference amounts to racial or gender discrimination, which is a bad thing. I don’t think this is right, for two reasons. One is that discrimination of this type is not harmful. Those who benefit from affirmative action are obviously not harmed, and those who do not benefit are merely experiencing what must be experienced by someone. The sense in which the losers of this process are harmed is that the resources they want are not offered to everyone. This, I agree, is a harm, but if someone was going to be denied access, then with or without affirmative action that harm would take place. The use of one’s race or gender to determine who has access does not do any further harm. The second reason that the use of affirmative action does not amount to racial discrimination is that it does not express an attitude of disdain toward the groups that do not benefit from it. It would not be motivated by a desire to dominate them, nor would it contribute to their groups being systematically cut off from resources and so cause widespread disparities. If it did do the latter, it would no longer be affirmative action by definition.

In a decision supporting the use of affirmative action, Justice Blackmun called it an “ugly but necessary” policy[[7]](#endnote-7), and in a decision arguing against the use of affirmative action Justice Roberts called it “discriminating on the basis of race.”[[8]](#endnote-8) It is a commonly held view that affirmative action is in itself morally wrong, though supporters will hold that it is a good and necessary antidote to our current situation, and one which we can hope to someday no longer need. My view is that this confuses the ideals of imperfect procedural justice, in which our procedures are independently valuable, with the ideals of pure procedural justice, in which our procedures and the distribution of goods and resources that result from these procedures must be evaluated as one whole. Affirmative action is not to be considered an illegitimate interference in hiring or admissions procedures, as these procedures themselves are not sacrosanct. If these procedures do not lead to the results that we want, we may employ affirmative action in order to ensure better results.

The view I am arguing against would hold that economic procedures must be kept free from interference that tries to direct more resources to certain racial and gender groups. The burden of proof should be on this view to show why these procedures are so special. For example, in the criminal trial, there are good reasons why we would not want to allow police unrestricted rights to search and seize property, even if such rights would allow them to convict more guilty people. We believe citizens need a measure of privacy, and that this has value apart from whether it furthers or hinders the goals of criminal conviction. The legal rights against search and seizure, and the rules the state must follow in prosecution, are developed in order to guard these rights and not to simply lead to any particular outcome. (It should be noted that here I’m discussing the US legal system in an idealized sense, because I’m attempting to draw out some common intuitions about the value of this idealized system. The truth is that the idealized system that we value doesn’t in fact exist, and many people are denied these rights in practice. Still, I think our intuitions about the value of the idealized version of this system serve a useful contrastive purpose here.)

So, while the rights one should enjoy against criminal prosecution are laid out in procedures that serve to respect these rights, on the other hand, our economy is just the means by which we agree to divide up the resources that we jointly produce. Some would say that resources should be divided according to dessert, so that those who produce the most value should receive the most reward. Some would prioritize equality over dessert. And further there may be quite a lot of disagreement over the proper theory of value we employ when evaluating who or what has contributed the most to the resources that have been produced. My argument here does not depend on a particular view of how to answer these questions, but only on the claim that economic procedures are not analogous to legal procedures when we evaluate the fairness of each. (And I should note that my arguments against a pure meritocracy are not meant to rule out economic procedures that reward dessert in any fashion, just those that exclusively reward merit.)

Some might think that economic procedures should be thought of as rights protecting (like the criminal trial), rather than just distribution mechanisms. On this view, one might argue that a college applicant has a right to be considered for only their achievements and not their race or gender. I am willing to say that this right might exist if college admissions were not one of the primary means by which our society distributes economic resources. I’m also suggesting that college admissions should not be used in this way. However, given that they are, I do not believe there are any rights to be considered on the basis of merit alone.

A corollary to my argument is that we could replace certain anti-discrimination laws with either race-conscious or randomized mechanisms and still not violate any rights. For example, when considering applicants to a desirable job for which there are more qualified applicants than positions available, choose among them by hiring only the people of color. Or put the resumes in a hat and pick the winners. Better yet, we could distribute jobs and resources more evenly, so that the stakes of every job and college application are lowered, and everyone can be assured a minimal income and a degree of dignity.

Five Recommendations for Further Reading

Ira Katznelson *When Affirmative Action was White: An Untold History of Racial Inequality in Twentieth-Century America* (Norton, 2005).

Anthony Appiah, and Amy Gutmann, *Color Conscious: The Political Morality of Race* (Princeton, NJ: Princeton University Press, 1996).

Richard Arneson, "Against Rawlsian Equality of Opportunity" *Philosophical Studies* 93: 77-112 (1999).

Elizabeth Anderson *The Imperative of Integration* (Princeton, NJ: Princeton University Press, 2010).

Derrick Bell “Diversity’s Distractions” *Columbia Law Review* Vol. 103, No. 6 (Oct., 2003).

1. Anthony Appiah, and Amy Gutmann, *Color Conscious: The Political Morality of Race* (Princeton, NJ: Princeton University Press, 1996). [↑](#endnote-ref-1)
2. Judith Jarvis Thompson, 'Preferential Hiring,' *Philosophy and Public Affairs* 2 (1973): 364-84. [↑](#endnote-ref-2)
3. Thomas Nagel, 'Equal Treatment and Compensatory Discrimination,' *Philosophy and Public Affairs* 2 (1973): 348-63. [↑](#endnote-ref-3)
4. Elizabeth Anderson, *The Imperative of Integration* (Princeton, NJ: Princeton University Press, 2010). [↑](#endnote-ref-4)
5. Lesley Jacobs, *Pursuing Equal Opportunities: The Theory and Practice of Egalitarian Justice* (Camrbidge, UK: Cambridge UP, 2004). [↑](#endnote-ref-5)
6. John Rawls, *A Theory of Justice* (Cambridge: Harvard UP, 1999). My discussion of Rawls’s three types of procedural justice that follows is taken from pages 73-78. I develop the Rawlsian argument for affirmative action in more detail in “Procedural Justice and Affirmative Action” *Ethical Theory and Moral Practice* 19 (2):425-443 (2016). [↑](#endnote-ref-6)
7. *Regents of the University of California v. Bakke* 438 U.S. 265 (1978). [↑](#endnote-ref-7)
8. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007). [↑](#endnote-ref-8)