PROCEDURAL JUSTICE AND AFFIRMATIVE ACTION

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ABSTRACT: There is widespread agreement among both supporters and opponents that affirmative action either must not violate any principle of equal opportunity or procedural justice, or if it does, it may do so only given current extenuating circumstances. Many believe that affirmative action is morally problematic, only justified to the extent that it brings us closer to the time when we will no longer need it. In other words, those that support affirmative action believe it is acceptable in nonideal theory, but not ideal theory. This paper argues that affirmative action is entirely compatible with equal opportunity and procedural justice and would be even in an ideal world. I defend a new analysis of Rawlsian procedural justice according to which it is permissible to interfere in the outcomes of procedures, and thus I show that affirmative action is not morally problematic in the way that many have supposed.

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In *Fisher v. University of Texas at Austin* the Supreme Court reaffirmed their commitment to limiting affirmative action in higher education to situations in which it is the only workable way to achieve diversity. That this particular court could pass a decision on affirmative action with a 7-1 majority shows that there are at least a few things that all sides of the affirmative action debate can agree on—the first being that if affirmative action is acceptable at all it should be reserved for particular situations. This paper is an attempt to rethink the seemingly widespread assumption that affirmative action is morally problematic. I will examine what I think is the best case to be made that affirmative action violates important principles of justice. I will argue that although many think that principles of either equal opportunity or procedural justice somehow prohibit affirmative action (or would do so in a society without a history of racism, sexism, or other similar injustice), in fact, this is not the case given the most plausible way of construing either principle. This paper is not a defense of affirmative action; rather, it argues that ideals of equal opportunity and procedural justice do not have the implications for the affirmative action debate that either side has supposed. It seems that equal opportunity is about securing everyone the same chance to achieve particular outcomes in life, rather than about securing the exact same outcomes for everyone. Thus it would seem that achieving equality of opportunity requires achieving just procedures. But the question of what makes a procedure just is surprisingly under-theorized. John Rawls has given the most detailed defense of an ideal of equal opportunity that is grounded in respect for procedural justice. I will argue that Rawlsian procedural justice does not prohibit interference in the outcomes of procedures, and that this notion of procedural justice has much to recommend it. If we accept this, then the fact that affirmative action interferes with hiring and admissions procedures in order to achieve particular outcomes is not a violation of these principles of justice. However, affirmative action may violate other principles of justice, or it may for various reasons be ill advised, thus the policy implications of my view are limited.

Both supporters and opponents agree that affirmative action either must not violate any principle of equal opportunity or procedural justice, or if it does, it may do so only given current extenuating circumstances. For example, in *Regents of the University of California v. Bakke* Justice Blackmun called affirmative action an “ugly” but necessary policy, writing “in order to treat some persons equally, we must treat them differently.” [[1]](#footnote-1) Although he is arguing in favor of affirmative action, he views affirmative action as essentially problematic, only justified to the extent that it brings us closer to the time when we will no longer need it. Justice O’Connor expressed the same view in the subsequent decision upholding the use of affirmative action when she predicted that these policies would not be needed in 25 years.[[2]](#footnote-2) Philosophers who have defended views similar to Blackmun’s include Judith Jarvis Thomson, Thomas Nagel, Richard Wasserstrom, Ronald Dworkin, and Alan Goldman.[[3]](#footnote-3) Most commentators ascribe this view to John Rawls, though he did not address the issue directly.[[4]](#footnote-4) Recently, Robert Taylor has elaborated on this interpretation of Rawls, arguing that affirmative action is for the most part prohibited by Rawls’s ideal theory, but allowed to some extent in nonideal theory.[[5]](#footnote-5) In other words, morally problematic policies may sometimes be justified to the extent that they bring about a more just society, and therefore affirmative action may be justified in certain circumstances, but some forms of affirmative action are too far beyond the moral pale and thus never permissible.

With friends like this, affirmative action hardly needs enemies. But of course it has many, and these also suppose that affirmative action is, at least in ideal conditions, a violation of either equal opportunity and/or procedural justice. Justice Roberts has said, “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” which captures the idea that any preferential treatment of racial groups is itself a violation of the ideal that proponents of affirmative action are trying to achieve.[[6]](#footnote-6) Opponents of affirmative action typically focus on attacking either the empirical claim that affirmative action will lead to a situation of greater equality or the claim that preferential treatment is justified as a means to an end.[[7]](#footnote-7) They don’t have to argue that affirmative action itself violates any ideals since proponents of affirmative action typically concede this point.[[8]](#footnote-8) I will argue to the contrary that affirmative action is entirely compatible with equal opportunity and procedural justice and would be even in an ideal world, thus affirmative action is not morally problematic in the way that many people have supposed.

WHAT IS AFFIRMATIVE ACTION?

To start, affirmative action is a general name for a host of disparate policies. It was introduced in the United States as a general term for anything the federal government might impose on contractors to ensure that they did not violate the Civil Rights Act of 1964. (Thus, even though many have argued that affirmative action is justified as a type of reparations for past injustice, it has always been legally distinct from reparations in that it was meant to ensure future compliance with civil rights legislation, rather than penalize non compliance.) By 1972 this took the form of imposing goals for the representation of women and specific racial groups and timetables for reaching those goals not only on construction firms with government contracts, but also on public hospitals and universities. Then, as now, it was often assumed that hiring and admissions quotas would be unacceptable because rejecting an applicant because of her race is by definition not allowing citizens an equal opportunity to hold coveted positions, so it was a controversial issue whether these federal goals and timetables amounted to quotas or not. My discussion will largely sidestep the issue of whether any particular affirmative action policy is or is not a quota, because I mean for my argument to apply to any and all affirmative action, including explicit quotas.

But even apart from the debate about quotas, simply defining affirmative action is fraught. Taylor provides the following taxonomy of affirmative action, adopted from Nagel:

1. formal equality of opportunity—the elimination of legal barriers to underrepresented groups, and the punishment of private discrimination;
2. aggressive formal equality of opportunity—sensitivity training, monitoring, and/or outreach to supplement type (1);
3. compensating support—special training programs or other support designed to help underrepresented groups to compete effectively;
4. soft quotas—non-explicit quotas such as adding “bonus points” to university applications from underrepresented groups;
5. hard quotas—hiring or placing a particular number of underrepresented minorities, perhaps in proportion to the population at large.[[9]](#footnote-9)

This taxonomy has the advantage that it nicely mirrors some of the legal distinctions made in the *Grutter* and *Gratz* cases, which place a heavy emphasis on distinguishing hard quotas, which are illegal, from soft quotas, which are sometimes legal. However, I think it is worth noting that offering this taxonomy in order to argue that quotas are morally problematic begs the question. Purportedly, the taxonomy represents policies from “weak” to “strong”, but the sense in which sensitivity training is “weaker” than hiring quotas is merely that hiring quotas are thought to be a greater violation of the principle that all people should be given an equal opportunity to be hired for jobs for which they are qualified. But since it will be my contention that such quotas do not violate ideals of equal opportunity, I do not endorse this taxonomy of affirmative action. I offer it as a kind of example of what we mean when we talk about affirmative action, but I will assume for the time being that I can proceed without a more formal definition, because for the purposes of my argument it will not matter.[[10]](#footnote-10) If even quotas do not violate our principles of equal opportunity and procedural justice then no other form of affirmative action can. It will be a separate question whether a given policy should or should not be called affirmative action, as it will be a separate question whether affirmative action is or is not all things considered justified.

EQUALITY OF OPPORTUNITY

 Though it is somewhat contentious how much equality of resources justice requires, it is generally accepted that at least the opportunity to gain resources should be equal.[[11]](#footnote-11) Thus, much of the debate over affirmative action has really been about whether and how opportunities are affected by group membership, with race-based affirmative action being the most controversial. Some will say that black people in the US have far fewer opportunities than whites; thus, affirmative action programs are necessary in order to give blacks more opportunities. Others will argue that a person’s opportunities are not as closely tied to race as they are to economic status. Thus they worry that race-based affirmative action handicaps poor whites.[[12]](#footnote-12) Adjudicating these difficult questions about the measurement of opportunity, which are mainly empirical, will be made easier with a clearer understanding of why we value equality of opportunity in the first place.

On this point Rawls was insightful. He distinguished between formal equality of opportunity and fair equality of opportunity (the latter is known as FEO).[[13]](#footnote-13) Formal equality of opportunity (or “careers open to talents”) obtains when positions are open to all those able and willing to strive for them and all have the same right to hold any position for which they are qualified. But Rawls is worried that merely instituting “careers open to talents” will lead to a distribution that is the result of natural abilities, and over time this will in turn influence which natural abilities are favored or allowed to develop, so that we can end up in a situation in which some people have better life chances simply because they are born to parents who were better able to exploit their natural abilities in the past. This would not be a situation of true equal opportunity, so we must conclude that the mere right to hold any position that one is qualified for is not sufficient for true equality of opportunity. To address this worry, Rawls adds the requirement of fair equality of opportunity, which he explains by saying that “those with similar skills and talents should have similar life chances.”[[14]](#footnote-14) But he then rejects even this as unsatisfactory for a complete picture of justice, writing, “it still permits the distribution of wealth and income to be determined by the natural distribution of abilities and talents…and this outcome is arbitrary from a moral perspective.”[[15]](#footnote-15) Thus, we need the addition of the difference principle – the principle that benefits enjoyed by those who are better off in society are just only if they also benefit the least advantaged in society - to make the outcome of the principles acceptable according to his theory of justice as fairness.

Notice that for Rawls, we must use our intuitions about the fairness of the outcome to judge the acceptability of the principles in order to achieve what he calls reflective equilibrium. But beyond this, for Rawls the principle of FEO merely specifies a condition under which inequalities can be permissible – it is one part of the second principle of justice that reads, “Social and economic inequalities are to be arranged so that they are both (a) to the greatest expected benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.”[[16]](#footnote-16) For Rawls, equality of opportunity must be robust because it is functioning in his theory as a justification for inequality. This does not imply that equality of opportunity is valuable for its own sake.

I think this tracks an important fact about equality of opportunity. There is no need to equalize opportunities, except in situations of scarcity and inequality. If we all had equally good jobs and went to equally good schools, we wouldn’t value the opportunity to get into those jobs and schools.[[17]](#footnote-17) In this type of ideal situation, there would not be competition for jobs and college placements so much as there would be mechanisms to ensure preference satisfaction for different types of work. So without some scarcity, the usual worries about equalizing opportunities in life, as well as ensuring that application procedures treat everyone equally, do not apply. However, it doesn’t follow that equality of opportunity is only valuable in a nonideal world, so to speak. For Rawls the ideal is a “realistic utopia”, and thus it includes both moderate scarcity and morally flawed individuals.

Some think that in Rawls's system equality of opportunity is valuable for its own sake, and so here I must defend why I think it is not.[[18]](#footnote-18) Richard Arneson argues that fair equality of opportunity includes formal equality of opportunity, for him fair equality of opportunity is just the formal principle "careers open to talents" plus "fair background."[[19]](#footnote-19) For Arneson, this is a principle of meritocracy, that is tempered or softened by the fair background requirement, but still ultimately assigns some value to the meritocratic "careers open to talents." I think it is more accurate to say that fair equality of opportunity is opposed to formal equality of opportunity; given that Rawls thought formal equality of opportunity was not enough to secure a just society, we should replace it with the superior principle of fair equality of opportunity.[[20]](#footnote-20) Though I think this interpretation is more consistent with Rawls's aims and with the tenor of the discussion in *A Theory of Justice*, there is one important piece of evidence that tells against my view.In *Justice as Fairness*, Rawls makes the point that some equality of opportunity "for example careers open to talents" is a constitutional essential, but that fair equality of opportunity requires more than that, and is not a constitutional essential.[[21]](#footnote-21) This indicates that he believes fair equality of opportunity encompasses formal equality of opportunity. But I think we should not make too much of this comment. In *Political Liberalism*, he doesn't mention careers open to talents as a constitutional essential and instead uses free choice of occupation as an example.[[22]](#footnote-22) In both discussions of constitutional essentials, he doesn't obviously commit himself to the idea that any particular principle of equal opportunity is a constitutional essential, just that some such principle must be. And the shifting examples themselves suggest that he was not sure what type of equality of opportunity should be a constitutional essential. I suspect that the best way to interpret careers open to talents as a constitutional essential is as a constitutional right to be considered for any job one is qualified for, not an obligation on the part of employers to hire exclusively according to merit. I do not consider formal equality of opportunity absolutely necessary for fair equality of opportunity because, as even Arneson admits, there are possible instances in which these principles conflict with each other, and thus this brings up the question of their priority. It seems in Rawls's discussion in *Theory* that fair equality of opportunity would trump formal equality of opportunity if they were to conflict.[[23]](#footnote-23) But giving fair equality of opportunity priority over formal equality of opportunity makes formal equality of opportunity redundant. Thus in order to suppose that Rawls meant for fair equality of opportunity to include formal equality of opportunity, we would also have to suppose that formal equality of opportunity had priority over fair equality of opportunity, and this seems to go entirely against the tenor of Rawls's discussion in *Theory* in which Rawls repeatedly notes the shortcomings of formal equality of opportunity. Given this, I think it is more plausible to assume that fair equality of opportunity is meant to replace the defective formal equality of opportunity, even though this requires us to assume that the example of careers open to talents as a constitutional essential was ill chosen.

Rawls explained the importance of equality of opportunity by contrasting a system of positions open to all with a system in which some are excluded from positions yet benefit somehow from this arrangement. He says their benefit does not justify their exclusion because “the realization of self which comes from a skillful and devoted exercise of social duties” is a main form of human good.[[24]](#footnote-24) This statement has been misunderstood as a presumption against affirmative action. It also seems to echo the reasoning of the petitioners in *Bakke*, *Grutter*, *Gratz*, and *Fisher*. In each case a white applicant (or applicants) petitioned the court on the basis that a university's use of affirmative action denied them a right they allege is protected in the Constitution.[[25]](#footnote-25) But the Rawlsian point that humans benefit from meaningful employment cannot justify this kind of argument against affirmative action. Those white applicants who are passed over for offices or positions on the basis of affirmative action are not denied anything that is not also denied to any of the other losing applicants, even those who lose based on insufficient merit. The point that a skillful and devoted exercise of social duties is one of the main forms of human good is an argument for making meaningful and fulfilling work available to all people, not an argument for any particular hiring or placement procedures, for example, allocating the limited positions in a given freshman class to those students with the highest SAT scores regardless of their race.[[26]](#footnote-26)

I have tried to establish so far that equality of opportunity is only valuable when the result of some competition must be unequal, and that it is no argument against affirmative action programs that they deny something to the losers of the competition. But that doesn’t mean that affirmative action is never a violation of equality of opportunity. It is natural to think that equal opportunity requires the establishment of fair procedures according to which citizens compete for various social rewards. Thus in determining whether opportunities are equal we must thereby determine whether the procedures for hiring and college placement treat all applicants fairly because these procedures are the primary mechanism for granting differential rewards in our society. In the context of affirmative action, it is hotly debated whether a fair procedure must be “color-blind.” But here again, all sides tend to agree that ideally, procedures used to grant social rewards would never discriminate on the basis of race or sex unless such things are directly relevant to the performance of a particular job.[[27]](#footnote-27) The disagreement is generally over whether current conditions are such that correcting for racism or sexism is required or allowed (hence affirmative action is sometimes known as “reverse discrimination”). I want to sidestep the usual disagreement and instead focus on whether procedural justice prohibits affirmative action (even the so-called “strong” kind) in the ideal case. In other words, if we had somehow reached the point that O’Conner predicted, in which we no longer needed affirmative action to achieve racial equality, what would be wrong with using affirmative action then? How exactly does affirmative action offend against procedural justice in the ideal society?

This is in fact where the crux of the issue lies, and it is also the area that has been the least explored in the literature on affirmative action so far, save for the recent work by Taylor. Taylor has pointed out that Rawls writes, “The role of the principle of fair opportunity is to ensure that the system of cooperation is one of pure procedural justice,”[[28]](#footnote-28) and also “pure procedural justice obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed.”[[29]](#footnote-29) In light of these remarks, Taylor has offered the initially plausible reading (*contra* Nagel and Freeman) that Rawls cannot sanction either hard or soft quotas, because we do not know exactly what the result of a fair job search or college application process is so we cannot place people in the positions they would have obtained if fair procedures had been followed. Rather, in cases like these we must define fair outcomes only in terms of fair procedures, and fair procedures are those that do not discriminate based on race or sex.

Although this is somewhat controversial as a reading of what policies Rawls can sanction, it is not controversial at all as an account of Rawlsian procedural justice.[[30]](#footnote-30) As I’ve already pointed out, even proponents of affirmative action generally concede that procedural justice requires treating applicants for positions as if we did not know their race or sex. They merely counter that procedural justice should be ignored for the time being, because current conditions are so far from ideal.[[31]](#footnote-31) Though I will argue that Taylor’s interpretation of Rawls is misguided, his work has made salient an issue that has been lurking in the background of the affirmative action debate for a long time – that our understanding of the fairness of affirmative action is reliant on some implicit understanding of what counts as a fair or just procedure. Thus it would seem that Rawls’s account of procedural justice has special relevance for affirmative action, because Rawls is so commonly taken to be the authority on procedural justice. In what follows I will argue that Rawls’s account of procedural justice is more novel and complicated than anyone has yet noticed. And though I cannot provide a complete and defensible account of Rawlsian procedural justice here, I can show that if we take Rawls’s account such as it is seriously then we must admit that procedural justice does not prohibit any type of affirmative action at all, even explicit quotas. However, though the next section will focus on a close reading of Rawls, this is not meant to serve a simply exegetical argument. Given that there are very few philosophical accounts of procedural justice, this should be an important result for anyone; if successful I will have shifted the burden of proof on those who would disagree to formulate an alternative account of procedural justice.[[32]](#footnote-32)

PROCEDURAL JUSTICE

Rawls's categories of perfect, imperfect, and pure procedural justice were not only novel, but also entirely at odds with previous understandings of procedural justice. Readers have apparently failed to remark on this aspect of Rawls’s theory because Rawls himself did not remark on it; the first time he mentions procedural justice in *A Theory of Justice* he cites Brian Barry as if they are in agreement, then he mentions the seemingly tangential economic literature on fair division, which I will discuss shortly.[[33]](#footnote-33) Brian Barry had previously defined “procedural fairness” as having been achieved “when the formalities that define the procedure have been correctly adhered to,” for example, a fair race in which no one gets a head start, or a fair trail in which the defendant has a right to have a lawyer and present evidence.[[34]](#footnote-34) He contrasted procedural fairness with the deeper notion of “background fairness” which concerns the advantages or disadvantages that participants have at the outset of a procedure. For example, considerations of procedural fairness dictate only that all racers start at the same time, whereas background fairness might demand that a particularly well-trained runner's time be handicapped. We can easily imagine how excessive concern for background fairness could compromise procedural fairness, for instance if the race were handicapped overzealously. Similarly, we can imagine how excessive concern for procedural fairness can compromise background fairness, as it would if the race pitted a child against a professional athlete. For Barry the two notions are clearly in tension, if not entirely opposed to each other in practice.

 But Rawls, by contrast, introduced three kinds of procedural justice: perfect, imperfect, and pure.[[35]](#footnote-35) Perfect procedural justice is achieved when there is an independent criterion for judging the justice of the result and a procedure guaranteed to lead to that result. Rawls uses the example of cutting a cake and letting others choose their slices. Imperfect procedural justice is achieved when there is an independent criterion for judging the result, but no procedure that is guaranteed to lead us there, as in a criminal trial, which has the potential to convict the wrong person. Pure procedural justice is exemplified by gambling, it

…obtains when there is no independent criterion for the right result; instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been correctly followed.[[36]](#footnote-36)

Even before fully understanding the difficult notion of pure procedural justice, we can have a number of distinct worries about the three categories. First, no one of them seems exactly analogous to Barry’s notion of procedural fairness, but neither does it seem that all three taken together are. It’s also arguable that perfect and imperfect procedural justice are too similar to be distinct, and the relevant difference is between procedures designed to lead to a specific outcome versus procedures that are not.[[37]](#footnote-37) In Rawlsian pure procedural justice, the background circumstances determine whether the result of the procedure is just, for instance, in the gambling example, as long as the game is fair and bets are freely entered, whatever each person wins will be just. To understand what Rawls has in mind here we should imagine a very rudimentary game of chance, like a coin toss, rather than a casino game. There is no way to judge the justice of the result of a single coin toss. Whether the coin toss is fair is determined entirely by the conditions under which it is carried out. Either heads or tails can be a just result, as long as the parties to the coin toss have agreed to abide by the result. The importance of the example is not merely that the procedure must actually be carried out, but also that procedural justice is not achieved unless background justice is already in place.

Rawls is here combining two things that seem to be opposed, procedural justice and background justice, and thus his view is a significant departure from Barry’s. In recognizing a type of procedural justice that depends on the justice of background circumstances he also departs significantly from the game theory literature he cites (though again, without acknowledging the departure). Rawls cites *Games and Decisions*, in which Luce and Raiffa survey a number of different “games of fair decision” which are all based on the method in which one person cuts the cake and the other chooses her slice, though tailored for various more complicated situations. For example if a father wills that four of his indivisible commodities be shared equally among his three children, the children might each add an equal sum of money to the pot before, in a random order, one child will divide the estate in some way and the subsequent children will choose which part of the estate they want, with each subsequent child having the option to diminish the piece of estate they want before accepting.[[38]](#footnote-38) But in each of these games what will count as a fair outcome is knowable prior to undertaking the game (in these examples a fair outcome is either equal shares or a Pareto optimal division of shares), the issue is just that the game is the most efficient way to achieve the outcome, given the situation. These types of games are analogous to Rawls’s perfect procedural justice, but they are very different from his pure procedural justice.

So in perfect procedural justice we say the procedure is just if it results in a just outcome, where what counts as a just outcome has been determined in advance. This is the type of procedural justice most amenable to game theory formalization because it is essentially a maximization problem. We know what outcome or outcomes we want, and we have some parameters constraining us, what is the most efficient way to achieve the outcome given the parameters; i.e. how do we maximize utility given conflicts of interest? It seems that Rawls brings this up only in order to contrast it with pure procedural justice, in which the desired outcome is not known in advance.

Imperfect procedural justice also appears to serve this merely contrastive purpose, and is thus necessary to clarify pure procedural justice along another dimension. Like perfect procedural justice, imperfect procedural justice, as typified by a criminal trial, is also a situation in which the desired outcome is known. In this case, the desired outcome is convicting the person that committed a crime, and only this person. But what is most important about imperfect procedural justice for Rawls is that the procedure can be said to be just even if it does not produce the desired outcome. We can say that a defendant who in fact committed a crime but was acquitted in court nevertheless received a fair trial, and the fact that she did so is in a sense more important than getting the right outcome. So in imperfect procedural justice we have a situation in which procedural justice is opposed to some other type of justice; in the case of the criminal trial, procedural justice takes precedence over retributive justice.

Rawls’s use of perfect and imperfect procedural justice to clarify his novel notion of pure procedural justice can be seen in table 1. He contrasts pure procedural justice with perfect procedural justice to show that in pure procedural justice the outcome cannot be considered fair independently of the procedure used to arrive at it. On the other hand he also contrasts pure procedural justice with imperfect procedural justice to show that in pure procedural justice the procedure cannot be considered fair independently of the outcome. In pure procedural justice the procedure affects the outcome and the outcome affects the procedure. This was an entirely new notion of procedural justice in the literature at the time.

But I should say more about why pure procedural justice is to be interpreted in this way, given that it is natural to think that pure procedural justice has nothing at all to do with outcomes. Admittedly, the gambling example is confusing on this point. It seems to indicate that pure procedural justice describes procedures that are just no matter what outcome results from them, since of course the coin toss is just whether the result is heads or tails. But I think this is to misunderstand the purpose of the example. As I understand it, Rawls’s choice of gambling as an example of pure procedural justice serves not only to make the point that pure procedural justice judges outcomes in light of procedures but also that pure procedural justice judges procedures in light of outcomes. In the gambling example, this point is merely trivially true; any outcome would lead us to judge the procedure just, so it seems that we aren’t judging the procedure at all. But in fact we are – if it were the case that the coin toss wasn't being judged in light of its outcome then the coin toss would not really be distinct from the criminal trial; they would both be cases in which the procedure's justice is transmitted to the outcome and determined independently from it. But while this makes sense in a criminal trial, and we can say that the justice of the trial made the outcome procedurally just whether the right person was convicted or not, this is in fact not what occurs during the coin toss. There is no way to coherently talk about the justice of the outcome of the coin toss as distinct from the justice of the toss itself, which means that the coin toss is just if and only if the result is just. In a criminal trial, if the trial is just then the result is just, but not vice versa, and in cake cutting if the result is just then the cutting procedure is just, but not vice versa. If something was wrong with the result of a coin toss then we would say that toss itself had gone wrong, and this is just as true as the fact that if something was wrong with the toss we would say the result was wrong. Many have supposed that in pure procedural justice the procedure's justice can sanitize the outcome, no matter what we might say of the outcome if we had considered it apart from the procedure. Admittedly, this is strongly suggested by Rawls's statement that pure procedural justice obtains when "there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is…"[[39]](#footnote-39) This statement establishes the conditional that if the procedure is fair the outcome will be fair, but if this is all there is to pure procedural justice it would not be truly distinct from imperfect procedural justice. In my account it is more accurate to say that in pure procedural justice any injustice in the outcome would necessarily infect the procedure and vice versa. In perfect procedural justice injustice in the procedure can be insulated from the outcome (if we got an equal division of the cake it would not matter if we arrived at it accidentally) and in imperfect procedural justice injustice in the outcome can be insulated from the procedure (if an innocent man is convicted that does not thereby make the trial unjust). However in gambling or games generally if there is injustice in either the procedure or the outcome then the other will be unjust as well, games in which participants cheated make their outcomes unjust and harmful results will make the game that led to them unjust.[[40]](#footnote-40)

Besides making sense of why pure procedural justice had to be defined in opposition to two different types of procedural justice, this way of understanding pure procedural justice also fits nicely within the Kantian paradigm of Rawls’s social contract theory more generally in that implementing pure procedural justice would require using a sort of reflective equilibrium between intuitive ideas about procedures and intuitive ideas about outcomes, just as the principles of justice themselves are constructed using intuitive ideas about fairness expressed in a hypothetical social contract and tested against intuitive ideas about principles that should result from such a contract.[[41]](#footnote-41)

Rawls's discussion of pure procedural justice is embedded within his discussion of distributive shares. His point in this section is that what each person produces in a society will be determined by what the society’s rules say he is entitled to, and what he is entitled to will depend on what he produces.[[42]](#footnote-42) If doctors make more money than janitors in my society, I may choose to become a doctor for that reason and given that choice I will be entitled to the additional compensation. But because of this, we must think about whether to establish a public system of rules that will give rise to the expectation of greater compensation for doctors in the first place (rather than, say, imploring doctors to give their extra money to the janitors voluntarily). He says,

"These considerations suggest the idea of treating the question of distributive shares as a matter of pure procedural justice. The intuitive idea is to design the social system so that the outcome is just whatever it happens to be, at least so long as it is within a certain range."[[43]](#footnote-43)

In order to achieve fair equality of opportunity, in the sense that positions that grant differential social rewards are open to all, we must design a system in which the outcome is within a certain range. It’s true that we have no independent criteria for judging the distribution of the results of cooperative ventures, since such ventures will be shaped by individual's expectations of their own share of the benefits. But just because outcomes cannot be judged independently of the system that led to those outcomes doesn’t mean that outcomes cannot be judged. Rather it means that we judge outcomes in light of procedures and vice versa.[[44]](#footnote-44)

 As to whether we should accept this Rawlsian account of procedural justice it might be useful to consider some of the objections that have been made to it, most notably from Stuart Hampshire and Jurgen Habermas. Hampshire sets out a distinction between procedural justice and substantive justice such that the justice of procedures is distinct from the justice of the outcomes of procedures, and that in a pluralistic society we should only hope for the former.[[45]](#footnote-45) He argues that fair procedures of dispute resolution are of fundamental importance, and that such procedures will generate some absolute duties but not anything like substantive moral agreement. For example, fair procedures would foreclose the possibility of slavery but would be compatible with both liberal and illiberal conceptions of justice. Thus he thought Rawls’s theory was too substantive and not procedural enough, in the sense that hope for agreement on Rawlsian principles of justice is utopian. Similarly, Habermas argues that his theory is superior to Rawls’s because it is focused on the procedure of public reason, rather than its content.[[46]](#footnote-46) So that rather than try to set out a theory of what justice is, philosophy should aim to describe the ideal process of deliberation in the public sphere and any outcome of that ideal process is thereby just.

 Rawls notably does not reply that Hampshire and Habermas’s accounts of procedural justice are incorrect, rather he holds that Hampshire and Habermas are mistaken about how substantive their own accounts are. He holds that the division between the justice of procedures and the justice of outcomes cannot be maintained, and that theories of justice that claim to be procedural and not substantive are in fact reliant on substantive values to define fair procedures.[[47]](#footnote-47) He claims to be "unmoved by the objection that justice as fairness is substantive rather than procedural. For as I understand these ideas, it could not be otherwise."[[48]](#footnote-48) Rawls rejects not only the idea of an exclusively procedural idea of justice but even the idea of an exclusively procedural idea of legitimacy. As he puts it,

…our considered judgments with their fixed points—such as the condemned institution of slavery and serfdom, religious persecution, the subjection of the working classes, the oppression of women, and the unlimited accumulation of vast fortunes, together with the hideousness of cruelty and torture, and the evil of the pleasures of exercising domination—stand in the background as substantive checks showing the illusory character of any allegedly purely procedural ideas of legitimacy and political justice.[[49]](#footnote-49)

 Rawls is here referring to the entire system of justice as fairness, but in case we are tempted to suppose pure procedural justice is a special case that operates within this substantive conception of justice we should recall that Rawls earlier claimed that “justice as fairness is able to use the idea of pure procedural justice from the beginning.”[[50]](#footnote-50) Rather than assume that Rawls abandoned his commitment to pure procedural justice we can read him as consistently endorsing a notion of procedural justice that despite the misleading label of "pure" is in fact one in which procedures make outcomes just and outcomes make procedures just. If Rawls is right that "it could not be otherwise," then the reason to accept the Rawlsian idea that procedural justice requires that the outcome of the procedure be just is that the alternative view does not make sense when we consider the issue carefully. It seems initially plausible that there is something fundamentally different about the fairness of procedures and the fairness of the outcomes of those procedures, especially when we consider examples of games or sports. But a closer look at even these trivial examples shows that in fact these two things cannot be entirely separate, if they were there would surely be much more disagreement about how to award accolades in sports. To the contrary, we have settled on particular ways of playing particular games; we do not handicap runner’s times in most track and field events, because we are not dissatisfied with the outcomes of these events. When we have changed the rules in particular sports, it is usually because the outcomes of the games have become unacceptable to us, which underscores the idea that the justice of outcomes does affect the justice of procedures.

AFFIRMATIVE ACTION DOES NOT VIOLATE PROCEDURAL JUSTICE

 Now we can begin to see why arguments against affirmative action that rest on equal opportunity or procedural justice will fail. Consider first what is perhaps the most common argument against affirmative action, which is that treating people differently based on their race is wrong.[[51]](#footnote-51) Now the sense in which affirmative action treats people differently based on race is that affirmative action interferes with traditional hiring or college application procedures to guarantee that some successful applicants are from particular racial groups. In what some would consider extreme cases, affirmative action may take the form of hiring or placing a set number of black applicants before considering any applications from white applicants; thus it treats black applicants better in this respect than white applicants. What principle does this violate? Is it a violation of fair equality of opportunity? If we think, like Rawls, that fair equality of opportunity is valuable because it ensures that those with similar skills and talents have similar life chances then we cannot judge whether any single hiring procedure violates this principle; the principle can only be violated or not by the entire basic structure.[[52]](#footnote-52) One institution’s use of affirmative action, in a large society like ours, would rarely be sufficient to interfere with anyone’s life chances. Instead, in order to judge whether affirmative action violates FEO, we should consider whether the social system is one of pure procedural justice. But in this case, we don’t have to reserve judgment for the entire basic structure. A society’s basic structure is not necessarily in violation of fair equality of opportunity just because a single company within that society does not grant opportunities fairly. But presumably, if a single company violates pure procedural justice then the entire basic structure might thereby violate pure procedural justice.

 So in this way, the requirement of pure procedural justice might be seen as very demanding. But not in the way that opponents of affirmative action usually argue. Consider Taylor’s argument that affirmative action quotas are incompatible with Rawlsian pure procedural justice. Taylor holds that pure procedural justice prevents us from intervening in the outcome of any job search or college admissions procedure because under pure procedural justice we do not know what the outcome of a fair procedure is without actually completing the procedure. On this view, the results of a procedure are just if and only if the rules of the procedure are just and the procedure is actually carried out. Thus, Taylor holds that we cannot place people in the positions they would have attained as the result of a fair procedure because we do not have any way to tell what those results would have been. Taylor points out, as critics of affirmative action often do, that we cannot assume that fair procedures would lead to proportional representation of racial groups within every college or every profession. His example is the overrepresentation of black people in the NBA, he says this is unlikely a result of racial bias against white players. Furthermore, Taylor worries that the more uncertain we are about the results of a fair procedure, the more likely it is that we will "overshoot" or place more affirmative action applicants into positions than we should.

The view can be reconstructed as follows:

1. Procedural justice requires no interference in the outcome of procedures.
2. Affirmative action quotas interfere in the outcome of procedures, in that they attempt to achieve racial justice by using unfair means.
3. The end that quotas attempt to achieve is what would have happened if there had been no racism in society.
4. We do not know what the outcome of hiring and admissions procedures would be in the ideal society (i.e. the society without racism).

Each tenant of the view can be challenged. But first, the view shouldn’t be attributed to Rawls. By pure procedural justice Rawls meant a situation in which we judge outcomes in light of procedures and judge procedures in light of outcomes. Taylor’s (1) places undue emphasis on the former, as if Rawls thought justice requires keeping procedures "pure" from interference. Also the concern that quotas may "overshoot" is inconsistent with (4), since if there is no particular racial distribution of college freshmen that is just, there is nothing to overshoot.

More importantly, if we take Rawls’s insights about procedural justice seriously, then (1) is not plausible. This would be a notion of procedural justice that valued the rules defining a procedure for their own sake, entirely independent of outcomes. We don’t use such a notion in games; it is not as if the rules of basketball are so important that we wouldn’t consider changing them if they consistently lead to undesirable outcomes. For example, before 1954, if one team took the lead in an NBA game they would simply try to prevent the other team from getting the ball rather than attempt to shoot the ball and risk losing possession. Team owners worried they would not be able to entice audiences without more aggressive offense being played. So the NBA instituted a time limit, now teams have 24 seconds to shoot or they risk losing possession of the ball.[[53]](#footnote-53) There is nothing unjust about changing the rules of a procedure in order to achieve a particular outcome.[[54]](#footnote-54) Of course we wouldn’t change the rules in the middle of a game, but this is to confuse the requirement of procedural justice with the rule of law, which requires that laws are consistently applied and public. It doesn’t require that we never change the rules.

Now there is perhaps something unfair about the basketball example because the rule change was not contentious among NBA officials, they all had an interest in making the game more exciting. If we assume that (4) is true, then we can grant that changing the rules of a procedure is not a violation of procedural justice when we agree on what kind of outcome we want, but it would be if we did not know what outcome we want. But closer examination reveals that (4) is ambiguous: it is true in the sense that we don’t know exactly how many black students would be admitted to a given university if there had been no slavery, no school segregation, and no lingering wealth inequalities that stem from either. But (4) is not true if we are talking about all the universities in the U.S. put together. If we hold all other factors constant, e.g. demographics, the likelihood of securing employment without a college degree, and imagine the U.S. without any history of racism, then we do know that the racial makeup of college students would be more proportional to the racial makeup of the population at large (with elite schools being somewhat proportional to the population of the entire nation and regional schools somewhat proportional to the population of their regions).[[55]](#footnote-55) Exactly how proportional things would be is impossible to specify, but if we truly are holding other factors besides racism past and present constant then we are supposing that there are not additional innocent reasons for the current large disparities.[[56]](#footnote-56) This is not to say there are not possible worlds without racism that have a different set of facts, this is just to say that the belief that gross racial disproportionality is unjust in our world is justified.

This kind of argument against affirmative action must suppose that there is something valuable about hiring applicants based only on merit, and that if such procedures result in a disproportionately white workforce this would not be sufficient reason to change hiring procedures. In other words, this notion of procedural justice holds that merit based hiring is fair no matter what outcomes it leads to. This idea follows from an insistence that affirmative action is an objectionable interference in the outcome of merit-based procedures.

Even if we leave aside the many objections that hiring procedures are not truly based on merit even when they purport to be, we can ask is hiring based on merit more just than race-conscious hiring? According to the view of procedural justice that I’ve been arguing against, if merit-based hiring is fair, that must mean that any and all outcomes of merit-based hiring are fair as well. But if Rawls is right about procedural justice then there is no reason to think that there is such a thing as a fair procedure, defined independently of its outcome, which will transmit its justice to the outcome in this way. In pure procedural justice we must judge outcomes in light of procedures but also procedures in light of outcomes. Insofar as merit based hiring is fair, it will make the outcome of a meritocratic job search fair, but insofar as the outcome of a meritocratic job search is unfair then so too is the merit based procedure itself unfair. This is compatible with the thought that merit based procedures are preferable when they are available, but interfering with merit based procedures does not violate procedural justice unless it is done to achieve unjust outcomes.

This two-way evaluation of procedures and outcomes does not offend against procedural justice, and is in fact exactly what practitioners of affirmative action often engage in. Consider the University of Texas policy that was challenged in *Fisher*. The university had stopped explicit consideration of the race of applicants in 1997, in response to the Texas Supreme Court ruling that outlawed the practice.[[57]](#footnote-57) In the following years, the student body became much less diverse. According to an internal memo, the university considered the fact that their lack of overall diversity lead to a situation of most smaller classes lacking any significant minority enrollment to be a bad thing, and detrimental to the few minority students who were enrolled. Thus, due to their dissatisfaction with the outcome of the previous admissions procedures, they proposed to modify admissions procedures in order to achieve better outcomes.[[58]](#footnote-58) As far as procedural justice is concerned, this is entirely appropriate. In fact pure procedural justice, in the Rawlsian sense, seems to *require* continual evaluation of admissions procedures with respect to the outcomes of those procedures.

Now I would like to consider an objection to my argument. I’ve argued that treating a black candidate better than a white candidate in order to meet a minimum quota for black admission is not necessarily a violation of equal opportunity or procedural justice, so what about treating a white applicant better than a black applicant? Like the reverse case, it isn’t necessarily a violation of fair equality of opportunity or procedural justice. Whether it is a violation of fair equality of opportunity will depend on the basic structure as a whole and whether it is a violation of procedural justice will depend on whether it leads to unjust outcomes. The justice of the outcome will be determined by the contribution it makes to the justice of the basic structure, and evaluated in light of the procedure itself. (If we are whole-heartedly Rawlsian we would ask whether the basic structure conforms to the two principles of justice; if not there will be some other metric here.) Consider an elite university that treats white applicants better than black applicants in that it refuses to consider admitting more than 1% black applicants, despite the many more that apply. If this is done against the background of lesser opportunities for blacks in general, and it results in very few black students compared to the number of blacks in the population, then it is plainly a violation of fair equality of opportunity and of procedural justice. But this isn’t because it treats individuals differently based on their race; it is because of the way that the procedure fails to lead to a just outcome, in so far as the outcome contributes to injustice in the society at large. It is true that the justice of the outcome must be judged in light of the procedure, in the same way that my losing a coin toss is fair as long as no one used a trick coin. But this would be an absurd principle if it required that the justice of the outcome be judged solely by whether the rules of any given procedure are carried out. In this case, it is clear that the outcome is unjust, and the patent injustice of the outcome makes the procedure unjust.

Consider another way white applicants might be treated better than black applicants— legacy admissions. Legacy admissions are not a violation of procedural justice because they treat applicants unequally. Alumni might plan their whole lives around the idea that their children will be given preferential treatment at the university from which they graduated. Other things being equal, procedural justice requires that this expectation be met, and dictates that the outcomes that result from this procedure are just, given that the expectation arose from the procedure itself. In practice though, legacy admissions do contribute to injustice in the amount of overall opportunities afforded to different racial groups, and so given this outcome in the actual world, legacy admissions can be said to violate procedural justice.[[59]](#footnote-59) The upshot of my argument is that since procedural justice does not require equal treatment of all applicants in any given procedure it cannot condemn preferential treatment of any racial group, even whites, on that basis. But given that any preferential treatment of whites in our actual world will contribute to black disadvantage overall we can condemn legacy admissions on the basis of their outcomes.

AFFIRMATIVE ACTION IN PRACTICE

The policy implications of my argument, considered alone, are narrow. I have argued against the assumption, common on both sides of the affirmative action debate, that affirmative action is morally problematic. I did this by locating that assumption as a worry that affirmative action violates procedural justice. I then argued that although procedural justice is an important part of equality of opportunity, there is no plausible principle of procedural justice that would condemn affirmative action. To think so is to mistakenly value the rules of a given procedure for their own sake. Given just this argument, I have said nothing about the justifiability of affirmative action more generally. My points here about procedural justice are consistent with various defenses of affirmative action, whether based on rectification, diversity, or integration, though it follows from what I’ve said that defenders of affirmative action need not cede as much ground as they have to the procedural justice argument. Although my argument about procedural justice rules out most arguments against affirmative action based on “color-blind” principles, what I’ve said here does in theory allow for new arguments against affirmative action that are not based on any principle of procedural justice. In focusing on the justifiability of affirmative action in ideal theory, I have in fact meant to emphasize the importance of nonideal theory in this debate. If I am right that there are no ideal principles that affirmative action violates, then this means that affirmative action must be justified by the results it brings in the real world. So I have attempted to show that the proper locus of the debate is on whether those results are desirable or not. Since we cannot maintain the distinction between the justice of procedures and the justice of the outcomes of those procedures we must embrace the fact that our judgments about the outcomes are relevant. Opponents of affirmative action will have to do more than argue that any given admissions or hiring procedure must be adhered to, they will have to justify those procedures in light of the outcomes. This means that meritocratic procedures as well are only as just as their outcomes. Procedural justice requires that we design procedures that lead to desirable outcomes. Opponents of affirmative action must show that racially diverse college campuses and workplaces are not desirable outcomes. In this they face an uphill battle.

|  |  |  |
| --- | --- | --- |
|  | Justice of outcome is independent of procedure | Justice of procedure is independent of outcome |
| Perfect procedural justice | Yes | No |
| Imperfect procedural justice | Yes | Yes |
| Pure procedural justice | No | No |

**Table 1.**

1. *Regents of the University of California v. Bakke* 438 U.S. 265 (1978). [↑](#footnote-ref-1)
2. *Grutter v. Bollinger*, 539 U.S. 306 (2003). [↑](#footnote-ref-2)
3. Granted, when we look closely, these views are quite heterodox in a number of ways. Thompson argues that affirmative action can be justified as compensation for past wrongs, whereas Nagel argues that affirmative action can be justified so long as it mitigates a greater social evil. What ties these views together for my purposes is that they all defend the use of affirmative action on instrumental grounds, while upholding the non-instrumental value of equality of opportunity. Judith Jarvis Thompson, 'Preferential Hiring,' *Philosophy and Public Affairs* 2 (1973): 364-84; Thomas Nagel, 'Equal Treatment and Compensatory Discrimination,' *Philosophy and Public Affairs* 2 (1973): 348-63; Richard Wasserstrom, 'Racism, Sexism, and Preferential Treatment: An Approach to the Topics,' UCLA Law Review, 24 (February 1976): 581–622; Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985); and Alan Goldman, 'Affirmative Action,' Philosophy and Public Affairs 5, (1976): 178-95. [↑](#footnote-ref-3)
4. Thomas Nagel, 'John Rawls and Affirmative Action,' *Journal of Blacks in Higher Education* 39 (2003): 82-84; Samuel Freeman, *Rawls* (London: Routledge, 2007), 90. Nagel reports the view was implied in comments Rawls made to him in conversation around the time of the Bakke decision in 1978, and Freeman reports the Rawls spoke about affirmative action in his lectures. [↑](#footnote-ref-4)
5. In fact, Taylor argues that Rawls's theory can allow fewer forms of affirmative action than many had previously thought, including Nagel and Freeman. See Robert Taylor, 'Rawlsian Affirmative Action,' *Ethics* 119 (2009): 476-506. [↑](#footnote-ref-5)
6. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007). [↑](#footnote-ref-6)
7. For the former, see Richard Sander, 'A Systemic Analysis of Affirmative Action in American Law Schools,' *Stanford Law Review* 57 (2004): 367–484 and for the latter see Louis Pojman, 'The Moral Status of Affirmative Action,' *Public Affairs Quarterly* 6 (1992): 181-206. [↑](#footnote-ref-7)
8. Perhaps someone like Amy Gutmann should be seen as the notable exception to this point, since she argues that affirmative action of a certain type can satisfy ideals of diversity. But the affirmative action that Gutmann defends is not any type of quota, so she leaves open the question of whether racial or gender quotas would violate equal opportunity if we did not agree with her that being a member of a certain race is itself a relevant qualification for employment. See Anthony Appiah, and Amy Gutmann, *Color Conscious: The Political Morality of Race* (Princeton, NJ: Princeton University Press, 1996). [↑](#footnote-ref-8)
9. Taylor op. cit, p.478. [↑](#footnote-ref-9)
10. See also Anthony Appiah on problems with James Sterba's definition in ''Group Rights' and Racial Affirmative Action,' *The Journal of Ethics* 15.3 (2011): 265-80. [↑](#footnote-ref-10)
11. Though see Kershnar for an argument against equality of opportunity. Stephen Kershnar, 'Why Equal Opportunity Is Not a Valuable Goal,' *Journal of Applied Philosophy* 21, 2 (2004): 159-73. [↑](#footnote-ref-11)
12. This example comes up so often that Lawrence and Matsuda spoke of “endless citings of 'the poor white male from Appalachia'” in 1997; see Charles Lawrence and Mari J. Matsuda, *We Won't Go Back: Making the Case for Affirmative Action* (Boston, MA: Houghton Mifflin, 1997). [↑](#footnote-ref-12)
13. Thanks to Andrew Valls for correcting my perception of this distinction. Though fair and formal equality of opportunity are different, formal equality of opportunity is itself a demanding requirement. [↑](#footnote-ref-13)
14. John Rawls, *A Theory of Justice* (Cambridge: Harvard UP, 1999) 63. [↑](#footnote-ref-14)
15. Ibid, 64. [↑](#footnote-ref-15)
16. Ibid, 72. [↑](#footnote-ref-16)
17. Kershnar op. cit makes a similar point in his argument against the value of equality of opportunity. [↑](#footnote-ref-17)
18. Thanks to an anonymous reviewer for pressing me on this point. [↑](#footnote-ref-18)
19. Richard Arneson, "Against Rawlsian Equality of Opportunity" *Philosophical Studies* 93: 77-112 (1999). This interpretation of Rawls is ultimately what leads Arneson to reject the Rawlsian principle of fair opportunity, because Arneson doesn't believe that meritocracy should have any value to us. My interpretation of Rawls's principle anticipates some of Arneson's objections, so though I embrace Rawls's principle and Arneson rejects it, we end up with many of the same substantive conclusions, in that both Arneson and I advocate that there is nothing wrong with sacrificing meritocratic procedures in order to benefit the worst off. [↑](#footnote-ref-19)
20. See also Seana Shiffrin "Race and Ethnicity, Race, Labor, and the Fair Equality of Opportunity Principle" *Fordham Law Review* 72, issue 5, article 13 (2004), p.1649; she notes that Rawls seems to pit formal and fair equality of opportunity against each other in *A Theory of Justice*. Even Arneson admits this is a possible interpretation of Rawlsian fair equality of opportunity, "Against Rawlsian Equality of Opportunity" p.81. [↑](#footnote-ref-20)
21. John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard UP, 2001) p.47. [↑](#footnote-ref-21)
22. John Rawls, *Political Liberalism*, p.431. [↑](#footnote-ref-22)
23. John Rawls, *A Theory of Justice*, p.62-63. Fair equality of opportunity is here defended as superior to formal equality of opportunity. [↑](#footnote-ref-23)
24. Rawls, *Theory of Justice*, 73. [↑](#footnote-ref-24)
25. *Regents of the University of California v. Bakke* 438 U.S. 265 (1978), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Gratz v. Bollinger*, 539 U.S. 244 (2003). [↑](#footnote-ref-25)
26. For more detailed argument against meritocratic admissions policies see Elizabeth Anderson, *The Imperative of Integration* (Princeton, NJ: Princeton University Press, 2010). [↑](#footnote-ref-26)
27. Here I have in mind for example the way that race or gender can be relevant to acting, modeling, or service work in particular communities. But see Kaspar Lippert-Rassmussen, *Born Free and Equal* (Oxford University Press, 2013), Ch. 9 for a good discussion of "reaction qualifications," Alan Wertheimer's term for when the reaction of others to a candidate's race is relevant to the candidate's job performance. Alan Wertheimer "Jobs, Qualifications, and Preferences," *Ethics 94*, 99-112. [↑](#footnote-ref-27)
28. Rawls op. cit, 76. [↑](#footnote-ref-28)
29. Ibid, 75. [↑](#footnote-ref-29)
30. For more explanation of how Taylor's interpretation of Rawls is out of line with other interpretations see Andrew Valls, 'Reconsidering Rawlsian Affirmative Action,' Paper presented at the 2010 meeting of the Western Political Science Association. For Valls affirmative action might be justified in an ideal world in so far as it prevents our backsliding into injustice, but he does not deny that some forms of affirmative action are a violation of pure procedural justice. He argues that Rawls can nevertheless permit affirmative action in a nonideal world, because it is inappropriate to apply pure procedural justice to a nonideal situation. See also D.C. Matthew “Rawlsian Affirmative Action: A Reply to Robert Taylor” in *Critical Philosophy of Race 3*, 2, 2015. [↑](#footnote-ref-30)
31. Arguing for affirmative action Elizabeth Anderson says "…the ideal of color blindness has no *direct* application in our nonideal world," *The Imperative of Integration* (Princeton, NJ: Princeton University Press, 2010) p.177. This reasoning is implicit in any defense of affirmative action based on compensatory justice or rectification for past wrongs from the Rawlsian (e.g. Freeman op. cit) to the libertarian (Valls argues that libertarians should defend affirmative action as a form of reparations in 'The Libertarian Case for Affirmative Action,' *Social Theory and Practice* 25, 1999: 299-323 though he is not himself a libertarian and not all libertarians endorse this). Proponents of the “diversity argument” for affirmative action generally are agnostic as to whether the use of affirmative action would violate principles of justice in an ideal world, in other words they don't discuss whether racial quotas or the like would be problematic if we lived in a world in which all major institutions were already diverse in the relevant ways (see Gutmann op. cit). [↑](#footnote-ref-31)
32. Those who see no value in equality of opportunity or procedural justice will have either already accepted affirmative action as permissible even in ideal circumstances or they will reject affirmative action for a different reason. These arguments are beyond the scope of this essay. [↑](#footnote-ref-32)
33. William Nelson is an admirable exception to this; he noted that Rawls's account was novel, and he also noted how strange it was for Rawls to cite Barry, see Nelson, 'The Very Idea of Pure Procedural Justice,' *Ethics* 90.4 (1980). But incidentally I disagree with Nelson's claim that pure procedural justice can be understood entirely in terms of entitlement. [↑](#footnote-ref-33)
34. Brian Barry, *Political Argument* (Berkeley: University of California Press, 1990), 97-99. (Originally published 1965.) [↑](#footnote-ref-34)
35. Rawls op. cit. [↑](#footnote-ref-35)
36. Rawls, *A Theory of Justice*, p.75. [↑](#footnote-ref-36)
37. Martin Gustafsson, 'On Rawls's Distinction between Perfect and Imperfect Procedural Justice,' *Philosophy of the Social Sciences* 34.2 (2004): 300-05.  [↑](#footnote-ref-37)
38. Luce, R. Duncan, and Howard Raiffa, *Games and Decisions: Introduction and Critical Survey* (New York: Wiley, 1957), p363-370. [↑](#footnote-ref-38)
39. Rawls, *A Theory of Justice*, p.75. [↑](#footnote-ref-39)
40. Russian roulette is perhaps a good example of the latter. I thank an anonymous referee for mentioning it in this context. [↑](#footnote-ref-40)
41. A fortiori Rawls is consistent when he says “justice as fairness is able to use the idea of pure procedural justice from the beginning,” op. cit, p.104, contra Nelson op. cit and contra Justin Weinberg, 'Is Government Supererogation Possible?' *Pacific Philosophical Quarterly* 92 (2011): 263-281, fn 23. [↑](#footnote-ref-41)
42. Rawls op. cit, 74. [↑](#footnote-ref-42)
43. Ibid, 74. [↑](#footnote-ref-43)
44. It should be noted here that the alternative view of Rawls's pure procedural justice, that the procedure makes the outcome just, is perfectly coherent given what Rawls has said on the matter, and it doesn't necessarily lead one to an anti-affirmative action position. For example, Valls (2010) argues that though pure procedural justice is an end for Rawls, to impose it without the appropriate background fairness in place would be unjust. I agree, but on my view pure procedural justice requires background fairness by definition so imposing proceduralism without background fairness should more appropriately be called imposing imperfect procedural justice. But Valls's arguments against Taylor do not question Taylor's assumption that pure procedural justice describes procedures that can make their outcomes just no matter what the outcomes are. It is my contention here that this is not the case; in pure procedural justice procedures can be revised in light of outcomes. I think this makes better sense of his overall project, but nothing in his remarks has clearly ruled out the other reading. [↑](#footnote-ref-44)
45. Stuart Hampshire, *Innocence and Experience* (Cambridge, MA: Harvard UP, 1989). [↑](#footnote-ref-45)
46. Jurgen Habermas, 'Reconciliation Through the Public Use of Reason: Remarks on John Rawls' Political Liberalism,' *Journal of Philosophy* 92, 3 (1995): 109-31.  [↑](#footnote-ref-46)
47. In his reply, he draws on Josh Cohen's argument that agreement on procedures presupposes agreement on substance to a certain extent, so that the fact of moral pluralism is not a threat to the idea of an overlapping consensus in our ideas of justice. Joshua Cohen, 'Pluralism and Proceduralism,' *Chicago-Kent Law Review* 69 (1994): 589-617. [↑](#footnote-ref-47)
48. Reply to Habermas in John Rawls, *Political Liberalism* (New York: Columbia UP, 1995), p.431. [↑](#footnote-ref-48)
49. *Ibid*., p. 431 [↑](#footnote-ref-49)
50. Theory of Justice, p. 104. [↑](#footnote-ref-50)
51. This was the argument advanced by Ward Connerly during the successful campaign to ban affirmative action in California with prop. 209. [↑](#footnote-ref-51)
52. Valls makes the same point in 'Reconsidering Rawlsian Affirmative Action'. [↑](#footnote-ref-52)
53. http://www.nba.com/history/24secondclock.html [↑](#footnote-ref-53)
54. We might also think of the way we have changed the rules of American football to make it less likely to cause brain injury, and it seems there would be nothing unjust about changing the rules even further. In this case the outcome we are trying to achieve is a more just outcome, but in fact I mean to make the larger point that there is nothing unjust about changing rules to achieve outcomes that are merely desirable, as long as any changes are consistent with other principles of justice. [↑](#footnote-ref-54)
55. Of course racism itself influenced the other factors we hold constant here, if there had been no slave trade there would probably be far fewer blacks in America to begin with. But this doesn't mean we can't imagine the scenario, in order to evaluate the truth of claim (4). [↑](#footnote-ref-55)
56. As an anonymous reviewer for the journal has noted, an example of a group that is underrepresented in higher education for innocent reasons is the Amish, because they have chosen a lifestyle for themselves that does not value either education itself or the higher earning power it tends to bring. In the stylized example we suppose that every black person in the US has the same cultural values they have now, which for many would include valuing both education and the higher earning power it brings. It is possible for some racial disparities in income to exist in the counterfactual world without racism, if these track the fact that it is easier for richer people to immigrate to the US, then if a particular racial group is composed of many recent immigrants this group may have a higher income level on average than other races. My counterfactual may include disproportionate representation of higher income students and so given that it may include some racial disproportionality due to this. [↑](#footnote-ref-56)
57. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). [↑](#footnote-ref-57)
58. The memo is described in Kennedy's opinion in Fisher, p. 4 of http://www.supremecourt.gov/opinions/12pdf/11-345\_l5gm.pdf [↑](#footnote-ref-58)
59. See Richard Kahlenberg, ed. *Affirmative Action for the Rich: Legacy Preferences in College Admissions* (New York: Century Foundation, 2010). [↑](#footnote-ref-59)