

Justifying Affirmative Action

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Introduction

In celebrating the achievements of women this centenary, discussion of affirmative action immediately reveals just how far women have overcome discrimination – rather than fighting to gain the vote and the right to enter the workforce, the aim is now to achieve full participation in the workforce at any level, in any sphere, without discrimination. Yet the very fact that affirmative action is needed at all is a salutary reminder of how much remains to be achieved. Furthermore, that this article is a discussion of justifications for affirmative action is indicative of the need for continued vigilance and commitment to ensuring genuine equality.

Affirmative action is an attempt to overcome imbalances in workplaces, universities, professions, or other fields, of numbers of target groups, such as women or ethnic minorities, in comparison to “majority” groups, such as White males.¹ It takes many different forms, ranging from targeted advertising campaigns to preferential hiring and admission policies.

The discussion in this article is concerned primarily with preferential hiring and admission. While it generally uses women as the “target group”, most of the points made are equally applicable to racial and other minority groups.

Affirmative action programmes are already in place in some areas, most notably in university admissions and public sector employment. It could therefore

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1 This article adopts the use of such terms as “Black” and “White” common to discussion of affirmative action.

be said that justification for affirmative action is a redundant issue. Justification, however, is still hotly debated, as can be seen both in the media,² and in political party remits. It is a controversial issue over which people still honourably (though often bitterly) disagree. There is no shortage of political, philosophical, sociological, and legal discussion of the issue. Moreover, as is demonstrated by the quantity of litigation in the United States,³ there is often more opposition to affirmative action *after* it begins to affect people than before it is implemented.

Justification is the most important aspect of affirmative action. The adequacy of the justification has an enormous effect in many areas – not just on its political survival, but also on its legal survival, in the sense of balancing the various rights issues, and on its form and processes.

The various justifications can be “distilled” into three main groups, though of course these overlap to some extent. These can be loosely termed “Equality of Opportunity”, “Utilitarian Justifications”, and “Distributive Justice”. It will be argued that the third of these models is the most comprehensive and, in fact, effectively encompasses the other two.

Equality of Opportunity

This justification posits the basic precept that each person should have equal rights and opportunities to develop his or her talents, and that there should be equal reward (in terms of opportunity) for equal performance. This is the principle that is often cited by opponents as being “violated” by affirmative action.

Achieving genuine equality of opportunity was the initial justification for racially based affirmative action in the United States in the late 1960s. It arose in response to the feeling that simply removing overt forms of discrimination, such as segregation,⁴ was not enough to give Blacks equality of opportunity.

Analogies abound in the affirmative action debate. A favourite symbol is that of a running race, because it incorporates the idea of competition involved in both employment and university placement. If a race has started between two runners, and one is shackled, simply removing the chains and allowing the runners to continue is insufficient, because one runner has had a head start. The race must be started again or, more realistically, the previously chained runner must be moved up to an equal position. This analogy captures the lingering and pervasive effect of sexism, and provides a good illustration of what affirmative action tries to achieve through this justification.

Obviously this justification incorporates an historical approach to the extent that past discrimination is seen to have an impact on the present, and so overlaps with compensatory models.⁵ However, the emphasis of this justification is on achieving equality of opportunity, not of outcome. This means that the “best” (or

2 See, for example, “Reserved Seats” Frontline, TVNZ, 2 August 1992.

3 See, for example, the cases cited *infra* at note 6.

4 See *Brown v Topeka Board of Education* 347 US 483 (1953).

5 Discussed *infra*.

most qualified) person for the job always gets it, while recognising that characteristics which have historically been discriminated against should not rule out an applicant.

Those who concentrate on individual rights often find this problematic. Affirmative action often helps people not directly affected by past discrimination. A woman who has never suffered overt discrimination may benefit from an affirmative action programme “merely” because she is a woman. The obvious response is that she will also have suffered discrimination, directly or indirectly, “merely” because she is a woman. Moreover, there are no guarantees that she will not, at some stage in the future, be discriminated against. Discrimination can be said to be so pervasive that all target group members have suffered from it, directly or indirectly.

More pointedly, affirmative action necessarily places a disadvantage on the “unshackled runner” that he or she previously did not have. As equality of opportunity is essentially focused on the individual, it becomes difficult to justify imposing burdens on some in order for others to achieve equality of opportunity. While this can be viewed as a *reduction* in unfair advantage, if equality of opportunity is the goal, giving benefits to some and disadvantaging others seems to be a case of the means being contrary to the end.

On its own, equality of opportunity seems inadequate as a justification, although it certainly has a place in a fuller justification.

Utilitarian Justifications

This view stresses the benefits gained by society and individuals by including previously excluded or under-represented groups in education and the professions. It is one of the most common justifications used in decisions of the United States Supreme Court in relation to racially-based affirmative action programmes.⁶

In a gender-based context, the benefits that are upheld are usually cited as the greater variety of experiences, opinions, and outlooks brought into educational and work environments, the provision of role models for young women, and the provision of better and more sensitive professional services to women.

Utilitarian justifications premise that the overall benefits to society outweigh the overall costs (usually to individuals). However, for the justification to succeed, the gains must outweigh the losses, therefore producing a greater good. The costs, from a utilitarian point of view, are many and not difficult to identify. The first (and perhaps most obvious) cost is resentment among non-target members, that is, men. (This criticism is even more applicable to racially-based affirmative action.)

6 See the “diversity” argument of Powell J in *Regents of the University of California v Bakke* 438 US 265 (1978); Brennan and White JJ in *Metro Broadcasting v Federal Communications Commission* 497 US 547 (1990); and Stevens J in *Wygant v Jackson Board of Education* 476 US 267 (1986).

This includes the views of those among the “better qualified” who “miss out” because of affirmative action, and those who, even though they were not sufficiently qualified, feel they have lost out because of the affirmative action programme. The reasonableness of such views is not at issue – simply the fact that they exist is a cost. If equality is the goal, then an increase in gender-based discrimination and prejudice is directly counter-productive.

A further cost is that women become stigmatized as inferior to men, perceived as needing the affirmative action in order to succeed. This simply reinforces sexist stereotypes of inherent inferiority. The flip-side of this attitude is the potential loss of self-esteem among women, especially those who would have succeeded anyway, because they are branded as “special option” candidates.⁷ Once again, the reasonableness of such views is less important than their very existence. They can be partially countered by education, but the system tends to fall foul of scapegoating, especially in depressed economic times. Such programmes also often fail to educate properly. Such criticisms are especially relevant to “quota” systems,⁸ because it is easier for disgruntled men to see they have “lost” a place, and for women to be seen as a specific “class”.

A utilitarian justification for affirmative action therefore relies on a balancing of costs and benefits, and it is doubtful that the benefits will be greater. There is necessarily a strong reliance on empirical sociological data, which leads to a battle of experts and figures. At best the justification is doubtful, especially when considering that what is socially beneficial changes with the political and demographic climate.

The strongest criticism of the utilitarian approach is the intuitive feeling in Western liberal democratic philosophy that individual rights cannot be outweighed by a benefit for the group:⁹

An individual may be said to have a right, when applying for a position, not to be discriminated against on the basis of race but rather to be judged on his or her merit. Can this right be overridden by social policy which promises greater benefits for the general welfare in the long term?

In summary, utilitarian justifications collapse under the weight of social costs, or at any rate find themselves forced to surrender to notions of individual rights – criticisms which have a great impact on the liberal democratic tradition. Furthermore, the emphasis that utilitarianism places on social goods ignores the sense of historical justice that many women (and racial groups) seek to achieve through affirmative action. Utilitarianism is simply unable to incorporate the pervasive, systemic and self-perpetuating nature of discrimination, which is the main advantage of the model below.

7 For example, note the comments of Pauline Kingi, *supra* at note 2.

8 See the criticisms of quotas in *Bakke*, *supra* at note 6.

9 Segers *et al* (eds), *Elusive Equality* (1983) 80.

The Compensatory or “Distributive Justice” Model

The central focus of a distributive justice model is whether all people have a fair share of benefits and burdens. If one accepts that certain benefits such as income, status, and wealth are concentrated in certain groups, and burdens such as unemployment and low income are concentrated in other groups,¹⁰ then affirmative action is justified as a method of achieving a society in which benefits and burdens are more equitably distributed. Underlying this justification is the assumption that contemporary society is or should be committed to creating a more just distribution of benefits and burdens. If one is satisfied with an “unjust” distribution, then this justification (and indeed the justifications for many socio-economic human rights) will fail.

Many characteristics of the other justifications are apparent in distributive justice. It is concerned with achieving genuine equality of opportunity, but it is concerned with outcome as well as simply the ability to compete. The focus is on a more just distribution of benefits and burdens. As a result, the “best” person on formal qualifications will not necessarily get the job.

The benefits relied on by a utilitarian justification, such as the social benefits of increased diversity of involvement in the professions, are also still relevant, but are not the sole justification, and can therefore withstand the criticisms discussed earlier.

Past discrimination has a vital role to play in this model, but compensation for past wrongs is not the main concern, as that would involve “penalising” current generations (of men). Rather, distributive justice focuses on present inequality; the past is relevant as an explanation of current inequalities, and in identifying historically disadvantaged groups who may need assistance, but it is not directly part of the justification.

This captures better the idea that sexism is systemic and self-perpetuating. Instead of placing collective responsibility on present generations, affirmative action seeks to neutralize present disadvantages caused by past wrongs. It seeks to restore equal access to those goods which society distributes competitively.

Notice that the focus is on redistribution, not on competition, as in the equal opportunity model. The equal opportunity model will probably not overcome systemic discrimination, and, as noted above, has some difficulty in favouring any one group. A model directed at redistribution is not concerned if some groups are favoured over others, as it is more closely linked to the desired outcome, provided that it can be shown that the respective groups concerned have unequal shares. The justification for redistribution, the inequality of present shares, is based on the recognition that past discrimination is systemic, pervasive, and self-perpetuating.

It can now more easily be seen that the justification adopted for affirmative action determines which groups it benefits, and how. An affirmative action programme must be a finely tuned tool for social justice. A blanket quota,

¹⁰ Social data would be necessary at this point.

automatically closing out non-targeted, but deserving groups, is not narrowly tailored to achieve accurate redistribution. However, using race or sex is justified where it can be shown that the classification group has suffered past wrongs which have impacted on their ability to compete and gain current social goods. Group classifications can be used, but less rigidly, in a distributive justice model. Because it is concerned with addressing both economic and gender-based disadvantage, the poor male is therefore not automatically excluded, although more disadvantaged groups – such as women – will be able more easily to demonstrate historically pervasive discrimination.

Economic distribution

One might argue that if the concern is economic distribution, why need there be any differential on the basis of gender at all? A “gender-blind” approach, however, focusing solely on economic factors, would not capture the specific connection, the systemic causal link between sex and disadvantage. A woman is economically disadvantaged simply because she is a woman.

Furthermore, it is not clear that economic affirmative action alone would change the distributive proportion of the sexes in university and employment. If there were two applicants, one male and one female, all other factors being equal (especially their economic position), a solely economic-based affirmative action programme would ignore the various discriminations that the female applicant faces because she is a woman – including, for example, sexual harassment and/or working as the only woman in a traditionally male workplace. (One need not be paranoid to suspect the man might win.) Affirmative action must also seek to redress the double disadvantage of sex and poverty, and gender must therefore be included.

Discussion

This distributive justice model is not an instant formula to apply to affirmative action cases. It will fail if one is unable to show a sufficient link between the current disadvantage and the discrimination in the past which has *caused* it. Establishing such a causal link is to a certain extent a matter of statistics. It also requires interpretation and opinion, a political standpoint, and philosophical parameters. As a notion it is readily accepted by radical commentators, and neither is it anathema to liberal democratic views.

Some commentators, while (perhaps begrudgingly) accepting that such points are valid reasons for affirmative action based on race, argue that gender-based affirmative action is not as justifiable because women and men are naturally different, unlike Whites and Blacks, with regards to skills and physical abilities in the job market. Arguments about natural differences seem to be raised at every step in women’s struggle for equality – one need only examine the arguments against female suffrage to see that. It is not the purpose of this article to refute such spurious claims, other than to make two well-worn points. First, that much of what

is “natural” is in fact learned behaviour, which includes discrimination. Mill refutes the nature arguments by analogy to cultivation of flowers: the method of nurture can completely alter the flower.¹¹ Secondly, the increasing numbers of women entering the workforce in many different areas, who are succeeding despite discrimination, should on its own prove the fallacy of such an argument.

Perhaps a more pointed criticism is that since awareness of discrimination in recent decades has led to the removal of overt and unintentional discrimination, affirmative action is superfluous. If women have had the same education as men, why should they receive preference at the tertiary education or employment stage?

A number of points can be made in reply. First, it is by no means established that overt discrimination has actually been eradicated. Secondly, and more importantly, this criticism fails to consider the pervasive and deep-rooted effect of sexism and racism. It is more than just the adequacy of one’s education that enables one to compete equally for a place at university or employment; economic and social factors are equally important.

Thirdly, the argument assumes neutrality of “qualifications”. If the problem being addressed is the advantage and domination gained by one group in society, then it is not difficult to see that the education system, especially a state one, can and will have inherent cultural and gender biases:¹²

The original logic of affirmative action was that dramatic statistical imbalances in a school or workforce raised an inference that discrimination, or discriminatory assumptions about qualifications, were at work.

If women are receiving the same education as men, but are not achieving the same places in university and the professions, then the systemic nature of discrimination is revealed. Bias, intentional or by effect, can permeate education, qualifications, testing systems, culture, role models, and institutional values and practices, which feed and are fed by attitudinal biases and assumptions about proper roles and ability to work:¹³

In other words, systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of “natural” forces, for example, that women “just can’t do the job”.... To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged.

The supposed diluting of academic and professional standards is a common criticism of affirmative action programmes. Such criticism ignores the fact that affirmative action programmes require minimum qualification and equivalent

11 Mill, “The Subjection of Women”, in Rossie (ed), *Essays on Sex Equality* (1970) 148.

12 Heins, *Cutting the Mustard* (1987) 15.

13 *Canadian National Railway Co v Canada (Canadian Human Rights Commission)* [1987] 1 SCR 1114, 1139.

performance once acceptance is gained, and the pervasive and historical influence of a dominant culture (male, White) on ostensibly neutral standards. The historical exclusion of the target group is an affront to “meritocracy”:¹⁴

Many ... beneficiaries of affirmative action recognize the thoroughly ... contestable nature of “merit”; ... it is a malleable concept, determined by ... the perceived needs of society.

Political theory

At many points in the various models above, certain political assumptions and standpoints must be made. This is not surprising, given the inherently political nature of affirmative action. The willingness to make those assumptions will determine the acceptance or rejection of the justification, and consequently of affirmative action. An assumption underlying and prior to the debate is that the “rewards” of mainstream society are desirable – although, of course, how these are defined will change with the inclusion of more women and other beneficiaries of affirmative action.

It goes without saying that to adopt a view of the world as outlined in the distributive justice model, and the consequences of doing so, is an enormous step; but then the same could have been said about female suffrage prior to 1893.

Litigation

Affirmative action has been vigorously litigated in the United States, due mainly to the ambiguous wording of the Fourteenth Amendment of the United States Constitution, forbidding states to “deny to any person ... the equal protection of the laws.”

In New Zealand, however, affirmative action receives express recognition in ss 28 and 29 of the Human Rights Commission Act 1977 and s 19(2) of the Bill of Rights Act 1990. As such it is similar to s 15(2) of the Canadian Charter of Rights and Freedoms. These provisions provide a basic statutory answer to the fundamental question of justification in New Zealand, should an affirmative action programme be challenged by litigation.¹⁵ This effectively confines any debate in New Zealand to the political and academic arenas, which is perhaps more appropriate, considering the issue’s inherently political nature.

Conclusion

By way of summary, a defensible affirmative action programme will, therefore, meet the following criteria:

- (i) be partially meritocratic in that it requires minimal qualification;
- (ii) incorporate, but not totally rely on, utilitarian benefit arguments;

¹⁴ Heins, *supra* at note 12, at 19, quoting R. Kennedy, a law professor.

¹⁵ See the quotation from *Canadian National Railway Co*, *supra* at note 13, and the case generally.

- (iii) begin with a critique of society based on principles of distributive justice;
- (iv) view discrimination as systemic and self-perpetuating;
- (v) be directed to achieving genuine, as opposed to formal, equality of opportunity; and
- (vi) regard history as relevant, to the extent that present inequalities are seen to have historical causes, and therefore identify potential target groups.

A defensible affirmative action programme can and will distinguish between compensation and neutralising present disadvantage. It permits measures based on sex or race, together with other factors, and should distinguish quotas, because “poor White males”, among other groups, cannot be ignored or excluded. It achieves and incorporates the idea that in order to treat people equally, some must be treated differently.

Affirmative action can and should be a carefully considered and justified attempt to balance rights in a way that is far more than just “reverse discrimination”. Once it is accepted that discrimination and disparate social status and rewards exist in society, and that such a situation is undesirable, affirmative action can be justified simply on the ground that to do nothing is to support the status quo. Can that be justified?

