**Affirmative Action and adequate Representation**

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This chapter is written from a perspective of faith in the civil service’s potential for maintaining a professional, impartial, and transparent appointment process, as well as for operating to reduce the harm to under-represented population groups, integrating them into the labour market, and creating employment diversity. The basic argument, based on the premise that affirmative action programs are essential to generating change in the employment market, and to creating employment diversity, is that the civil service should act to promote certain social behaviour within the labour market and thereby lead the private sector in these areas. In addition, it posits that in the absence of a clear duty and targets for hiring under-represented groups, significant changes in employment patterns are unlikely to occur.

1. **CIVIL SERVICE DEVELOPMENT AND HUMAN CAPITAL POTENTIAL EXTRACTION**

The affirmative action doctrine originated in social movements that arose in the United States in the mid-1940s seeking to eradicate from American society the evils of discrimination and prejudice, usually on the basis of race and ethnic origin.[[1]](#footnote-1) Clayton and Crosby (1992), who extensively discussed the transition from preventing discrimination to implementing affirmative action, emphasized the passive element of discrimination law, contending that it is based on reactive policy that does not require proactive intervention, which affirmative action does require,[[2]](#footnote-2) with the goal to empower disenfranchised groups. In addition, it can be argued that discrimination law assumes fairness, whereas affirmative action presupposes that we operate within an unfair employment world that has created socio-economic stratification resulting from certain discriminatory practices.

The principle of equality before the law is a cornerstone of the rule of law. The essence of this principle is that all people should be treated equally, without ascribing any significance to an individual’s personal characteristics, such as social status, marital status, gender, age, religion, language, skin colour, etc. However, the phrase ‘everyone is equal before the law’ should not be interpreted superficially and two different meanings of equality must be distinguished. One is formal – the administration of justice by the courts without prejudice or bias, and without differentiation between litigants. The other meaning is substantive – a review of the law itself, and not the manner of its application. This is a substantive-constituent review. Thus, the true meaning of the principle of equality is not mechanical or arithmetic equality. According to Prof. Aharon Barak, President (Ret.) of the Supreme Court of Israel:

Equality is not a formal concept. It is a substantive concept, in which fairness, justice, and morality are all mixed together. There is no ‘pure’ principle of equality. One cannot completely separate equality from justice and morality. Equality is a compound of all these.[[3]](#footnote-3)

The principle of equality – recognized as ‘one of the first principles in the kingdom’, which ‘rises up and permeates every plant of the law’ – must be a part of the DNA of the legal system as a whole, and tender law in particular.[[4]](#footnote-4) The very concept of affirmative action represents the recognition of the fact that the principle of formal equality failed to achieve equality in practice.[[5]](#footnote-5) In fact, because the principle of equality is not absolute, the right of an individual or a group to equality can be abridged, considering the general idea of non-absolute nature of the right of equality. Any biased appointment that violates the individual’s right to compete for a certain position impinges on that person’s equality. The term ‘biased appointment’ encompasses several different types of biased appointments. There are those made based on party affiliation, personal interest, and more, all of which are appointments that are not made in accordance with the rules of meritocracy, or based on skills alone. In 1958, Michael Young predicted that in a futuristic system, promotion would be determined by IQ and efforts alone, which would eventually lead to a social revolution in which the masses would revolt against the elites who benefit from the system.[[6]](#footnote-6)

The harm in cases of biased appointments is twofold. Not only is the very value of equality undermined, but under-represented groups suffer mistreatment, since a biased appointment, by its very nature, connotes appointment of a member of the majority group. However, the importance of the principle of affirmative action arises from its being based on the way in which the principles of equality and justice are interpreted.[[7]](#footnote-7) Those who support and oppose affirmative action programs disagree on the interpretation of the term the ‘principle of equality’ – the formal versus the substantive.[[8]](#footnote-8)

Formal equality is the measure of personal equality achieved when every individual in the population is given an equal opportunity to advance his or her personal desires and aspirations without others impeding them. In the formal sense, the state must approach equality as a negative right or freedom, requiring others to withdraw from the individual’s sphere. However, the need for affirmative action programs arises in view of the starting point, as some groups in the population have traditionally encountered barriers throughout their lives, and therefore suffer from a disadvantaged starting point when competing for any position. For this reason, from an affirmative action perspective, it is difficult to adopt formal equality. The need for affirmative action implies a positive right or liberty; that is, promotion of, or giving preference to, certain segments of society, in order to minimise the gaps between the differing starting points. Giving preference to a particular group will always be accompanied by an infringement of the rights of another, usually one who does not belong to the target group.[[9]](#footnote-9) Another difficulty is in the overall, collective aspect of exercising affirmative action: the disadvantaged groups are predetermined with respect to whom affirmative action policies will apply, based on the judgement, most likely a faulty one, that all members of the group were discriminated against in the past. In the opinion of proponents of formal equality, affirmative action is justifiable only where the individual has demonstrated that he or she has suffered personal and direct discrimination.[[10]](#footnote-10)

Unlike formal equality, which seeks to apply a particular, egalitarian process, based on the degree of personal effort that the individual invests, substantive equality seeks to achieve equality of outcomes.[[11]](#footnote-11) This approach, which adopts the principle of equality as a positive right, and accordingly asks the state to take measures to correct inequality that hurts the chances of target groups to achieve equality in admission to the civil service, is known as ‘affirmative action’.[[12]](#footnote-12) The justification for an affirmative action program is based not only on concerns about equality, but also on concerns about justice. An affirmative action policy, as an element in the effort to create equality of opportunities, recognizes the differences between the target populations and the non-target populations, and applies a principle of remedial or corrective justice, on the basis of which priority is given to the target population in order to correct the historical discrimination against it.[[13]](#footnote-13) At the heart of the debate on affirmative action is the attempt to justify a policy that seeks both to help those who have historically been unable to exercise the freedoms and rights guaranteed to them by law, and to prevent the de facto social exclusion of population groups. The concept of affirmative action is based on the assumption that there is pervasive discrimination in all areas of life, and it offers a way to ameliorate or neutralise this. At the same time, affirmative action shifts the burden to the majority group to justify the non-acceptance of a candidate belonging to one of the target, discriminated-against groups, on objective grounds of incompatibility, thus increasing the representation of those target groups in, this case, the civil service.

In addition to corrective justice, there are other justifications for employing affirmative action: utilitarian justice and distributive justice.[[14]](#footnote-14) Utilitarian justice examines the aggregate benefit to society, and assumes that the benefit of employing affirmative action is greater than the necessary investment or the price that society and the individuals in it must pay for its implementation. Proponents of utilitarian justice argue that the only way to persuade the individuals who pay the price of affirmative action that its goals are worthwhile is by performing this type of cost-benefit analysis of the aggregate aspect. The second justification of distributive justice or social justice assumes that society is committed to distributing its resources fairly, and that the need for affirmative action arises in cases where different individuals benefit from different shares of the aggregate social pie. Distributive justice defines the need for affirmative action pursuant to integration results, and usually sets goals and quotas to apportion the outcomes or benefits differently.[[15]](#footnote-15)

John Rawls’s multi-layered argument about the concepts of justice and equality synthesises the two concepts. Nonetheless, he defines justice as an essential and practical element, anteceding that of equality. Indeed, Rawls’s definition of equality is limited and adapted to the conception of justice. Without delving too deeply into Rawls’s legal-philosophical discussion, some distinctions arising from his philosophy should be noted. Rawls’s conception of justice is a political one that relates to the way in which social institutions or processes can define positions or jobs.[[16]](#footnote-16) An affirmative action policy seeks to address the problem of fair distribution and to promote principles of distributive justice. It is derived from the principle of equality, and its purpose is to determine a legal policy under which equality can be achieved as a resultant social norm, whereby justice is also equivalent to fairness.[[17]](#footnote-17)

According to these principles, equality is paramount not only with respect to the distribution of positions and jobs, but also with respect to ensuring political freedom as an essential element of basic civil liberties.[[18]](#footnote-18) The option of preferring inequality in cases of principle, in order to promote fair equality of opportunity in hiring for jobs, exists only to regulate inequality and to correct lasting historical social effects. By applying affirmative action in this way, the actual division of public benefits and outcomes becomes more important than the efficiency of its division.[[19]](#footnote-19) Behind the ‘veil of ignorance’, Rawls argues, parties will choose two principles for the distribution of primary goods distribution.[[20]](#footnote-20) The first and supreme principle is that of liberty, with each individual having the right to enjoy a system of equal fundamental freedoms, that will allow that individual to develop a personal sense of justice and perception of the good. The second principle, which is subject to the first one, is the principle of equal opportunity, according to which public sector positions and jobs should be open to all, under terms of fair equality of opportunity. To the extent that any inequality is present in this system, it should operate to benefit those traditionally worse-off. The principle of equality of opportunity addresses the need for legislation to serve general interests, and not just the parochial interests of the legislature itself, or of the majority group to which it owes its power. The fair conditions for social cooperation will be achieved, according to Rawls, if all individuals in society are treated as free and equal, and no particular party is permitted to benefit from an unfair advantage, or from social and natural circumstances that favour it. Rawls believed that behind the ‘veil of ignorance’ people would not choose a completely equal distribution of wealth, but a just distribution that would allow for fair equality of opportunity. The gap is justified, according to Rawls, when it benefits those at the bottom of the social ladder; it is a tool that should make clear to policymakers that they must do their best for the benefit of the entire public, while adhering to the principles of justice.[[21]](#footnote-21) There is, however, a more fundamental discussion that looks at affirmative action from a more complex perspective. For the purposes of this discussion, focused on employment diversity, particularly in the civil service, the major issue revolves around what is the state’s commitment to and capacity for creating and maintaining reasonable equality and diversity, which will prospectively prevent unreasonable gaps that will be difficult to bridge.

1. **DIVERSITY MANAGEMENT**

In recent decades, there has been increased research into the subject of diversity management in organizations, and the need for diversity and inclusion,[[22]](#footnote-22) due to, inter alia, the potential that diversity and inclusion have in terms of the labour market.[[23]](#footnote-23) This is in contrast to older approaches based on the theory of social identity, which assume that people tend to cooperate better with those who are similar to them and belong to the same social group, and therefore that a process of diversity will not be very successful.[[24]](#footnote-24) This more contemporary approach to human capital diversity is the basis for the existence of affirmative action programs.

The underlying conception of affirmative action is based on equality of opportunity, but this does not necessarily result in equality of outcomes. A discussion of justice as fairness inevitably involves the issue of equal treatment, which, in the context of the principle of compensation, addressing past wrongs, for the purpose of redressing social injustices, assumes that everyone is the same. The solution lies in the essence of true justice based on need rather than fairness, and it may be necessary to base an affirmative action program on individual rather than group needs. The current model is driven by an aspiration to correct past injustices, rather than a goal of not overlooking excellent people whose contribution could be significant if an effort is made to successfully integrate them. The conflict between the value of merit ​​and affirmative action has never been examined in depth in civil service appointments, in part because the affirmative action model is perceived as temporary policy.[[25]](#footnote-25) The Weber case[[26]](#footnote-26) in the United States Supreme Court defined the pioneer model of affirmative action as a temporary measure that allows preferring one group over another until the population assimilates and proves itself, at which point there will no longer be any need for solutions to employment discrimination.

The existing model relates only to the measurement of diversity, which examines the proportion of employees belonging to pre-defined groups. This model does not require a policy of horizontal integration (across all jobs) or vertical integration (on all job levels); instead, it promotes diversity by generalizing and facilitating entry into the system for groups that were less involved in it in the past.[[27]](#footnote-27) But providing adequate representation or setting quotas should be reflected in all workplaces according to their share of the population. The effect on population representation in the labour market is insufficient; thus, the concentration of the disadvantaged groups in various occupations within the labour market, and in particular in professions and rankings where representation is particularly low, must also be eradicated. Of course, in the first stage of implementing an affirmative action model, one cannot know for certain where representation is particularly low, and the basic premise is that representation is low everywhere, and there is no point in encouraging intentional integration. We seem to have moved beyond this stage. At present, the civil service must set goals by profession and by ranking, i.e*.*, transition from a quantitative dimension to a quantitative-qualitative dimension. At an even more advanced stage, representation should be treated in accordance with a geographical splicing, while measuring the rate of the group in those areas.

Affirmative action has already made great advances, making possible an examination of the situation of new, perhaps even marginal, groups within the labour force, thereby reflecting society’s changing demographics.[[28]](#footnote-28) Beyond redressing injustices and justifications appealing to justice, affirmative action with respect new groups can be justified by the goal of encouraging diversity, which, among other things, will benefit the citizenry which the civil service is designed to serve. A skills and achievement-based hiring policy raises concerns about its ability to promote integration and reward perseverance, as well about possible structural discrimination in the assessment of certain populations.[[29]](#footnote-29) Acknowledging the existing difficulties in processing and using skills-based assessments across the board in civil service tender law, a critical examination of merit assessments is warranted. A review of merit assessments in the context of affirmative action should take into account that employee assessments at the hiring stage are based, inter alia, on skills determined in large part by pre-market factors and education, which could affect the ability of target populations to compete for jobs. Who is the most qualified? This is the question asked when evaluating attributes and skills. Affirmative action solutions seek, rightly or wrongly, to shift away from the majority group’s perception of the merit mechanism.

​​Equality’s central tenet is strict adherence to impartiality and uniform distribution; but this idea does not necessarily guarantee a fair distribution.[[30]](#footnote-30) This is the prevailing argument against the merit assessment and the uniform setting of threshold conditions for the entire population, since the population is not all equal. The question of Aristotelian equality versus substantive equality raises issues concerning the division rule itself, and requires adjustment: equal treatment of equals, and different treatment of differences, when the distinctions are relevant to the division.[[31]](#footnote-31) This Aristotelian idea may justify the existence of dedicated tenders or even the existence of different threshold conditions in such tenders. However, the way to justify such measures on the horizontal level with regard to the possible harm to stereotypes, or even to giving ‘discounts’ to those who belong to the target group but who do not suffer by belonging to it, is to determine predictive measures for assessing a candidate’s group ability and personal ability. It may not be sufficient that a person merely belongs to a particular group to determine that that individual is entitled to the benefit of affirmative action; distinctions within the population that can predict under-representation may need to be established. However, the proposition that individual examination is required when a person belongs to a particular group imposes financial costs on the appointment process. These general diagnoses not only may offend the individual being examined, but may also impose on that individual a collective and even arbitrary stereotypical group affiliation that does not reflect that individual’s personal attributes. Due to the difficulties presented by seeking Aristotelian equality, it is customary to promote the values ​​of affirmative action on the basis of substantive equality that offers equality in capabilities that justifies adjustments.[[32]](#footnote-32)

A discussion of employment diversity, from integration to segregation, forms part of the discussion relating to affirmative action’s advantages and disadvantages. Despite the validity of many of the arguments supporting affirmative action, some of the arguments against it have merit, and deserve to be addressed. The controversies are the result of polar conceptions regarding the interpretation of the principle of equality, or the meaning of the concept of justice.

1. **ARGUMENTS FOR AND AGAINST AFFIRMATIVE ACTION POLICIES**

Affirmative action programs are fertile ground for moral dilemmas and controversial opinions.[[33]](#footnote-33) The literature is replete with arguments in favour of affirmative action and refuting those who reject such an approach.[[34]](#footnote-34) The debate, in my opinion, should focus on the content of the program, selecting the most suitable program, and the ways to implement it. The following presents a brief overview of arguments for and against a policy of affirmative action so as to better address some of its inherent problems. Identifying and discussing these problems should not invalidate the policy, but should facilitate and examination of it and the changes needed, thereby resulting in implementation of better programs. One of the main problems of implementing an affirmative action program is the opposition and negative responses it may encounter, especially from the majority group.[[35]](#footnote-35) The assent of the majority group is essential to the program’s success, as coercive enforcement of the provisions of the law is impossible. In any event, the implementation of the provisions of the law concerning affirmative action will always be carried out by persons belonging to the majority group, operating according to complex decision-making affected by various biases and positions, some of them unconscious. While the literature provides a myriad of pros and cons, I have chosen to focus on a few key areas of criticism of affirmative action.

*The first* and most basic argument against affirmative action is posed by the majority group, which considers itself harmed and maintains that affirmative action is actually reverse discrimination. *A second* argument claims that an affirmative action policy to benefit specific populations constitutes a group classification which is characterized by over-inclusion so that preference is also given to individuals belonging to that group, who, upon substantive review, are not worthy of being preferred. *Third*, the majority group even claims that some affirmative action programs allow people without the appropriate skills to be hired at the expense of people with the appropriate skills. However, this concern has been shown not to be entirely well-founded.[[36]](#footnote-36)

*A fourth* argument against affirmative action is that the target population itself is harmed by the existence of a stigma of being low-skilled and low-performance workers as compared to the stronger group.[[37]](#footnote-37) This argument applies the basic observation that affirmative action harms the group’s uniqueness and blurs its characteristics *vis-à-vis* the majority group. Sceptics raise a *fifth* argument against affirmative action, according to which affirmative action provides a solution in outcomes rather than opportunities, which does not necessarily constitute heterogeneity in allocations. *Finally*, according to interest theory in general, and self-interest theory and cooperative group interest theory in particular, the majority group claims that affirmative action policies threaten its competitiveness. The self-interest theory assumes that the individual will take care of him or herself on the basis of personal loss and gain calculations, and therefore it can explain why underrepresented groups will support affirmative action that bestows on them, at least theoretically, a potential profit.[[38]](#footnote-38) The cooperative group interest theory, according to which the group is central, also assumes that under-represented populations will support affirmative action, but from the perspective of strengthening the group, while the majority group will prefer to retain power and control for itself.

Whereas theories of personal interest and group interest can also substantiate an argument against affirmative action, as shown above, underrepresented groups will also support them when they benefit groups other than themselves.[[39]](#footnote-39) *First*, is the goal, which is at times general and horizontal: a type of re-education of the majority group, to recognise and accept those how are different from it.[[40]](#footnote-40) *Second* and the most basic argument in favour of affirmative action is an argument of corrective justice, that justifies redress of historical class and group injustices. From this perspective, affirmative action is designed to correct historical discrimination against a group, and therefore, a society in which a reality of continuing violation of collective equality was created must bear the burden of rectifying this reality. This consideration ensures equality for the individual belonging to the discriminated-against group. *Third* and Parallel to the argument of corrective justice is that of distributive justice, which recognizes society’s need to allow equal access to its resources to all groups within the population, including to the work resource, by means of ‘social engineering’, a consideration contrary to the meritocracy ethos and the qualifications barrier imposed by it.

*Fourth* argument supporting affirmative action is utilitarian justice, according to which discrimination cannot be justified because it is an irrational phenomenon that is not consistent with free market behaviour. Therefore, use of affirmative action is necessary for the proper utilization of the full extent of human capital, and market forces should not be relied upon exclusively This consideration supports pluralism, and advances an anti-homogeneous interest in employment. The following *fifth* argument is based on the power of changing and directing behaviour while changing internal preferences; affirmative action as externally expressing a preference could, in the long run, affect the design of internal preferences. Yet *another argument* favouring affirmative action is the importance of promoting diversity, or adequate representation of different positions and perspectives in the group, to ensure diversity in the civil service, which will in turn ensure faithful representation of those views. This argument alone is insufficient, as it is difficult to measure the assurance of representation of different views by increasing diversity in the civil service, and not everyone shares this point of view.

Opponents of affirmative action cling to the principle of formal equality, while proponents of the doctrine rely on substantive equality.[[41]](#footnote-41) Under the formal equality approach to employment, affirmative action places barriers that prevent the individual from developing. Under this approach, removing the barriers will limit the employer’s freedom of choice, dictating who can be hired.[[42]](#footnote-42) This action may give one individual an advantage, while infringing on another’s equality. On the other hand, supporters of affirmative action in the context of formal equality recognize the need to apply affirmative action with respect to a discriminated group. According to the substantive equality approach designed to achieve equality of outcomes, affirmative action gives all individuals the means to self-fulfilment and person development. To this end, measures and actions must be taken to ensure true equality of opportunity.[[43]](#footnote-43)

It is difficult to unequivocally determine whether to support or reject affirmative action without referring to different models. Indeed, affirmative action models, or even discussions of the need to change a model raises complex questions, even for those who support affirmative action. Since it can no longer be argued that affirmative action represents only an issue of corrective justice, without examining current and forward-looking justifications, it is difficult envision a possible future resolution or model.
While I believe that reflections on a future model should be postponed to such time when a chosen model will prove effective, affirmative action programs can nonetheless operate differently even now, and are indeed employed in different contexts.

1. B.T.A Love, *Justifying Affirmative Action*, 7 Auckland University Law Review. Annual (1993) 491; Ch.M. Koggel, *A Feminist View of Equality and Its Implication for Affirmative Action*, 7 Canadian Journal of Law and Jurisprudence (1994) 43. The principle was first established in the United States in 1965, when President Lyndon Johnson signed an affirmative action executive order relating to companies bidding for government contracts; See: Executive Order 11246 issued by President Johnson. [↑](#footnote-ref-1)
2. Clayton, Susan D. and Crosby, Faye J. (1992) *Justice, Gender, and Affirmative Action*. University of Michigan Press. [↑](#footnote-ref-2)
3. Aharon Barak, *Interpretation in Law*, *Second Vol.* *Legislative Interpretation* [Hebrew], 459 (1993). [↑](#footnote-ref-3)
4. High Court of Justice 2671/98 **Israeli Women’s Lobby v. Minister for Labour and Welfare**, *Pey-Daled Nun-Bet*(3) 603 (1998), HH Justice Heshin at para. 29 of his opinion. [↑](#footnote-ref-4)
5. Bowen, William G. and Bok, Derek, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*. Princeton, NJ: Princeton University Press (1998). [↑](#footnote-ref-5)
6. Michael Young, *The Rise of the Meritocracy* (1958). [↑](#footnote-ref-6)
7. Joel Wm. Friedman, *Redefining Equality Discrimination, and Affirmative Action Under Title VII: The Access Principle*, 65 Tex. L. Rev. 41 (1986); Buchan T.A. Love, *Justifying Affirmative Action*, 7 Auckland U. L. Rev. 491 (1993). [↑](#footnote-ref-7)
8. Christine M. Koggel, *A Feminist View of Equality and Its Implications for Affirmative Action*, 7 Can. J.L. & Juris. 43 (1994). *Cf*. Frances Raday, *Concerning Equality* [Hebrew], Mishpatim *Caf-Daled* 241 (1994). [↑](#footnote-ref-8)
9. See: Samuel Scheffler, *Doing and Allowing*, 114 Ethics 215 (2004). According to this approach, a duty to save is secondary to a more powerful and more basic duty, to do no harm, so that if the realization of the duty to save ‘A’ requires doing real damage to ‘B’, we should not interfere. Philippa Foot, ‘The Problem of Abortion and the Doctrine of the Double Effect*’*, *in Killing and Letting Die* 156, 160–63 (Bonnie Steinbock ed., 1980). Underlying this position is the familiar distinction between act and omission, or in its modernized and more convincing variation, between doing and allowing. [↑](#footnote-ref-9)
10. *Cf*. Susan D. Clayton & Faye J. Crosby, *Justice, Gender, and Affirmative Action* 68 (1992). [↑](#footnote-ref-10)
11. Thus, for instance, if we wish to secure an increase in the number of women who complete a degree in nuclear physics, it is not enough to remove barriers to entry and rely on the individual efforts invested by the female students to complete the degree, but additional components must be invested in over the course of study. [↑](#footnote-ref-11)
12. Clayton & Crosby, *supra*., Footnote 10. [↑](#footnote-ref-12)
13. For extended reading see: Guy Mundlak, *The Law of Equal Opportunities in Employment: Between Equality and Polarization*, 30 Comp. Labor L. & Pol’y J. 213 (2009). [↑](#footnote-ref-13)
14. Aristotle, *Nicomachean Ethics*. [↑](#footnote-ref-14)
15. One of the most contentious disagreements concerning affirmative action relates to the issue of goals and quotas. The central contention is that affirmative action creates quotas of minority groups; see: *Affirmative Action and Equal Opportunity: Action, Inaction, Reaction* 170–181 (Nijole V. Benokraitis & Joe R. Feagin eds., 1978). [↑](#footnote-ref-15)
16. John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 Phil. & Pub. Aff. 223, 224 (1985); John Rawls, *Justice as Fairness*, 67 Phil. Rev. 164 (1958). [↑](#footnote-ref-16)
17. John Rawls, *A Theory of Justice* (rev. ed. 1999). [↑](#footnote-ref-17)
18. Ibid. [↑](#footnote-ref-18)
19. John Rawls, *A Well-Ordered Society*, *in* Philosophy, Politics and Society: Fifth Series 6, 8–11 (Peter Laslett & James S. Fishkin eds., 1979). [↑](#footnote-ref-19)
20. John Rawls, *Justice as Fairness: A Restatement* 5 (Erin Kelly ed., 2001). *Cf*. Rawls, *supra*. Footnote 17, at 118. [↑](#footnote-ref-20)
21. Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 Yale L.J. 399, 403 (2001). [↑](#footnote-ref-21)
22. Cedric Herring & Loren Henderson, *Diversity in Organizations: A Critical Examination* (2015); Alexandra Kalev, Frank Dobbin & Erin Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 Am. Sociol. Rev. 589 (2006); Frank Dobbin, Soohan Kim & Alexandra Kalev, *You Can’t Always Get What You Need: Organizational Determinants of Diversity Programs*, 76 Am. Sociol. Rev. 386 (2011); Soohan Kim, Alexandra Kalev & Frank Dobbin, *Progressive Corporations at Work: The Case of Diversity Programs*, 36 Rev. L. & Soc. Change 171 (2012); Frank Dobbin & Alexandra Kalev, *The Origins and Effects of Corporate Diversity Programs*, *in* The Oxford Handbook of Diversity and Work 253 (Quinetta M. Roberson ed., 2013). [↑](#footnote-ref-22)
23. Andrew O. Herdman & Amy McMillan-Capehart, *Establishing a Diversity Program is Not Enough: Exploring the Determinants of Diversity Climate*, 25 J. Bus. Psychol. 39 (2010). [↑](#footnote-ref-23)
24. Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, *in* Psychology of Intergroup Relations 7 (Stephen Worchel & William G. Austin eds., 2nd ed. 1986). [↑](#footnote-ref-24)
25. Thomas Sowell “Affirmative Action: A Worldwide Disaster,” *Commentary*, December 1989, pp. 21-41, p. 24. [↑](#footnote-ref-25)
26. Steelworkers v. Weber, 443 U.S. 193 (1979). [↑](#footnote-ref-26)
27. OECD Public Governance and Territorial Development Directorate, Public Employment and Management Working Party, *Fostering Diversity in the Public Sector*, October 13th, 2009. [↑](#footnote-ref-27)
28. Theresa Spilsbury, *What Social Exclusion Means to Me*, in From Social Exclusion to Participation 91 (Aila-Leena Matthies, Marja Jarvela & Dave Ward eds., 2000). [↑](#footnote-ref-28)
29. Kenneth L. Karst & Harold W. Horowitz, *Affirmative Action and Equal Protection*, 60 Va. L. Rev. 955, 965 (1974). [↑](#footnote-ref-29)
30. Timothy J. O’Neill, *The Language of Equality in a Constitutional Order*, 75(3) AM. POL. SCI. Rev. 626, 630 (1981); Larry S. Temkin, *Inequality: A Complex, Individualistic, and Comparative Notion*, 11 Philosophical Issues 327, 329 (2001). [↑](#footnote-ref-30)
31. Aristotle, *Ethics*. [↑](#footnote-ref-31)
32. Amartya Sen, *Inequality Re-examined* 39–55 (1992). [↑](#footnote-ref-32)
33. Kang, J., & Banaji, M.R*. Fair measures: A behavioral realist revision of ‘Affirmative Action’*. California Law Review, 94(4),1063-1118 (2006); Harrison, D.A., Kravitz, D.A., Mayer, D.M., Leslie, L.M., & Lev-Arey, D., *Understanding attitudes toward affirmative action programs in employment: Summary and meta-analysis of 35 years of research*. Journal of Applied Psychology*,* 91(5),1013-1036 (2006). [↑](#footnote-ref-33)
34. Bowen, William G. and Bok, Derek *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*. Princeton, NJ: Princeton University Press (1998). [↑](#footnote-ref-34)
35. Mack, D.A., Johnson, C.D., Green, T.D., Parisi, A.G., & Thomas, K.M., *Motivation to control prejudice as a mediator of identity and affirmative action attitudes*. Journal of Applied Social Psychology, 32(5),934-964 (2002). [↑](#footnote-ref-35)
36. In the United States, hiring a candidate who does not meet threshold conditions is illegal: Plous, S., *Ten myths about affirmative action*. In S. Plous (Ed.), *Understanding Prejudice and Discrimination* (pp. 206-212). New York: McGraw-Hill (2003) (excluding senior positions in the US). [↑](#footnote-ref-36)
37. Nacoste, R.B. *Sources of stigma: Analyzing the psychology of affirmative action*. Law & Policy*, 12(2),* 175-195 (1990). This could be states with regard to the majority group, but in the gender context, this is not necessarily true, and for that reason I say the ‘strong group’. [↑](#footnote-ref-37)
38. Kravitz, D.A., & Platania, J. *Attitudes and beliefs about affirmative action: Effects of target and of respondent sex and ethnicity*. Journal of Applied Psychology, *78(6),* 928-938 (1993). [↑](#footnote-ref-38)
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41. Ch.M. Koggel, *A Feminist View of Equality and Its Implication for Affirmative Action*, 7 Canadian Journal of Law and Jurisprudence 43 (1994). [↑](#footnote-ref-41)
42. On the differences of approach between justifying affirmative action in the civil service and the lack thereof in the private employment market, which enjoys a greater degree of autonomy in employee selection, see Koggle, p. 45. [↑](#footnote-ref-42)
43. Koggle p.46; Clayton, Susan D. and Crosby, Faye J. *Justice, Gender, and Affirmative Action*. University of Michigan Press (1992). [↑](#footnote-ref-43)