Affirmative Action as Distributive Justice
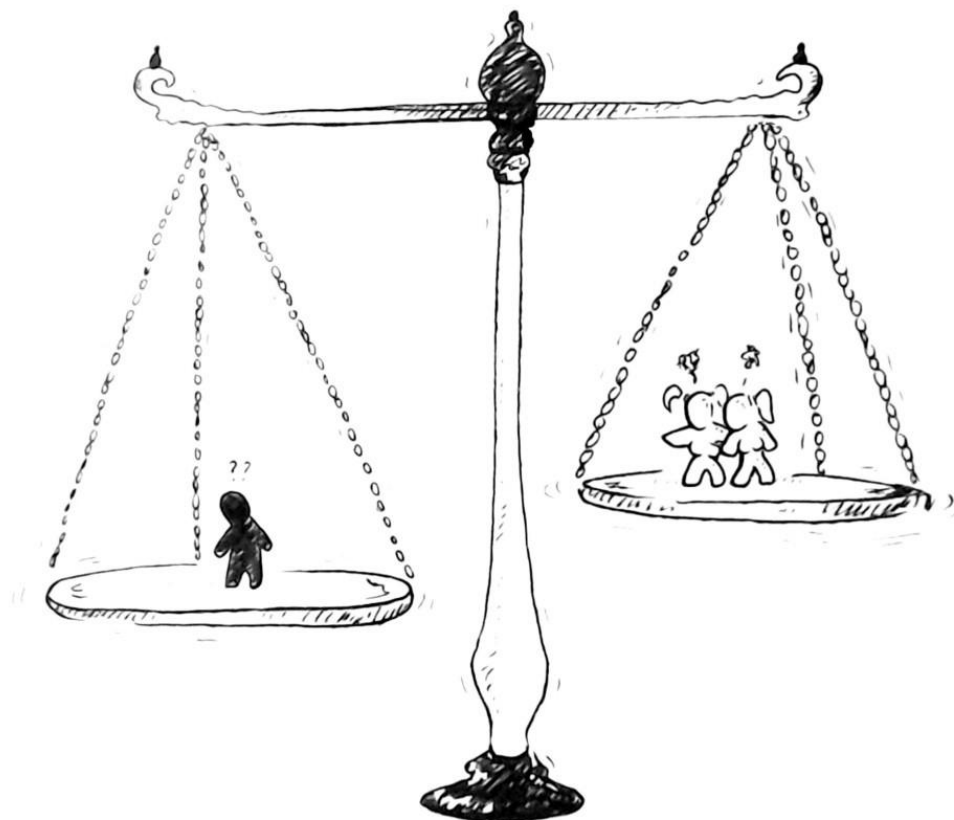
a Luck Egalitarian Defense of Preferential Selection Policies

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Acknowledgments

For a long time, I thought I would never be able to write this thesis, any thesis for that matter. This may sound overly dramatic, but particular, persistent health issues that were addressed after the initial deadline had already passed, made it almost impossible to find the mental clarity to undertake such an effort. But here we are, at the finish line. The commonly advanced wisdom among graduate students that 'the best thesis is the one that is finished' rings very true to me when writing this personal introduction.

Nor did I ever expect to be writing on such a topic. While I did always have a particular interest in political issues that everyone seems to disagree on, the public and academics alike, I never expected that I would try to contribute to a topic like this. Not having (consciously) experienced any discrimination myself, I hope I have done justice to the struggles faced by the individuals that have.

I would like to thank some people and places without whom this project would never have been realized. First, my thanks go out to EIPE for providing a stimulating study environment in with lots of freedom to pursue my own interests. Then, I would like to thank my fellow late-graduates part of the 'thesis support group' that we jointly set up for the nice talks we had, both informal and supportive. I also would like to thank Kaapse Maria for providing a nice, cosy study space outside my home in a time where nearly all external study spaces ceased to be accessible. Finally, my thanks go out to my Sophie and my parents, who supported me when nearly everything became impossible to do.

And thanks to you, the reader of this thesis. I hope you'll find something of value here, and that it provides some guidance in the complex debate that surrounds discrimination and public policy intended to address it.

1. Introduction

Nowadays, many organizations and institutions have policies in place, either self-initiated or required by law, for targeting and selecting individuals belonging to structurally disadvantaged groups for desirable positions.[1] These policies are called 'affirmative action' policies. Affirmative action can be defined as "policies that increase the representation of women and minorities in areas of employment, education, and culture from which they have been historically excluded".[2] Examples of such policies include strict quotas for selecting a minimum percentage of women or minority group members, as well as special education programs offered to raise their level of qualifications.

That such policies are common and widespread signals that the issue they seek to address, namely that membership of particular groups negatively affects the lives of group members, is still among us.[3] The fact that recent Black Lives Matter protests spread like a wildfire across the globe, even to a country such as the Netherlands that has a general reputation of tolerance, demonstrates this. Protesters' own or others' experiences led them to recognize that discrimination still impacts lives in various ways, and that efforts to eradicate this have become all but obsolete. While exclusionary attitudes have definitely become less widespread in so countries,[4] the protests raised awareness for those still having to deal with discrimination on a regular basis. Affirmative action is a set of policy tools advanced to help break the vicious cycle of discrimination. In philosophy, those specializing in normative ethics and political philosophy have proposed various arguments supporting or refuting (some) affirmative action policies and have dedicated themselves to mapping and analyzing the conceptual intricacies of the debate. Over the course of almost 50 years, a quite extensive body of philosophical literature has sprung into being.

Another related, lively debate in philosophy and beyond is that of distributive justice. Philosophers propose and evaluate various theories, principles and procedures that can be used as a basis for distributing scarce resources or opportunities. One specific set of theories of distributive justice can be grouped under the header 'luck egalitarianism', a term originally coined by Elizabeth Anderson (1999), who is a prominent critic of these theories. While plenty of disagreement exists among its adherents on what is the best version of it, they agree on its main underlying idea, which is the following. Namely, distributions of resources or opportunities are unjust if they are dependent on circumstances beyond individual control. Examples of circumstances that may influence distributions are

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[1] My definition of structural disadvantage can be found in section 1.2.

[2] Robert Fulinwider, "Affirmative Action," *The Stanford Encyclopedia of Philosophy,* ed. Edward N. Zalta (Summer 2018), Introduction. https://plato.stanford.edu/archives/sum2018/entries/affirmative-action/

[3] For an international survey and comparison of affirmative action policies, see Horowitz et al. (2003) or Sowell (2004).

[4] For instance, according to Krysan and Moberg (2016), survey data shows that expressed racist attitudes of whites in the United States have declined significantly since the 1940s.

being born with a physical disability, being part of a religious or ethnic minority that suffers from discrimination[5] or growing up in a rich, safe neighborhood. These external circumstances, which can be of a natural or social kind, have a significant impact on how well someone's life goes for them. Luck egalitarians claim that unequal distributions are just if and only if they do not depend on such factors, for which individuals cannot be held responsible. Many contemporary social welfare policies, such as disability benefits or conditional unemployment benefits, can be justified through the intuition that involuntary misfortune should be counteracted. It is now common in many countries for welfare benefit entitlement to depend on individual behavior,[6] which is used as a proxy for personal responsibility for being in a state of need. For instance, how one came to be unemployed or the amount of effort one puts into finding new work can influence the amount of support one receives. Or because one is born blind, one deserves special education or workspaces because one cannot be held responsible for having this disability.

An observant reader may already see a certain overlap between affirmative action and social welfare policies. Namely, both policies are means to correct for the effects that unchosen individual characteristics, such as race, sex, religious belief, disability, poverty or upbringing can have on the way someone's life goes for them. This is because it seems unfair that someone who is unlucky and could not reasonably prevent being in such an unlucky state, has to suffer the consequences of this state while others do not. Just as a black person suffering from discrimination may deserve compensation or additional support with finding employment that a white person does not, a disabled person who is unable to work is also entitled to benefits for reasons of a similar type.

In my thesis, I construct and argue for the benefits of a luck egalitarian defense of affirmative action policies. This defense is especially relevant for a specific type of policy that, while seemingly necessary, fails to gather a sufficient level of public support. These policies, as I will show in the first chapter, are policies that *adjust* meritocratic selection processes, but do not reject meritocracy as such. The main upshot of this thesis will be that considering affirmative action as a redistributive policy with a luck egalitarian justification has particular, favorable theoretical and practical benefits with respect to generating more widespread public support for currently controversial affirmative action policies. Moreover, to my knowledge, a luck egalitarian defense of these policies has not yet been addressed in the philosophical literature. I aim to address this gap.

This thesis is structured as follows. The first chapter defines affirmative action and gives an account of the public and philosophical debate surrounding it. I do this by introducing its historical progression through different stages, as well as discussing different

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[5] I set aside any discussion of whether following a certain religion can be considered a voluntary act. While it may be in some cases, often enough religious beliefs seem to be clearly attributable to upbringing, not deliberate choice. Furthermore, any social implications of adopting a religion in a particular context certainly are not chosen.

[6] See Fitzpatrick and Watts (2018) for a survey of the different forms that welfare conditionality takes and the demographic groups it affects.

features and types of these policies and the reasons why they are (sometimes) controversial. The upshot of this chapter is that affirmative action policies that give preference to certain group members in selection processes are controversial, and that critics mainly raise doubts concerning the fairness of adjusted procedures to non-preferred candidates and its effectiveness in terms of counteracting discrimination. Then, in the second chapter, I introduce four of the most commonly advanced arguments in favor of the policy, which I call 'compensation', 'diversity', 'discrimination-blocking' and 'integration. I argue that a specific version of the discrimination-blocking argument, the equality of opportunity model, is the most plausible, practically feasible and promising argument with respect to overcoming the controversy. I conclude by arguing for the value of a distributive interpretation of the equality of opportunity model, for which luck egalitarianism seems especially suitable. The third chapter introduces luck egalitarianism and argues that it can specify and supplement the equality of opportunity model in such a way that further improves its practical feasibility and promise for overcoming the controversy. It does this in the following ways. First, it allows administrators to identify for whom, when and where unjust circumstances influence the distribution of opportunities and to what extent they should be corrected. Because it grounds affirmative action in demonstrably unjust distributions of opportunities and shows how adjustments to selection procedures can effectively counteract them, luck egalitarianism provides benefits both in terms of fairness and effectiveness. Second, by grounding it in luck egalitarian intuitions, analogies can be drawn between affirmative action and contemporary conditional social welfare policies that already enjoy a wide range of public support. The implication of all of these practical benefits taken together is that affirmative action, justified in this way, is likely to be considered less controversial in the public eye.

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2. The Affirmative Action Controversy

In June 2019, Eindhoven University of Technology announced far-reaching changes to its hiring policy. It was announced that for all academic positions that would open in the next 1.5 years, only female applicants would be considered. After that, the policy would be relaxed in an unspecified way, but would still apply to some positions. Over the course of 5 years, it was estimated that around 150 jobs would be made available only to women.[7] The main reason given for the change in course was that despite previous efforts to target and hire more female academics, they still only comprised a very small fraction of all staff. In 2018, only 15 percent of their tenured professors was female.[8] In order to be able to meet their goal of having at least 30 percent female academic staff, harsher measures were justified in order to 'break the glass ceiling'. Twelve months after introducing the measure, they had hired 48 new female academics, which had already brought them up from 15 to 18 percent.

However, many disagreed with their judgment that the end justified the means they proposed. While many agreed with the goal of increasing the representation of women in academia, the fact that the policy completely excluded male candidates was considered disproportionate. Some of the complaints raised against it were that it was 'unfair to qualified male applicants' and 'patronizing towards women'.[9] Following a lot of upheaval and discussion, the Netherlands Institute for Human Rights eventually confirmed the suspicion of many that the policy went too far. They claimed that it violated Dutch equal treatment law. Based on jurisprudence concerning equal treatment, they concluded that a minimum requirement of policies of this type is that positions should be open to all and equal consideration must be given to the qualifications of all candidates. In cases where two candidates, one male and one female, are equally qualified, preference may be given to the latter if they are currently underrepresented in the organization. If preference is given less qualified female candidates, then only a convincing explanation by the institution of the necessity of such a severe policy can vindicate it.[10] As the university failed to explain why an absolute preference for female candidates was to be preferred over less severe means with the same purpose, it was rejected.

The above example is an extreme case of preferential selection policy, which is an instance of what is known in the academic, legal and political realm as 'affirmative action'. The example is extreme because most policies of this type do not go as far as to completely reject all applicants not belonging to the underrepresented group. While it is not representative of more common types of affirmative action policy, it makes salient three important aspects of the debate surrounding these measures. First, it shows that individuals belonging to historically excluded groups, such as women, are still underrepresented in

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[7] Technische Universiteit Eindhoven, "Vacatures."
[8] VSNU, "Divers Personeelsbestand."
[9] Dorlo, "TU."
[10] College, "Voorkeursbeleid."

certain occupations. Similar things can be said about some ethnic, racial or religious groups, which together with women make up the typical target group of these policies. Second, while the public generally agrees that its goal, namely counteracting underrepresentation of members of historically excluded groups, is valuable, the means proposed to achieve this goal do not enjoy similar support. This is because these policies *prima facie* seem unfair, as they treat candidates unequally by giving advantages based on characteristics such as sex, race, ethnicity or religion that candidates generally did not choose to have.

This chapter will give an account of the history, context and conceptual space of affirmative action, as well as the criticism that is commonly raised against it. The purpose of this overview is to identify the types of affirmative action policy that are currently 'controversial' and explain why they fail to generate wide public and academic support. It is structured in the following way. The first section provides a rough definition and gives an account of its historical progression through different stages. The second section provides a more elaborate definition and sets out the different types and features of these policies. Then, in the third section, by discussing different lines of criticism often raised against it, an explanation is provided why some types of policy are controversial. The upshot of this chapter is that affirmative action policies that give preference to certain group members in selection processes are the type that is controversial and to accommodate the criticism raised against it, proponents need to show that it treats all candidates fairly and that it is an effective tool to counteract discrimination.

2.1 The Intellectual History of Affirmative Action

The example discussed in the introduction already gave some notion of what affirmative action policies may look like and the controversy that can accompany them. However, capturing the various forms these policies come in by discussing examples would be a futile endeavor. This is because the term encompasses a wide variety of means that share a common end; namely, to "increase the representation of women and minorities in areas of employment, education, and culture from which they have been historically excluded".[11] This definition does not capture all of its conceptual intricacies, which will be discussed in more detail in section 2.2. However, it does capture one essential element, namely that these policies traditionally target women and racial, ethnic, and religious minorities. Its target group mainly consists of demographic groups that have been historically excluded.

Thomas Nagel (1973) gives an intricate description of the way affirmative action policies have evolved over time. He identifies five stages through which the public, legal and academic debate around it has progressed. Each stage arose when some disputed the effectiveness of measures introduced in the previous stage. In response, subsequent stages involved proposals for increasingly severe measures to counteract

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[11] Fulinwider, "Affirmative Action," Introduction.

underrepresentation. Here, the progression described by Nagel serves a double function as a taxonomy. First, it can be used for anchoring different positions taken up by academics and the public alike. One can view the stages as a measure of "how far one wants to go" to tackle underrepresentation of historically excluded groups. Second, it links the practical challenges faced by administrators at a certain point in time with the means they proposed to overcome them. Thereby, it gives a general idea of the history of affirmative action policy both in terms of the positions of those in favor of its project, the problems they faced at a certain point in time and the solutions they proposed.

In the first stage "deliberate barriers against the admission of [some groups] to "desirable positions" were abolished.[12] At this point, laws and practices that were deliberately discriminatory were banned and equal rights for citizens were introduced.[13] The archetype example of first-stage policy is the Civil Rights Act of 1866 in the United States. It dictated that "all persons within the jurisdiction of the United States shall have the same rights in every State and Territory" and are entitled to the "full equal benefits of all laws and proceedings for the security of persons and property".[14] Negatively, it condemned all forms of deliberate exclusion based on group membership. Positively, it established equal rights for all citizens. Former slaves were now to be recognized as persons possessing the same rights, duties, opportunities and responsibilities as white (male) citizens. The type of equality brought about by first-stage policies can be called 'formal equality', meaning equality of all persons before the law. In the years succeeding the Civil Rights Act, it quickly became clear that formal equality meant very little in practice for black citizens and that passing legislation is far from sufficient for reducing the impact of discrimination and prejudice on people's lives.

The second stage followed when administrators recognized that merely passing legislation was not sufficient for counteracting deliberate exclusion and that strict enforcement was necessary. One of the flaws of the Civil Rights Act of 1866 was that its contents were hardly enforced, eventually giving rise to Jim Crow laws that persisted until the 1960s. Here, black and white citizens lived 'separate, but equal' lives. Through this separation, equality reduced to mere formal equality due to the inequalities in wealth, income and opportunities between white and black citizens. Moreover, administrators realized that discrimination may continue to operate in indirect ways. For instance, many U.S. states still restricted the right of black people to vote on other grounds, such as their

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[12] Thomas Nagel, "Equal Treatment and Compensatory Discrimination," *Philosophy & Public Affairs* 2, no. 4 (1973): 349.

[13] Strictly speaking, it is somewhat misleading to describe first-stage policies as 'affirmative action' policies. Rather, constitutional changes establishing equal rights for all should be considered as the groundwork upon which the affirmative action debate builds. Moreover, the first time the term 'affirmative action' was used in the way this thesis understands it was in 1935, see Uzorsky (2020) for details. For reasons of simplicity, I set this concern aside.

[14] Cited in Melvin I. Uzorsky, *The Affirmative Action Puzzle* (New York, NY: Pantheon Books, 2020), 3.

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ability to read or paying poll tax.[15] In the realm of employment, seemingly neutral seniority rules favored those employed for a longer time, which made it difficult for minority employees to get promoted to desirable, higher-paying jobs.[16] The new Civil Rights act was introduced, among other things, to establish means for enforcing the previously identified formal requirements. It intended to bring about a more ambitious type of equality than formal equality, namely equal employment opportunity for all citizens. A committee, called the Equal Employment Opportunity Commission, was called into being to investigate and penalize instances of explicitly and implicitly exclusionary policies in public and private organizations. The U.S. Civil Rights Act of 1964, introduced by President Lyndon B. Johnson, and the Executive Orders that followed in the years after it, are examples of second-stage policies that actively aim to eradicate all possible ways of using grounds such as race, sex, ethnicity or religion in selection processes.[17]

In turn, second-stage policies also appeared to be insufficiently effective at counteracting underrepresentation. Discrepancies between dominant group members on the one hand and women and minorities on the other persisted, calling for more severe efforts to eradicate them. One of the flaws of second-stage policies was that while they address and punish all explicit or implicit exclusionary practices and encourage positive efforts at impartiality, they overlook the ways that socio-economic differences between groups can influence the access to opportunities of group members. It happened to be that as many women and minorities were often already in a precarious socio-economic situation at the time, and that these situations tend to self-perpetuate. For example, children growing up in a poor neighborhood, which more often than not were predominantly populated by structurally disadvantaged group members, may not have equal access to education or healthcare, which can exacerbate disadvantages in their later life. Or prejudiced beliefs about minorities, such as that they are less intelligent or more prone to criminal behavior can be internalized, which in turn undermine their ambitions and self-respect, thereby reinforcing and confirming prejudiced beliefs of the majority.

The realization of the self-perpetuating nature of socio-economic disadvantage and that some groups disproportionately suffer from this gave rise to third-stage policies. Here, individuals belonging to structurally disadvantaged groups were given special attention through programs aimed at improving these socio-economic background factors, such as education, wealth, income and access to public services. The rationale underlying

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[15] Ibid., 406.

[16] Ibid., 38.

[17] A short note on terminology is in order. Henceforth, I will sometimes use the term 'group membership' to refer to all relevant group-specific characteristics that confer involuntary structural disadvantage upon members of these groups. It encompasses characteristics such as race, sex, ethnicity and religion but excludes characteristics such as age, which is involuntary but does not involve structural disadvantage (what I understand by structural disadvantage will be discussed in section 2.2). It may include physical and mental disability, but these groups are not traditionally taken to be part of the affirmative action target group. I will also use 'selection decisions' and 'selection procedures' as general concepts to refer to all relevant hiring and application procedures and the criteria they invoke.

such programs was that they directly or indirectly give them the means to compete at a more equal level with other competitors for desirable positions, which would lead them to be better represented in desirable positions. In other words, deliberate attempts were made at raising them to the level of qualifications they would have had, had they not suffered from socio-economic disadvantages.

Fourth-stage policies arose when even these special programs seemed to be insufficiently effective, as underrepresentation still persisted. The example discussed in the introduction is a policy of this type. The fourth stage is where most of the present debate is situated, as these policies have become common occurrences in many countries at this point.[18] It is also where positions and proposed measures get more controversial, for which I will provide an explanation section 2.3. Despite all efforts at improving the situation of structurally disadvantaged group members in the third stage, the aforementioned discrepancies still persist. Women encounter various obstacles that prevent them from climbing up the corporate ladder, and thus are still a rare sight in many boardrooms.[19] Many minorities are still, on average, less educated than members of dominant groups, which explains their overrepresentation in lower-paying occupations and underrepresentation in higher-paying ones.[20] This leads to the hypothesis that despite efforts at improving socio-economic background factors, selection decisions still have exclusionary effects, despite deliberate efforts at impartiality.

At this point, administrators are faced with a dilemma. Those skeptical of introducing more severe measures at this point argue that third-stage policies may indeed be not effective enough, but that we cannot go further without negatively influencing the fairness of current selection procedures. As Nagel puts it, they face the choice of "either allowing the effects of social injustice to confer a disadvantage in the access to desirable positions that are filled simply on the basis of qualifications relevant to performance in those positions", or one can put into place a "system of compensatory discrimination".[21] Fourth-stage critics defend the latter position. They argue that underrepresentation should be counteracted by adjusting selection procedures to favor underrepresented candidates.

Fourth-stage policies incorporate other factors besides traditional qualifications for selection decisions.[22] This goes against the intuitions of many people, who think that merit, which I understand as all criteria related to the ability to perform well in a position, should be all that matters for selection decisions. Because of its counterintuitive nature and the fact that most of the current affirmative action debate clusters around fourth-stage measures, I will focus exclusively on this type of policy for my purposes. However, it is possible to go one step further, which is what fifth-stage critics do.

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[18] See footnote 3.
[19] See Cotter et al. (2002).
[20] See Kmec (2003).
[21] Nagel, "Equal," 350-351.
[22] There is considerable disagreement on the issue of whether or not group membership can and should be considered a qualification in selection procedures. I need not take a position in this debate.

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Most fourth-stage administrators agree that selection procedures should continue to respect candidates' merit, at least to a certain extent. They merely emphasize that our exclusive concern with it should be relaxed as a means to increase representation of members of certain groups. In other words, fourth-stage critics argue that selection procedures should be adjusted, not replaced. They merely disagree on what such an adjustment should look like. Fifth-stage administrators go one step further by criticizing current selection procedures *as such*. They argue that the acceptability of adjustments to current selection procedures demonstrates that they are flawed. They also tend to reject meritocracy *as such* as providing a guide for selection. Shlomi Segall (2013) takes this position and defines meritocracy as: "the view that individuals are entitled to certain positions because they possess some qualifications that make them suitable for carrying out the tasks associated with these jobs".[23] If it is granted that selection procedures are means towards social goals, replacing them with a different procedure may better serve this purpose. This opens the door for considerations of wholly different criteria for selection than merit. For instance, instead of selecting the person who appears to be most capable to perform a certain task, an entirely justice-based hiring procedure can be put in place. Here, one may use 'need' as the primary criterion for hiring, allocating positions to candidates whose well-being would improve the most from getting them.[24] This is an unpopular position to say the least, which will not find much support among the general public. This is mainly due to losses in efficiency and productivity it may imply. As universities, employers and clients have a legitimate claim on candidates able to produce good-quality work, it seems absurd to require them to hire candidates exclusively based on need. Thus, as the likelihood of generating public support for this type of policy is very small, providing support for fifth-stage proposals is beyond the scope of this thesis.

To summarize, by providing a brief sketch of the intellectual history of affirmative action, this section has shown that the current locus of the debate lies with fourth-stage policies. The fourth stage presents a dilemma for administrators to either accept a certain level of structural disadvantage adhering to some groups or adjusting selection procedures by introducing criteria that give a certain degree of advantage to individuals belonging to these groups, which appears to be unfair.

2.2 Definition, Concepts and Context

Now that we have a clearer view of stages through which the affirmative action debate has progressed and the types of policies that accompanied these stages, I will now introduce a more comprehensive definition of it and discuss its main features. This section answers the following questions: (i) *what* is affirmative action and *why* is it necessary (problem), (ii) what does it aim to achieve (goals), (iii) *how* are these goals are achieved and

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[23] Shlomi Segall, *Equality and Opportunity* (Oxford, UK: Oxford University Press, 2013), 87.
[24] Segall (2013) defends this position, see chapter 4.

(iv) *who* the targeted and executive agents are. These questions will be dealt with in the respective order set out above.

(i) The definition of Fulinwider that I gave in section 2.1. already gave an idea about the shared goal of affirmative action policies. Namely, they aim to counteract underrepresentation of historically excluded groups. However, as mentioned, this definition lacks specification. Introducing a more nuanced and elaborate definition at this point can help to identify some respects in which affirmative action policies differ. The definition by Herring and Henderson (2011) provides an anchor for the discussion in this section: "affirmative action consists of government-mandated or voluntary programs and activities undertaken specifically to identify, recruit, promote and/or retain qualified members of disadvantaged minority groups in order to overcome the results of past discrimination and to deter discriminatory practices in the present."[25]

Note that this definition shifts the emphasis from 'underrepresentation' of historically excluded groups to 'discrimination'. This seems appropriate, as the existence of underrepresentation in a certain domain is not a sufficient reason for affirmative action to be required. Underrepresentation of a specific demographic group in a particular domain may have underlying causes that do not involve injustice. For example, different explanations for generally observed tendencies of women to apply for certain positions are available. Some explanations feature apparently neutral factors, such as differences between women and men in terms of their social networks or job search methods.[26] Also, as a clear-cut explanation for observed discrepancies in the proportion of males pursuing engineering and science degrees is unavailable, and some argue that difference in interest may partially explain this.[27] As no simple explanations are available for complex phenomena such as same-sex segregation, it is not unlikely that some 'innocent' causal factors enter into the mix. The above examples point out that discrimination, by itself, cannot fully explain at least some cases of underrepresentation.

Moreover, past exclusion of a certain demographic group, by itself, is also not a sufficient reason for affirmative action to be appropriate. Rather, it is appropriate because past discrimination can have lingering negative *effects* on members of these groups. It is true that many groups that currently make up the target group of affirmative action have been historically excluded. But it does not include all historically excluded groups, as some of them have suffered from discrimination in the past but are not discriminated against anymore. Irish communities in several foreign countries provide an example of a group that suffered from deliberate exclusion in the past, which no longer significantly affects

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[25] Cedric Herring and Loren Henderson, "From Affirmative Action to Diversity: Toward a Critical Diversity Perspective," *Critical Sociology* 38, no. 5 (2011): 631.

[26] I use the term 'apparently' here, because differences in job search methods and social networks can still negatively affect women's pay and access to opportunities indirectly. Understood in this way, these explanations may still count as discriminatory mechanisms. See, for instance, Hanson & Pratt (1991) or Huffman & Torres (2002) for examples of empirical research dealing with these topics.

[27] See Meyers et al. (2012) and Patrick, Burrego and Prybutok (2018) for recent research on this topic.

them in the present.[28] If this is the case, the appeal of affirmative action seems to weaken significantly compared to groups that do face present discrimination or discriminatory effects of the past.

Thus, neither 'underrepresentation' nor 'historic exclusion' of a group in a particular domain, by themselves, provide sufficient reasons for undertaking affirmative action policies. Rather, affirmative action policies aim to address underrepresentation *due* to either past or present discrimination. Underrepresentation due to discrimination is thus the main problem that affirmative action policies address.

(ii) The fundamental justificatory role that discrimination plays, is reflected in the explicit goals of real affirmative action policies. In the Netherlands, equal treatment law dictates that affirmative action is justified if it addresses the 'factually disadvantaged position' of women and minorities.[29] While this surely sounds reasonable, it is not very specific. The U.S. Civil Rights Act of 1964 further specifies factual disadvantage by putting forth a twofold goal that affirmative action strives for. Its first goal is 'eradicating present discrimination and the effects of past discrimination'. Its second goal is concerned with 'establishing equality of opportunity for all'.[30] The former is a negative, backward-looking aim of getting rid of all current discriminatory practices originating in past exclusionary practices. Put shortly, all discrimination that happens or has happened should either be blocked or redressed. The latter is a positive, forward-looking aim of bringing about a society where individuals have an equal chance at flourishing despite their differences in terms of unchosen attributes. More broadly interpreted, affirmative action contributes to establishing a genuine society of equal citizens, where we consider and relate to each on the basis of equality in various ways. [31]

However, affirmative action by itself cannot establish the latter, more demanding interpretation of equality of opportunity. Certainly, eradicating present discrimination is a necessary condition for relating to each other as equals. However, equality of opportunity, understood in this way, requires more than that. It requires real moral and political equality, which also requires equal political influence, widespread tolerant attitudes towards differences among citizens and a eradicating large inequalities in the distribution of as food, shelter, wealth and health. Thus, it seems more plausible to interpret equality of opportunity in the context of affirmative action as equal chances for accessing desirable positions. It is also possible to conceive of equality of opportunity in a much narrower way so that it reduces to formal equality. This is what some critics of affirmative action

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[28] In the 19th century, job adverts in the United States and Britain sometimes featured a NINA-clause, which meant 'No Irish Need to Apply'. For the United States, the prevalence of NINA is explored in Fried (2015).

[29] College, "Gelijkebehandelingswetgeving."

[30] Uzorsky, *Puzzle*, 11.

[31] Elizabeth Anderson, "Integration, Affirmative Action and Strict Scrutiny," *New York University Law Review* 77 (2002): 1204.

do.[32] The conceptual ambiguity adhering to equality of opportunity requires partially explains the controversial nature of fourth-stage policies, as they rest on a more demanding conception of it. As these critics are unwilling to go further than formal equality, and thereby would reject the entire project of affirmative action, this thesis will not provide an explicit reply to them. Only those committed to dealing with underrepresentation due to discrimination will find anything of interest here.

While eradicating discrimination seems to be a more achievable, realistic aim for affirmative action policies than bringing about a genuine society of equals, this is still far from easy. This is because discrimination takes many shapes and forms, which can be grouped under the headers 'direct' and 'indirect discrimination'. Direct, deliberate discrimination requires little introduction, as it is already widely rejected in many countries.[33] However, indirect discrimination is more elusive and thereby still more widespread. Some of the ways it manifests itself with respect to sex and race are captured by Mary Elisabeth Warren (1977) and Elizabeth Anderson (2002) respectively. Warren argues that while deliberate sexism has become less common, something she calls 'secondary sexism' is still widespread and more difficult to eradicate. She defines it as "the use of sex-correlated selection criteria which are not valid measures of […] merit, with the result that women tend to be passed over in favor of men who are not, in fact, better qualified".[34] Some examples of secondary sexism include: only considering full-time employees for promotion, counting (possible) childcare responsibilities as a negative qualification, giving preference to workers with uninterrupted work records and hiring candidates whose authority is more likely to be respected by their peers. Anderson identifies racial segregation in the residential, educational and occupational realms as one of the main barriers working against full integration of minorities in the United States. Examples of the consequences of segregation include isolation from social networks, unconscious racial stereotypes adhering to specific jobs and lower access to public and professional services.[35]

The indirect mechanisms that Warren and Anderson identify, help to maintain underrepresentation of women and minorities in certain positions. Group membership need not enter into the selection process as an explicit criterion for this to happen. It also explains the lingering appeal and necessity of affirmative action, as discrimination takes structural forms by becoming embedded in common practices and institutions. In this case, it can bypass any intentions on behalf of administrators not to discriminate and become impersonal. Hence, 'structural disadvantage' is often used to describe the current situation of women and minorities. When I use it in this thesis, I understand it as

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[32] Charles Lockhart, "Socially Constructed Conceptions of Distributive Justice: The Case of Affirmative Action," *The Review of Politics* 56 (1994): 34.

[33] See footnote 4.

[34] Mary Elizabeth Warren, "Secondary Sexism and Quota Hiring," *Philosophy & Public Affairs* 6, no. 3 (1977): 242.

[35] Elizabeth Anderson, "Integration, Affirmative Action and Strict Scrutiny," *New York University Law Review* 77 (2002): 1202-1204.

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encompassing all direct and indirect negative effects of group membership on individuals' chances at accessing desirable positions. It includes all instances of direct and indirect discrimination that influence these chances.

The goals they aim to achieve also make clear that affirmative action policies are meant to be temporary. As means to eradicate discrimination and establish equality of opportunity, they cease to be necessary once these goals are achieved. Moreover, it certainly seems preferable to have selection policies that do not need to give preference to individuals based on group membership. As Jonathan Wolff (2006) emphasizes, "as a long-term policy, affirmative action is undesirable, and in certain aspects unjust. People should be treated on their individual merits, as critics of affirmative action claim. But without a temporary policy of affirmative action, it will be much harder to create a world in which people are treated on their individual merits."[36] Thus affirmative action is only required and desirable while the effects of past discrimination and present discrimination persist, and 'real' equality of opportunity is not realized. Until we create a world in which unvoluntary individual characteristics do not determine the treatment this individual receives, implementing policies of this kind seems required.

(iii) Affirmative action policies can take two forms with respect to how its goals are to be achieved: 'outreach' and 'preference'.[37] The former involves "targeting [a] group for publicity and invitations to participate", while the latter involves "using group membership as criteria for selecting participants".[38] This distinction largely tracks the difference between fourth-stage policies on the one hand, which introduce preferences into the selection process, and the policies of stages that preceded it. Outreach does not require adjusting hiring procedures, while preference policies do. Thus, it is fourth-stage policies that 'preference', in this distinction, refers to. However, Anderson's definition of 'outreach' is too narrow to include third-stage policies, which include education programs and welfare transfers which can (but not necessarily) target specific groups. Therefore, outreach should also include conscious efforts at improving the ability of disadvantaged groups to compete.

Erwin Chemerinsky (1996) identifies several potential techniques of affirmative action which can be classified as either outreach or preference. In employment and education, outreach includes explicitly encouraging women and minorities to apply to positions as well as actively reaching out to specific, qualified candidates belonging to these groups to get them to apply. Preference includes setting 'goals and timetables' for representation, using group membership as one factor among many in hiring or selection decisions, classifying applicants according to e.g., sex or ethnicity and choosing the most qualified from each list, reserving a set percentage of slots for qualified minorities and setting rigid quotas. In the context of education, outreach can take the form of special programs

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[36] Jonathan Wolff, *An Introduction to Political Philosophy* (Oxford, UK: Oxford University Press, 2006), 189.

[37] Elizabeth Anderson, *The Imperative of Integration* (Princeton, NJ: Princeton University Press, 2010), 135.

[38] Ibid., 135.

designed for minorities, and preference includes reserving scholarships for minority candidates.[39] This list is certainly not exhaustive, but it demonstrates the wide range of policies that affirmative action encompasses.

An interesting practical challenge related to the discussion of *how* affirmative action achieves its goals is that in selection decisions, when assessing which candidate is most suitable for a job, a recruiter has to establish the degree to which someone is qualified. This is difficult to do in an objective, standardized way. Subjective considerations that are difficult to assess objectively[40] or biases can influence these decisions.[41] Moreover, in the context of affirmative action, the question is raised whether being a member of a structurally disadvantaged group can be considered a 'qualification'. As we will see in section 3.1., some consider this to be a qualification because it can serve different instrumental roles.

The debate over what counts as a qualification is crucial for clarifying a distinction that is being made in the literature between 'equal' and 'unequal' cases. This distinction reflects that there is a difference between affirmative action policies that prescribe selecting equally or less qualified female or minority candidates. In the latter, the discrepancy in terms of qualifications between the candidate that is judged to be most qualified for the job and the candidate that ultimately gets hired gives rise to stronger efficiency and unfairness objections (see section 2.3 for the latter). Unequal cases are thus generally more controversial, because they override the merit of the most qualified candidate and may provide employers with a less capable employee.

(iv) Affirmative action policies need to identify a specific target group. Therefore, they need a criterion to determine who is included in this group and who is not. One such criterion is that a group is 'historically excluded'. Because women and some minorities have suffered from exclusion in the past and are still experiencing the consequences of this today, they are entitled to special help. Desirable positions are one form in which this benefit can come, but other types of help, such as cash or in-kind transfers are also common. As mentioned in (i), not all historically excluded groups are entitled to support. Moreover, affirmative action policies are silent with respect to this criterion, allowing for the inclusion of the mentally or physically disabled in its target group, as is the case in the Netherlands.[42] They can also include groups of migrant workers also have not suffered from first-stage exclusion, such as the Moroccan and Turkish community in the Netherlands. Thus, while most groups that are currently considered to be part of the target group of affirmative action have suffered from exclusion in the past, this is not a necessary nor

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[39] Erwin Chemerinsky, "Making Sense of the Affirmative Action Debate," *Ohio Northern University Law Review* 22 (1996): 1167-1170.

[40] Judith Jarvis Thomson, "Preferential Hiring," *Philosophy & Public Affairs* 2, no. 4 (1973): 365-369.

[41] See Bertrand & Mullainathan (2004) and Pager & Sheperd (2008) for examples of studies demonstrating this.

[42] See footnote 29.

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sufficient condition. Experiencing current structural disadvantage, on the other hand, is sufficient for belonging to the target group of affirmative action.

This leaves open the question of who is responsible for executing affirmative action programs. The definition by Herring and Henderson includes both government-mandated and voluntary, private efforts undertaken to curb discrimination. Generally, the domains in which affirmative action is practiced are employment, education and government contracting.[43] The discussion in this thesis will mainly deal with the former two, but it may be generalized to the latter. I cannot account for the differences between them, however. Moreover, as will become clear from the discussion in section 3.1, who the executive and targeted actors can depend on the rationale for affirmative action policies. Nonetheless, it is safe to say that private and public administrators generally bear responsibility for constructing affirmative action policies, while their interests and degree of responsibility may differ. For instance, the duties of private agents may be more limited than those of public ones.

2.3 The Controversy Explained

The example discussed in the introduction already included a few, preliminary reasons people give to justify their aversion to affirmative action policies. The goal of this discussion is to show why preference policies are the main target of this opposition and explain why they are controversial. To do this, I describe some of the different lines of criticism commonly voiced against it and critically evaluate each. I will distinguish between (i) *individual reasons* for aversion against preference policies and (ii) academic *counterarguments* raised against it.

Before starting this discussion, a short side note is in order. As Chemerinsky points out, both proponents and opponents of affirmative action often are not clear on the type of affirmative action policy they promote or oppose. Alternatively, they tend to direct their defense or critique only at a very specific type that is respectively very modest or very extreme. Opponents often argue why rigid quotas or strictly proportional representation are unjust or undesirable, which are the most severe forms of fourth-stage policies.[44] It is therefore crucial to keep in mind that the individual reasons and counterarguments outlined here do not apply to all of types of affirmative action policies in the same way. This same concern applies to the different arguments in favor of it I will introduce in section 3.1 as well. Discussing the exact practical import of each line of criticism or defense for each type of policy is beyond the scope of this thesis, but I will discuss their import for fourth-stage policies specifically, as they are the focus of this project.

(i) There are at least three types of reasons for the aversive attitudes that some people express towards affirmative action policies. The first two explanations I give concern attitudes by dominant group members, whose chances for getting desirable positions

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[43] Anderson, *Imperative,* 135.
[44] Chemerinsky, "Sense," 1159-1160.

are reduced by affirmative action. The last one takes the perspective of members of target groups favored by affirmative action, who may also have reasons to oppose it.

To guide the discussion of the aversive attitudes by dominant group members, I use a distinction from the political science literature between 'prejudice-based' and 'policy-based explanations' of these aversive reactions, which will be defined in the next paragraph. The specific phenomenon that these researchers attempt to explain is that while generally, a majority of people exhibits favorable attitudes towards counteracting discrimination, at the same time there is also a majority that disfavors affirmative action policies. Kuklinski et al. (1997) provide an overview and independent research on the impact of individuals' beliefs and background on their attitudes towards affirmative action. They use surveys to determine attitudinal differences between Southern and non-Southern whites in the United States. Their research demonstrates that roughly 60 percent from both regions reject overt discrimination and contend that 'extra effort' should be given to eradicating this. While some Southern respondents still report blatantly racist attitudes (40 percent), most of them do reject discrimination and believe that something should be done about it. Large differences between these two groups start to show when asked if 'preference' should be given to black individuals in college and job applications. A minority of Southerners and non-Southerners agree (36 and 43 percent) that in the case of overt discrimination, this is justified. But when this criterion is not primed, about 80 percent of both groups oppose affirmative action. I introduce a variety of beliefs that can explain this aversion, touching upon both prejudice- and policy-based explanations.

First, prejudice-based explanations claim that prejudiced beliefs held by dominant group members explain the negative majority response to affirmative action. These beliefs may involve generalizations about characteristics of members of targeted groups.[45] Examples of such beliefs are that 'black people are less intelligent' or 'women are worse at negotiating higher wages'. While these beliefs are often blatantly discriminatory and empirically implausible, they are still quite common and provide an alternative explanation for the observed disparities between groups with regard to representation. Such beliefs may be held consciously or unconsciously and may be directly or indirectly discriminatory. They may also believe that they are unbiased or do not hold prejudiced beliefs. A possible expression of such a belief is that they claim to 'not see color'. The conviction that they and many others are actually 'colorblind' and that they do not exhibit discriminatory behavior, may lead them to underplay the need for affirmative action. It may also lead them to underplay its rationale, as they may come to believe that overt discrimination 'is not a problem anymore' and that minorities overplay the extent to which they are disadvantaged. Thus, the existence of prejudiced beliefs and the inability of some individuals to recognize them, should be acknowledged by proponents of affirmative action.

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[45] Kuklinski, James H., Paul M. Sniderman, Kathleen Knight, Thomas Piazza, Philip E. Tetlock, Gordon L. Lawrence, Barbara Mellers. "Racial Prejudice and Attitudes Toward Affirmative Action." *American Journal of Political Science* 41, no. 2 (1997): 403.

Second, policy-based explanations refer to individual beliefs that affirmative action is unfair or exclusionary to their detriment.[46] For instance, a dominant group member who is denied a position may believe that the hardships they suffered, such as poverty and stigmatization due to other characteristics they have, are left out of selection procedures and that it is unfair that affirmative action policies only take into account disadvantage due to group membership. Or individuals may simply feel that they will be the ones that 'lose out' in affirmative action programs. Personal hardships thus make the pill of rejection even harder to swallow. This contention, that affirmative action incorrectly assumes that 'all whites are privileged' and 'all women and minorities are deprivileged' gives rise to one of the most common objections against affirmative action policies. Namely, that they exclude the 'disadvantaged white'. I will discuss this objection in more detail later in this section when discussing counterarguments.

Feelings of resentment that arise when applicants are denied access to a job may also provide a partial explanation for their aversive reactions. An overt application of preferential policy introduces the suspicion that their rejection may not have been due to merit, but due to preferential treatment of other candidates. Even if their belief that they have been unfairly treated in a selection process is unwarranted, they may at least *feel* that this is the case. They may feel that they deserved the job due to their merits, or that their right to equal treatment was violated. It is possible that this individual is actually structurally advantaged without realizing it. Regardless of whether they are actually advantaged, their response is understandable to a certain degree because, as Herring and Henderson point out, denying a privilege evokes 'real feelings' on behalf of those whose privilege is denied.[47] While this may not be a strong objection against affirmative action, as reasons for selecting the minority candidate likely trump any feelings of resentment they may cause, the reality of these feelings must be acknowledged as a partial explanation of the observed aversion. Moreover, affirmative action policies must be able to take away individuals' suspicion of unfair treatment if they are to reduce its controversial nature.

Third, from the perspective of individuals that are favored by affirmative action, preferential selection introduces doubt with respect to the reasons they were hired. Assuming that the exact procedure leading up to selection decisions is not disclosed to candidates, it is unclear to selected female or minority candidates to what extent they were selected due to their own merit. Affirmative action may therefore undermine their self-confidence and self-respect, as well as their credibility in the eyes of their peers. Being hired based on merit expresses a sense of worth and reinforces the belief that one was hired due to the sweat of one's own brow. Introducing structural disadvantage into the mix can undermine such beliefs. However, transparency about the selection process may take away this doubt.

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[46] Ibid., 403.

[47] Herring and Henderson, "Diversity," 637.

(ii) Now that different explanations for aversive public reactions have been given, counterarguments advanced by academics will be discussed. I will group their lines of criticism under three headers: 'effectiveness', 'reverse discrimination' and 'stigmatization'.

The first line of criticism concerns the effectiveness of affirmative action policies. A common version of this criticism is advanced by Wilson (1987), who claims that affirmative action policies mostly help members of structurally disadvantaged groups that need it the least, while generally failing to help truly disadvantaged individuals who do or do not belong to such a group.[48] This objection consists of two parts. First, it claims that affirmative action disproportionately helps relatively well-off minority candidates, as worse-off group members either fail to apply or have insufficient qualifications for particular positions due to socio-economic background factors.[49] Moreover, as fourth-stage policies use salient group characteristics as a proxy for structural disadvantage, no assessment is (or can be) made with respect to the degree of structural disadvantage an individual candidate faces. Involuntary group characteristics can only be a crude test of being structurally disadvantaged, not how disadvantaged someone really is. Second, it advances a version of the 'disadvantaged white' objection raised earlier in this section. Dominant group members already suffering from hardships are not targeted by and may end up even worse under affirmative action policies. If they are already worse-off than some black candidates, they would actually benefit more from getting preferential treatment.[50] Affirmative action policies thus fails to consistently target the most disadvantaged candidates. Put in Wilson's terms, promoting equality of group opportunity need not promote equality of individual opportunity.

The claims of Wilson are empirical, which some have already attempted to refute.[51] For now, note that the import of Wilson's argument is limited in at least two respects. First, it seems to assume that affirmative action is only practiced in universities or jobs that require a high level of qualifications. However, affirmative action is not restricted to these positions, as it may be applied to all domains where there is underrepresentation due to structural disadvantage. Thus, it can also be applied to factory jobs, other education institutions or administrative work. Second, its import varies depending on one's favored type of preferential policy. Strict quotas may be better at helping less qualified minority candidates while having more impact on disadvantaged whites. For 'tie-breaking' preferences, it is the other way around. Moreover, it does not apply to outreach policies, which may be especially helpful less qualified minority candidates.[52] In the last chapter, I will

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[48] William Julius Wilson, *The Truly Disadvantaged: The Inner City, the Underclass and Public Policy* (Chicago, MI: Chicago University Press, 1989), 110.

[49] Ibid., 115.

[50] Ibid., 117.

[51] Gerald B. Bennett, "Racial Inequality and the Poor: A Critique of W.J. Wilson's *The Truly Disadvantaged*," *Social Justice* 16, no. 4 (1989): 205.

[52] Bennett, "Wilson," 205.

advance a different response that avoids Wilson's challenge altogether. I will argue that because affirmative action is only intended to tackle a specific type of disadvantage, it can avoid the question of how disadvantaged a candidate really is if it accurately targets structural disadvantage. In this way, I can avoid the question of which candidate is most disadvantaged, which is very difficult to reliably assess in practice.

The second type of criticism condemns all uses of group membership as grounds for selection on grounds of fairness. The use of such criteria *prima facie* conflicts with a fundamental constitutional principle, namely that all individuals should be treated equally, regardless of unchosen individual differences. Short, tall, dark or light-skinned, male or female, we all deserve equal treatment. The use of such characteristics in selection processes to advance social goals is accordingly dubbed 'reverse discrimination' as it re-introduces discrimination into selection processes. These critics argue that because the constitution forbids it, all uses of such criteria should be condemned. One could already reply here that this criticism is superficial, as equal treatment law in various countries already qualifies this principle and introduces exceptions, one of which I mentioned in the introduction of this chapter.

More generally put, apart from constitutional principles, one can still argue that it is simply unfair to treat candidates unequally due to involuntary characteristics they have. In other words, granting women and minorities larger chances at getting a certain position is unfair because it employs a 'double standard' with regard to characteristics such as skin color or sex.[53] Note that once again, this criticism applies only to preference policies. One could reply to it by stating that it arises due to disagreement about the nature of fairness.[54] Critics accusing affirmative action of reverse discrimination, on the one hand, understand fairness as 'procedural fairness'. A procedure that treats different individuals unequally based on individual characteristics they did not choose, is unfair. Proponents of fourth-stage affirmative action, on the other hand, put more emphasis on 'background fairness', namely that involuntary background factors should not influence selection procedures. A critic that is committed to procedural fairness will reject the entire project of affirmative action on grounds of procedural fairness. But if one accepts that background factors can influence selection decisions, as third-stage critics and beyond do, affirmative action is required exactly because procedural fairness is insufficient to generate equal chances.

Moreover, it seems implausible to say that all instances of discrimination are unjust. Jonathan Wolff emphasizes that "any policy must discriminate on some grounds. The university admissions office ought to discriminate between the clever and the not-so clever, for example. We cannot possibly say that all discrimination is unjust." [55] Thus, the

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[53] Sidney Hook, *Philosophy and Public* Policy (Carbondale, IL: South Illinois University Press, 1980), 139.

[54] Lockhart, "Constructed," 34-35.

[55] Wolff, *Political,* 187.

reverse discrimination line of criticism needs to be supplemented with an account under which conditions discrimination is unjust.

For the purpose of this thesis, I need not discuss different accounts of why or when discrimination is unjust. It suffices to deduce a requirement for any justification of affirmative action that wants to provide a reply to this line of criticism. Namely, those advancing this objection are owed a plausible explanation of *why* and *when* discrimination is just and *how* introducing membership of structurally disadvantaged groups into selection processes avoids treating candidates unfairly. As will become clear in chapter 4, the most promising justificatory model for affirmative action is one that respects equal treatment and thereby incorporates a condition of fairness.

Lastly, some criticize affirmative action policies for being stigmatizing to beneficiaries, as well as exacerbating racial tensions that exist in society.[56] Proponents of affirmative action seem to assume that the relevant members of minority groups cannot empower themselves. Some groups that have been disadvantaged and discriminated against in the past, such as the Irish, but have been able to transcend this burden over time. Why was this not possible for other minorities and women? Affirmative action policies thus express an attitude of passive dependency, not active empowerment. Moreover, by introducing individual characteristics as criteria for selection, it emphasizes individual differences rather than equality regardless of these differences. This can lead to polarization and conflicts between groups. As a reply, Chemerinsky emphasizes correctly that the exacerbation of tensions in society, by itself, does not provide a compelling reason to disfavor a policy.[57] The former, however, does seem legitimate to a certain extent, but it seems to suggest that women and minorities bear responsibility for emancipating themselves or that they have to wait for society to change. However, it is unclear why 'waiting a better situation' is preferrable over more direct means of addressing structural disadvantage, if these are available.

While this is certainly not an exhaustive survey of all different types of criticism raised against affirmative action policies, my discussion does include some of the most commonly raised objections in the literature. Taken together, it becomes possible to see that the individual reasons and counterarguments I discussed share some common characteristics. First, they mainly oppose preference types of affirmative action. None of the individual complaints or counterarguments apply to first- to third-stage policies. This corroborates my earlier conclusion that fourth-stage policies are the locus of current controversy. Second, the reasons advanced by individuals and academics overlap in certain respects. Taken together, they claim that affirmative action policies are ineffective, unfair and undesirable for a variety of reasons. Ineffective, because by using group characteristics as criteria they fail to do anything for truly disadvantaged group members, as well as

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[56] Chemerinsky, "Sense," 175.
[57] Ibid., 175.

making already disadvantaged non-members even worse off. Unfair, because introducing non-merit criteria into selection processes seems to imply that candidates from dominant groups are not treated equally. Undesirable, because it stigmatizes its beneficiaries, undermines their self-respect and emphasizes individual differences. While I have shown that each of these lines of criticism is only partially convincing and has limited import for fourth-stage policies, it is clear that a defense of affirmative action policies should at least provide compelling answers to why affirmative action policies are effective, fair and desirable. The next two chapters will be dedicated to developing a defense that can incorporate the challenges raised against it, which is necessary to reduce the controversial nature of affirmative action. I will mainly focus on the effectiveness and fairness of affirmative action, as the 'undesirability' critique can also be addressed by demonstrating the necessity and effectiveness of affirmative action policies, as well as improving the transparency selection procedures.

2.4 Chapter Conclusion

This chapter has given an overview of the current state of the affirmative action debate and explained why some affirmative action policies are controversial. It has discussed the five different stages it has progressed through, problems it addresses, goals it aims to achieve and the different types of policies it encompasses. Then, various explanations for public aversion to affirmative action were discussed, as well as some of the main objections raised against it. I demonstrated that the controversial nature of affirmative action policies adheres specifically to those of the 'preference' type, and that critics judge this type of policy to be ineffective, unfair and undesirable for a variety of reasons. In order to address this criticism, any compelling justification of affirmative action must provide a plausible reply to the challenges of its critics to generate a wider range of public support. It must argue why membership of a structurally disadvantaged group should be incorporated in selection processes and not disadvantage in general, when affirmative action is an appropriate and why it is an effective tool for counteracting the influence of discrimination, and if it can avoid unequal treatment. The next chapter will discuss and critically examine different justifications of affirmative action policies in terms of their potential to resolve the controversy.

3. The Potential of a Luck Egalitarian Justification

In the previous chapter, I have shown that affirmative action policies of the preference type are the locus of controversy and that critics have concerns about its effectiveness and fairness. To generate a wider range of support, a justification of these policies is needed that can take away these concerns. Put differently, a compelling justification of affirmative action policies shows why incorporating membership of structurally disadvantaged groups as a criterion into selection processes is warranted, why it provides an effective tool for counteracting structural disadvantage and that it does not treat disfavored candidates unfairly. In order to assess which currently available justification best meets these requirements, in this chapter I discuss and evaluate four of the most common types of arguments advanced in favor of affirmative action policies. I use the taxonomy of arguments put forward by Anderson (2010) as a guideline for this discussion, which I supplement with arguments by Thomson (1973), Warren (1977) and Lippert-Rasmussen (2020) to construct the most plausible version of each argument and thus arrive at a more complete taxonomy. Anderson's taxonomy consists of four types of arguments or 'models' as she calls them: compensation, diversity, discrimination-blocking and integration.[58] I will deal with each of them separately in the order set out above. Each will be critically examined in terms of their ability to provide grounds for effective and fair adjustments to selection procedures.

3.1 Four Justificatory Models

Before commencing the separate discussions of each model, I will shortly explain the aspects of each model that I will discuss and evaluate. First, I will consider the ability of each model to capture the problem that affirmative action addresses, namely discrimination in all possible forms, as well as providing a clear justification for the appropriateness of affirmative action as a tool for counteracting this problem. Second, I will look at the model's ability to provide a basis for practical public policy. In other words, is it possible to translate the model into real-world policy in a satisfactory, implementable way? Third, I will discuss the likelihood of dominant group members accepting the grounds that each model introduces for reducing their chances at getting certain desirable positions. To assess this, I introduce an 'interpersonal justification test'. This is a hypothetical scenario where a targeted candidate is preferred over another (dominant group member) due to preference policy. In this scenario, the candidate who gets the position tries to explain to the rejected candidate why the policy favored her and disfavored them. Using the grounds on which each justificatory model relies, such as 'harm', 'lack of diversity', 'inequality of opportunity' or 'integratory ability', I try to assess which of them is most likely to be accepted by rejected candidates. Each of the three aspects has bearing on perceived fairness,

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[58] I will use 'model' and 'argument' interchangeably throughout the thesis.

effectiveness, or both. How they have bearing depends on the model under scrutiny; I will make this clear in the discussion below.

3.1.1 Compensation

To begin, I discuss the 'compensation' justificatory model of affirmative action. Anderson formulates the argument in the following way: "if a person has suffered from wrongdoing, she is entitled to compensation from the wrong-doer, to the extent of the damages the wrong inflicted on her".[59] According to her, the compensatory model claims that harms which have already occurred, ought to be addressed. Applied to affirmative action, she claims that its main targets are the harms that arise from past discriminatory practices. The extent of compensation that the person suffering from this type of harm is entitled to is then equal to the amount of damage caused, which boils down to the amount that is necessary to bring victims up to the level of well-being they would have been at had discrimination not taken place.

Additionally, she claims that the compensatory model only requires redress from agents that have engaged in past discrimination.[60] Thus, the costs of affirmative action, according to the compensation model, should be borne only by agents that have caused the harm. This also means that individuals who demonstrably suffer from burdens that originate in the past, are the only ones entitled to compensation. In other words, only perpetrators of discrimination should bear the cost of affirmative action, and compensation should only go to those who are victims of agent-caused discrimination.

However, Anderson's reading of the compensation argument is too narrow in two ways. First, she interprets 'past harm' only as the effects of *past* discriminatory practices, which means that only this generates a claim for compensation.[61] However, as I argued in the section 2.2., present structural group disadvantage cannot be exclusively traced back to discriminatory practices in the past. Some of Warren's examples of secondary sexism I mentioned, such as preferring candidates with non-interrupted work records, clearly do not have such origins as they are instances of indirect discrimination. Despite their possible origins in past exclusionary practices, the harm they cause arises due to current discriminatory mechanisms, which can generate a similar claim of compensation if the harm can be traced to present actions by administrators. Moreover, the way she formulates the argument allows for a broader reading that includes present harm. It only mentions 'suffering from wrongdoing' due to a 'wrong-doer' as giving rise to an entitlement to compensation. Thus, a broader interpretation of the compensation model would claim that all harm, whether it originates in past or present discriminatory practices, implies that those

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[59] Anderson, *Imperative*, 137.

[60] Ibid., 137-138.

[61] Anderson considers it an objection to the compensation model that it focuses on past discrimination only, and that it suggests that 'current group disadvantage consists only of the inherited effects of past events'. As I take the strategy of presenting the most plausible version of the compensation model, I incorporate her critique into a more complete version of it.

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suffering that harm are owed compensation equal to the amount necessary to restore them to pre-harm well-being levels.

Second, the compensatory model also does not require that the costs of compensation should be only borne by those who directly caused individual harm, as Anderson claims. Judith Jarvis Thomson (1973), one of the initiators of the affirmative action debate in philosophy, sees disadvantages faced by historically disadvantaged group members as analogous to monetary debt that is owed to them by society in a certain way. According to Thomson, when a society fails to pay back its creditors, this is a form of injustice. Moreover, because many positions do not 'belong' to a rejected candidate but are owned by the community, rejecting a candidate that was not harmed in this way is not unjust because it does not take away something they 'owned'.[62] Thus, it does not violate the right that all citizens have at equal treatment, but merely overrides it for a specific reason, namely, that it would be unjust not to compensate those groups that it has harmed. As Thomson puts it: "no one is asked to give up a job which is already his; the job for which the white male competes isn't his, but it's the community's. […] it is something the community takes away from him in order that *it* may make amends."[63] Affirmative action can thus also be conceived as a means for society to pay back those it harmed in the past, thereby not requiring identification of clear 'perpetrators' of discrimination.

Thus, Anderson's reading of the compensation argument is too narrow in two ways: it should include harm that cannot be traced back to past discriminatory practices, and it should relax its assumption that the cost of affirmative action should be borne only by those who engage or have engaged in discrimination. Now that the 'best' version of the compensatory model has been set out, I now assess how it responds to critics' concerns regarding effectiveness and fairness of adjustments to selection procedures.

With respect to capturing the problem giving rise to affirmative action and giving a clear justification for it, the compensation model does not look promising. While it is possible to conceive of indirect discrimination as 'harm', instances that lack personal involvement cannot be captured by it. Often enough, indirect discrimination does not occur through interpersonal exchanges, but through impersonal discriminatory mechanisms, such as segregation. Through its reliance on victims and perpetrators, the agent-specific compensation model cannot capture this. Moreover, Anderson points out that the compensatory model does not offer a clear justification of the appropriateness of affirmative action as the best form of compensation over, for instance, cash transfers.[64] It is not clear why increased chances at accessing desirable positions would be the best means for compensation.

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[62] One could argue that not all jobs belong to the community. Thomson is concerned with the case of university selection procedures, for which this applies. This may not apply similarly to private companies, which can be argued to 'own' a particular position.

[63] Thomson, "Hiring," 382.

[64] Anderson, *Imperative,* 140.

However, more pressing flaws of the compensatory defense lie with the practical difficulties that plague it, which are the following. First, it is costly and probably impossible to isolate the effects of discrimination from all other potential causes of current disadvantages adhering to an individual. This is especially difficult if the harm has occurred in the distant past. Take the example of the abolition of slavery in the United States, which happened more than 150 years ago. The fact that it happened so long ago constitutes to a double problem for the compensatory model. First, it cannot clearly identify perpetrators and victims of past discrimination if the original perpetrators and victims are already deceased. It seems unfair to hold contemporary dominant group members responsible for harm caused in the past, especially if they have not exhibited present discriminatory behavior. Second, there is no standardized way for determining the amount of compensation that current 'victims' are entitled to, as it is also impossible to assess the exact amount of well-being they would have been at without suffering from discrimination.

These problems are especially pressing for cases that involve harm in the distant past, such as the harm caused by slavery. When dealing with clear cases of present harm, the compensatory model does not always face the same difficulties of establishing victims and perpetrators if the extent and origin of the harm caused are clear. Nonetheless, when dealing with more indirect, subtle ways in which a group member is presently disadvantaged, the problems still apply. It is hard to hold people strictly responsible for unconscious biases they hold or the negative effects of segregation. Moreover, it is very difficult to assess when and whether or not these effects apply to an individual situation, how much harm was caused and thus how much compensation one is entitled to. Identifying victims, wrong-doers, and the extent of harm caused, is not practically feasible in many cases.

Another practical problem for the compensation model is its reliance on group characteristics such as race, sex or ethnicity as a proxy for 'suffering from harm due to discrimination'. However, as we have seen, critics point out that not all individuals belonging to the target group of affirmative action suffer from discrimination to the same extent. The compensation model offers no conceptual tools to assess differences between group members in this respect. Moreover, for dominant group members, even if they are currently benefiting from past discrimination, this is not the same as being responsible for current discrimination. It seems too strong to hold those people responsible for harm caused by past actors.

Thus, while there clearly are ways that membership of a historically excluded group has negative effects, it is hard for the compensation model to make explicit how much disadvantage someone faces on an individual level, why it is appropriate to use group characteristics for selection purposes and why rejected candidates should bear the costs of it. The latter concern is especially problematic for the interpersonal justification test. Imagine a preferred candidate saying to a rejected one that the policy was justified because he was harmed and that he was owed compensation. The rejected candidate may then rightfully ask: who harmed you, and in what way were you harmed, and how much? And why should I bear the cost of this if I had no part in it? The compensatory model does

not offer satisfying answers to these questions. Proponents of the compensation model may object that sharing the costs of 'societal debt' with the community, as Thomson proposes, avoids the practical difficulties of the compensation model. This proposal is not promising, because it still assumes 'joint responsibility' on behalf of society for current harm, which is still too strong to deal with some forms of indirect discrimination. If so, it still does not provide a compelling answer why specific dominant group members should bear the burden of affirmative action if they are not individually responsible, and why a specific individual has a claim to compensation if this cannot be made explicit.

To bypass these problems Anderson suggests that the compensatory model could be defended through a notion of 'rough justice', which means that "general compensation to the group comes closer to the ideal of compensatory justice than a refusal to compensate without individualized proof."[65] While this makes sense on a practical level, defending the compensatory model by saying 'doing something is better than doing nothing' is unsatisfactory, especially if there are other models available. A different model that can avoid the difficulties of the compensation model with assessing the impact of discrimination on an individual basis, is clearly preferable.

Thus, I conclude that the compensation model has little promise for overcoming the controversy, as it suffers from numerous practical problems and fails to offer a clear justification of the appropriateness and effectiveness of preference policy.

3.1.2 Diversity

The second justificatory model of affirmative action is 'diversity'. The argument can be construed as follows: in order to achieve a 'robust exchange of ideas', institutions need a diverse body of employees or students. The meaning of diversity, as used here, is ambiguous. It can be interpreted narrowly, where it refers exclusively to underrepresented, structurally disadvantaged candidates. Alternatively, it can be taken to refer to all types of differences that exist among individuals.[66] The first interpretation seems more appropriate with respect to the goal of affirmative action, namely, to counteract underrepresentation due to discrimination. However, in practice, the latter interpretation is more common, which leads organizations to also select members of groups that do not belong to the 'traditional' target group of affirmative action, such as highly qualified expats, people with mental or physical disabilities or people who have travelled a lot. While these individuals may differ from the exemplary student or employee in salient respects, they have not necessarily suffered from discrimination and thereby do not require preferential treatment to counteract this.

Additionally, the diversity argument is not a moral argument for affirmative action. Diversity is not justified from the perspective of justice but by reference to prudential

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[65] Ibid., 140.
[66] Herring and Henderson, "Diversity," 630.

institutional goals.[67] It is because organizations benefit from having a diverse workforce or student population in particular ways that affirmative action policies are justified. Group characteristics, then, serve as a proxy for possessing ideas that are not underrepresented in an organization. It is these ideas, not the characteristics that are used for selection, that are valuable for its prudential mission. The occurrence of past or present discrimination thus does not play a justificatory role in diversity-based affirmative action.

According to Anderson, the diversity model has several problems. I discuss three of these problems here. First, it "cannot account for the special weight institutions give to [group membership] compared to other dimensions of diversity"[68]. As mentioned, the diversity model contains no criteria for preferring candidates from structurally disadvantaged groups over others with no such background, apart from differences among them in terms of ideas and knowledge. Because group membership by itself does not imply having different ideas, there is no independent reason to prefer a structurally disadvantaged candidate whose background does not improve ideational diversity over a non-disadvantaged candidate that does. Yet, affirmative action policies require a justification that targets those who are currently unjustly disadvantaged due to discrimination, which the diversity model cannot provide. This gives rise to the second problem. Namely, the diversity model does not explain why membership of a structurally disadvantaged group should be used as a basis for affirmative action policy instead of targeting directly for differences in knowledge, lived experience and ideology. Finally, it opens the possibility for justifying opposite uses of racial preferences, if institutional goals conflict with having a diverse workforce.[69] As said, a well-off dominant group candidate that has travelled a lot may be preferred over another, structurally disadvantaged candidate that has not. For these reasons, the diversity model fails to explain why using group characteristics for selection procedures is an effective means to attain its goals. Moreover, as it is not concerned with discrimination but with ideational diversity, affirmative action conceived in this way is unlikely to be an effective tool for counteracting discrimination.

The virtues of the diversity model lie with its practical feasibility and that it avoids some of the affirmative action controversy. With respect to the former, it is definitely much easier for selection processes to assess a candidate's degree ideational diversity than it is to establish whether a candidate suffers from discrimination. With respect to the latter, note that I say that it can 'avoid' the controversy, not overcome it. Because ideational diversity can be considered as a specific criterion of merit, it is also uncontroversial to incorporate it into selection processes and likely to be accepted by rejected candidates. Therefore, selecting for diversity is unlikely to require any far-reaching adjustment of selection procedures. But note that with respect to the interpersonal justification test, the diversity model still fails. A rejected candidate may object that using group membership

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[67] Anderson, *Imperative*, 141.
[68] Ibid., 142.
[69] Ibid., 143-144.

as a criterion in selection processes offers no guarantee that the favored candidate has more diverse ideas than they may have. When selection is based on race, sex and ethnicity instead of ideational diversity directly, the diversity model offers no plausible justification to the rejected candidate without specifying why and how being part of a historically excluded group contributes to institutional goals.

In conclusion, while it is a very common line of defense, the diversity model fails to provide grounds for effective and fair adjustments to selection procedures. Its practical feasibility provides minor benefits that fail to weigh up to stronger objections against it.

3.1.3   Discrimination-Blocking / Equality of Opportunity

The third argument in favor of affirmative action policies is the 'discrimination-blocking' argument. Shortly put, it considers affirmative action as a necessary means to block all forms of discrimination in selection procedures. This is because without it, structurally disadvantaged group members would not have equal access to certain opportunities compared to dominant group members. It acknowledges the stubborn persistence of discrimination, especially in subtle, indirect forms and that the world is still "saturated with stigmatizing stereotypes of disadvantaged groups and structured by entrenched habits that favor advantaged groups."[70] Therefore, all institutions that still discriminate, albeit without having the intention to discriminate, should actively counteract this through affirmative action efforts. Discrimination, here, thus encompasses both direct and indirect forms. It applies to all failures by institutions to reach, consider and select a sufficient sample of structurally disadvantaged candidates to arrive at a student or employee population that is representative of the available pool of candidates. While strict proportionality of the candidate pool is probably too demanding and not required by the discrimination-blocking model,[71] clearly observable underrepresentation of structurally disadvantaged candidates should be countered as it signals the presence of either personal or impersonal discriminatory mechanisms. Group membership, in this model, thus serves as a proxy for being exposed to ongoing, present discrimination. Note that while it seems similar to the compensation model on the surface, the discrimination-blocking model does not require clear wrong-doers. For affirmative action to be justified, it must be the case that group members experience some form of discrimination in selection processes due to their group membership. It does not require any responsibility on behalf of others to discriminate.

Anderson says that the discrimination-blocking model only justifies 'tie-breaking' preferences.[72] This means that in cases where two candidates are equally qualified, a position should go to the one that is likely to have suffered from discrimination. However, it is unclear how she arrives at this conclusion. It may be because her interpretation of the

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[70] Ibid., 144.

[71] Many arguments can be raised against strict proportionality, but the main point is that it does not incorporate individual differences in effort and ability.

[72] Anderson, *Imperative*, 144.

discrimination-blocking model is too narrow. Her conclusion that blocking the influence of discrimination on selection decisions only requires tipping the balance towards the 'disadvantaged' candidate at the end of selection processes seems to rely on an assumption that the process leading up this decision is completely fair. This assumption seems unwarranted. Unconscious biases can influence the perception that recruiters have of a candidate's degree of qualifications, which can lead to rejection before the final decision is made.[73] Moreover, various authors have demonstrated the variety of ways that socio-economic background factors can influence one's degree of access to opportunities before candidates even enter into selection processes.[74] For example, the ability of rich, dominant group parents to pay for extra tutor sessions for their children, or preparatory courses for central exams, gives their offspring an edge in university selection procedures that poor parents cannot provide for their kids. Thus, the discrimination-blocking model should extend its scope to all the ways that group membership influences one's chances at accessing desirable positions.

A different, more convincing interpretation of the argument that can account for all the ways group membership influences chances at desirable positions is given by Warren. Warren's interpretation of the argument is structurally very similar but employs a wider conception of discrimination. As mentioned before, she emphasizes the negative influence that secondary sexism can have on the opportunities that women have. I will assume here that it can be generalized to other types of structural disadvantage, but this is a plausible assumption as will become clear in a moment.[75] The argument can be formulated as follows: "[some systems of preferential selection] would ... raise women's chances, and lower men's, to a closer approximation of what [equality of opportunity] would look like in an ongoing just society, in which the "straight merit" principle prevailed."[76]

The reason she arrives at this conclusion is that while many societies may have formal equality of opportunity and exhibit efforts to ban all instances of demonstrable discriminatory practices, there is no *substantive* equality of opportunity. This is partly due to subtle, often impersonal discriminatory mechanisms that do not involve discriminatory intentions. The subtle ways in which women are still disadvantaged in selection processes, for instance through their possibility of pregnancy, demonstrate this. Preferential selection, if it would improve the situation of women and worsen that of men to the point that neither is actually advantaged or disadvantaged in the selection process, is necessary

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[73] See footnote 41.

[74] Pager & Sheperd (2008) provide a comprehensive overview of the various ways in which group membership can negatively affect individual chances in employment, housing, attaining credit and more.

[75] Warren does not explicitly discuss the question of whether her argument can be generalized. However, she mentions that racism and sexism "comprise a somewhat separate set of phenomena" (p. 245). I will assume that they both fall under the header 'structural disadvantage', thus that her argument can be generalized from sexism to more classes of disadvantage, such as racism.

[76] Warren, "Sexism," 259.

to counteract all the subtle ways that discrimination still takes place. Anderson's claim, that impersonal processes of segregation and stigmatization can largely explain the disadvantaged situation of black people in the United States, can be generalized to all minorities. It is plausible to claim that just because some groups have fewer opportunities due to involuntary group membership, affirmative action is justified as a means to shift the currently unequal distribution of opportunities towards a more equal one. Affirmative action would help to make selection processes fairer by raising the opportunities of women and minorities and lowering those of the dominant group, without tipping the balance in the opposite direction. I will call Warren's version of the discrimination-blocking model the 'equality of opportunity' model, as it is concerned with blocking discrimination for a specific reason, namely because it negatively impacts the way opportunities are distributed in societies.

While by definition, substantive equality of opportunity is more demanding than formal equality of opportunity, at this point it is not clear what substantive equality of opportunity means and when it would obtain. To propose the most compelling version of the equality of opportunity model, it is important to define substantive equality of opportunity and show how it differs from formal equality of opportunity. Shlomi Segall (2013) defines it negatively, by spelling out what formal equality of opportunity does not do. Formal equality of opportunity cannot tackle "entrenched socio-economic inequalities [that] spell, in effect, unequal access to … positions. To pursue a genuinely equal starting point in the race for careers, the playing field […] must be levelled. [Formal equality does] not suffice to guarantee real, substantive [equality of opportunity]."[77] Thus, according to Segall, substantive equality of opportunity requires 'levelling the playing field' by ensuring that socio-economic inequalities do not influence the competition for desirable positions. However, this definition is not sufficiently precise to determine when substantive equality of opportunity obtains. For this, we have to understand what is understood by 'opportunity' as an *equalisandum*. Kasper Lippert-Rasmussen (2020) fills this gap. For Lippert-Rasmussen, substantive equality of opportunity between two individuals is obtained when "[they] have the same native talent and the same ambition, [they] enjoy equal chances of getting [a certain position]."[78] Opportunity, understood through substantive equality of opportunity, thus refers to equal chances at obtaining a position, given equal talent and effort expended at getting it.

The equality of opportunity model, understood as justifying affirmative action as a means to improve substantial equality of opportunity, is a more compelling version of the discrimination-blocking model. It includes all instances of discrimination and argues that because some of its forms are impersonal and hard to demonstrate, affirmative action is necessary to counteract all of the ways it influences the distribution of opportunities in

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[77] Segall, *Equality*, 3.
[78] Kasper Lippert-Rasmussen, *Making Sense of Affirmative Action* (Oxford, UK: Oxford Scholarship Online, 2020), 78.

society. If one accepts substantial equality of opportunity as an ideal that societies should strive for, affirmative action is a necessary, directly effective tool to achieve this because otherwise, selection processes fail to give equal chances to all candidates. Other methods, such as cash transfers, do not have such an effect. Group membership provides a proxy for having less opportunities due to discrimination.

Now that the most convincing version of the discrimination-blocking model has been presented, it is time to assess its ability to prescribe effective and fair adjustments to selection procedures. First, as it aims to eradicate all forms of discrimination, it completely captures the problem affirmative action is concerned with. It also provides a clear justification why affirmative action is necessary, as it claims that without it, selection processes would not give equal chances to all candidates.

Providing a verdict on its practical feasibility, however, is more difficult. This is because it hinges to a large extent on the ability of administrators to measure and identify where and for whom group membership leads to inequality of opportunity and how affirmative action counteracts it in a fair, effective way. In order to do this, the equality of opportunity model should be further specified and supplemented, which will be done in the next chapter. For now, a few preliminary remarks should suffice to demonstrate that the equality of opportunity shows potential with respect to practical feasibility and the interpersonal justification test.

A practical advantage of the equality of opportunity model over the compensatory model is that it does not require scrutinizing target group members' causal history to assess to what extent they are responsible for their own plight. It does not require establishing personal responsibility for outcomes to determine if preferential treatment is appropriate, who should compensate whom, and what amount is appropriate. It can simply show that on average, members of a specific group have less opportunities than those of another and that their group membership explains this. Indicators such as average income, wealth and education level are widely available and can be used for this purpose.[79] If group-level differences are observed here, they are unlikely to be explained by general differences of group members in terms of talent or ambition. The influence of discrimination is a more plausible explanation for such differences (see section 3.2). Additionally, using a general measure of opportunities allows administrators to estimate how much advantage should be given to structurally disadvantaged group members to increase substantial equality of opportunity, to avoid disproportionate adjustments to selection procedures.

An accurate metric for opportunity levels can also have a positive influence on the acceptability of preferential treatment. Passing the interpersonal justification test requires a plausible explanation for why a targeted candidate was advantaged. The equality

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[79] Amartya Sen's *capability approach* and John Roemer's *equality of opportunity* provide examples of measures that may be suitable for this purpose. However, it is beyond the scope of this thesis to analyze and compare different ways of measuring opportunity. It suffices to say that it is possible and justified to assess opportunity levels at the group level.

of opportunity model holds that this is justified if the preferred candidate had less opportunities than the disfavored one due to group membership. If so, it provides an answer to the question of rejected candidates why a minority candidate was instead selected, namely because of observable substantial inequality of opportunity and the ability of affirmative action to improve it. If substantial inequality of opportunity impacted their chances at getting the position, the rejected candidate was also not treated unequally, assuming that they had heightened chances at getting the position. If so, then affirmative action merely provided all candidates with more equal chances. Thus, hinging on its ability to measure substantial equality of opportunity and target it accurately, the equality of opportunity model seems promising for grounding effective and fair adjustments to selection procedures.

Another advantage is that it needs not invoke any personal judgment on behalf of the behavior or traits of a rejected candidate. In other words, it needs not 'point fingers' at dominant group members. It needs not claim that they have 'caused harm' to the preferred candidate and that they are responsible for that harm, albeit together with all dominant group members. Rather, it justifies preferential treatment by referring to the joint duty of citizens in a liberal democratic to ensure equal opportunities for all. It is on grounds of general, substantial inequality of opportunity of all group members that a candidate is rejected in favor of another, not in virtue of *their* discriminatory actions or attitudes.

A more elaborate discussion of how substantial inequality of opportunity is to be measured and how addressing group-level inequality of opportunity contributes to individual-level equality of opportunity is required to provide a more definite assessment of the ability of the equality of opportunity model to ground effective and fair adjustments to selection procedures. However, at this point we can conclude that the equality of opportunity model has potential for overcoming the controversy because it depersonalizes the grounds for affirmative action. Its potential hinges on whether it can be supplemented with an accurate measure of substantial equality of opportunity and demonstrating how affirmative action is a fair and effective tool to counteract this.

3.1.4   Integration

The fourth argument, which Anderson herself defends, is the integration argument. Integration, on her account, requires "full participation on terms of equality of socially significant groups in all domains of society."[80] The argument can be formulated as follows: since members of groups, which suffer from structural disadvantage due to segregation and stigmatization, have not been able to fully integrate into civil society, affirmative action is justified as it best realizes that goal and is the best means to realize this goal. In this model, the purpose of affirmative action is neither to compensate those who have suffered from discrimination nor to eradicate discrimination. Rather, it is concerned with using

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[80] Anderson, *Imperative*, 113.

affirmative action to provide the basis for a genuine society of equals. This ideal coincides with her defense of a relational ideal of justice, which requires the demand for a just distribution of resources and opportunities to be embedded in the demand of liberal democratic societies to fully respect and incorporate the moral and political equality of citizens.[81] Affirmative action, by putting agents from generally 'less integrated' groups in desirable positions, contributes positively to a society where citizens relate to each other in a way that respects their equal moral worth as persons. As segregation and stigmatization are the factors that undermine this, and affirmative action counteracts this, it is justified.

One interesting feature of the integration model is that it considers membership of structurally disadvantaged groups not as a proxy for some other, directly relevant characteristic. Rather, being a member of a structurally disadvantaged group is directly relevant to its integrative goal. Affirmative action directly empowers segregated and stigmatized group members, which also has indirect, positive effects on the community at large. It puts the recipients of affirmative action in positions where previously they were hardly ever seen. This counteracts stigmatization as it shows that these group members are able to succeed in these positions and desegregates societies through offsetting exclusionary mechanisms such as social networks. By selecting specific individuals who are qualified for a position and thus suitable for carrying out its integrative mission, affirmative action creates conditions for changes in both spatial, occupational and educational segregation and similarly, makes change in attitudes and behavior possible. By putting capable individuals in important positions, they serve as an example for both their own and the dominant group. It treats its beneficiaries not as passive victims of discrimination, but as active citizens who contribute to integrative goals.

Anderson claims that the integration model provides a better account of "the current obstacles to equal opportunity". She says that besides focusing on discrimination, it also focuses on "segregation and the lingering effects of stigmatization". But as I have argued in the previous section, a compelling version discrimination-blocking model should include all forms of discrimination, even the most subtle ones. The impact of segregation and stigmatization are already included in this definition. This leads to the suspicion that while on the surface, the integration model seems different, it actually overlaps to a large extent with the equality of opportunity model that I sketched in the previous section. Besides the above reason, I provide another reason why the integration model can be subsumed under the equality of opportunity model in section 3.2, as very little of its appeal remains once substantial equality of opportunity is obtained. Here, I will only discuss concerns I have with its practical feasibility and ability to pass the interpersonal justification test.

Similar to the equality of opportunity model, the ability of the integration model to provide a compelling answer to the interpersonal justification test hinges on its ability to specify what integration requires. If integration does not refer to equality of opportunity

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[81] Elizabeth Anderson, "What is the Point of Equality?" *Ethics* 109 (1999): 289.

but primarily to how we currently relate to each other, the account should point to specific ways in which a favored candidate is suffering from segregation, stigmatization, or both. With respect to the former, segregation provides an impersonal discriminatory mechanism for which individuals cannot be held responsible. If affirmative action intends to tackle segregation, and the preferred candidate has clearly been impacted by this, it is justified.[82] It provides an impersonal ground that does not involve pointing the finger to any 'faults' by the rejected candidate or the group he belongs to. This, however, cannot be said for stigmatization. By using this as a rationale, the integration model risks alienating those who believe they do not have stigmatizing or prejudiced beliefs or are actively counteracting such beliefs or exclusionary behaviors. It suggests that the grounds for preference were unwarranted if they do not apply to the rejected candidate. Moreover, it is unclear why this specific candidate should bear the burden of the general failure of the dominant group to fully respect and incorporate group members into civil society. The integration model risks feeding the controversy as it focuses on stigmatization as a rationale for affirmative action.

While the integration model *prima facie* offers a different, theoretically plausible rationale for affirmative action that is potentially practically feasible, its goal requires further specification to provide clarity on how it differs from the equality of opportunity model. Moreover, by relying on stigmatization as one of its main grounds for justifying affirmative action in society, it runs an additional risk of alienating rejected candidates who do not stigmatize, at least not consciously. As I will show in the next section, individuals suffering from segregation and/or stigmatization are very likely to suffer from inequality of opportunity as well. Once substantial inequality of opportunity is eradicated, which also indirectly addresses stigmatization and segregation, it appears that the remaining, independent case for the integration model is quite weak.

3.1.5   Other Arguments and Reflection

The taxonomy of Anderson is not complete, but it is representative of the most commonly advanced justifications of affirmative action in the philosophical literature. To substantiate this, I have compared and supplemented it with the taxonomy of Kasper Lippert-Rasmussen (2020). One argument he advances that I have not yet discussed is the 'role model' argument. It goes as follows: given current underrepresentation of women and minorities in certain positions, there is a lack of role models for young people in these groups. Young people would benefit from such role models because their presence has positive motivational effects. Affirmative action is necessary as a means for providing these role models.[83] While plausible, it seems to reduce to either the equality of opportunity or integration argument. It may be reduced to the former, because of negative motivational effects due

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[82] However, it is still unclear why the equality of opportunity model would be less effective at counteracting segregation than the integration one.

[83] Lippert-Rasmussen, *Sense,* 103-105.

to lack of role models, young people from these groups have fewer opportunities, and affirmative action grounded in equality of opportunity would also provide such role models. It may reduce to the latter, because hiring agents in terms of their ability to further the project of integrating women and minorities into civil society offers a more compelling account of the role of role models than the mere 'motivational effects' they cause. Moreover, it is far from clear why group-similar role models are needed, as their necessity may be due to undesirable biases on behalf of young people belonging to these groups.[84] Therefore, it will not be considered further as a separate argument.

There are two more possible lines of argument that can support affirmative action that I introduce here. One is an argument from efficiency. Following from the intuition that talent does not depend on group membership, and are thus equally distributed among the population, institutions would benefit from extending the pool of applicants they consider. Affirmative action can be a means for widening this pool.[85] This argument is similar to the diversity model in one respect, namely that it makes the desirability of preferential selection dependent on institutional goals and the distribution of qualifications across the population. With respect to the latter, it may well be that while talent is equally distributed, the abilities to develop this talent are not, leading to unjust inequalities in qualifications. Thus, the efficiency argument suffers from much of the same weaknesses as the diversity argument and therefore fails to provide a compelling justification of affirmative action.

Another line of argument is that the notion of 'qualifications' is incoherent, that too much emphasis is placed on it and that current selection procedures also fail to fully depend on merit. Thomson argues that recruiters must always interpret qualifications and that selection decisions often depend on qualifications that are not strictly academic or meritorious. For instance, when considering recommendation letters, some professors may be prone to exaggerate, describing many students as 'great', while the use of the term 'good' by others may be a rare occurrence. Also, the character of candidates or their ability to 'fit' into the organization is often judged in hiring procedures, which they may not be responsible for and is hard to assess objectively.[86] This is a fifth-stage criticism, which criticizes meritocratic procedures as such. I will not develop this argument further here due to my goal of addressing the controversy adhering to fourth-stage measures. Nonetheless, the fact that the act of assessing a candidate's qualifications has a large subjective nature does weaken the case for a fully merit-based selection procedure, thereby strengthening the case for fourth-stage policies. The fact that a fully merit-based selection procedure is a fiction that does not hold in current practice, as Chemerinsky emphasizes, further weakens its case. As nepotism and favoritism are still common practice in selection, this implies that current procedures are not completely fair because they currently

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[84] Ibid., 121-122.

[85] Herring and Henderson, "Diversity," 637-638.

[86] Thomson, "Hiring," 366.

also fail to take only merit into account. Sometimes favoritism is even institutionalized, for instance through legacy programs in universities that give preference to students whose parents have previously graduated (and more often than not donate generously).[87]

While the efficiency and qualification arguments can strengthen the case for affirmative action, they fail to offer an independent justification for it. Therefore, they will not be developed further, as my purpose is to find the most compelling, independent justification for affirmative action policies.

To summarize, I have demonstrated in this section that the compensation and diversity models fail to provide compelling grounds for fair and effective adjustments to selection procedures. This is an interesting conclusion by itself, as Anderson emphasizes that the compensation and diversity argument have largely dominated the courts and public debates until now.[88] In the United States, a specific court ruling on university admissions has had the impact that they are now considered as the *only* justifications for preferential policy that are consistent with the constitution, because other defenses would involve unjust reverse discrimination.[89] I have also shown that the equality of opportunity model is more promising in many respects. Hinging on further specification of its goal and the ability to measure and target structural disadvantage effectively, it is also potentially more practically feasible. I have also argued that the integration argument provides more controversial answers interpersonal justification test than the equality of opportunity model. Moreover, as I will argue in the next section, integrative goals seem to have little weight once substantial equality of opportunity is achieved. Therefore, from section 3.3. onwards, the remainder of this thesis will be concerned with working out how the equality of opportunity model provides grounds for effective and fair adjustments to selection processes.

3.2 Choice, Circumstance and the Primacy of Distributive Justice

As became clear in the previous section, the equality of opportunity argument offers a clear justification of affirmative action policies and *prima facie* does not suffer from debilitating practical difficulties and controversial interpersonal judgments. In this section, I argue that the goal of equality of opportunity also explains the appeal of affirmative action policies. There are at least two reasons for this. First, there are numerous empirical studies from which we can deduce that a general concern with equality of opportunity is the main reason why we value affirmative action. Second, we have reason to believe that a concern with equal distributions of opportunities actually operates as a prior reason for valuing affirmative action, and that substantial equality of opportunity provides a benchmark for when a just distribution of opportunities obtains. I will deal with these reasons in the respective order set out above.

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[87] Chemerinsky, "Sense," 1172.
[88] Anderson, *Imperative*, 136.
[89] Anderson, "Scrutiny," 1217.

First, until this point I have largely assumed that we have strong reasons to believe that women and minorities are structurally disadvantaged in many ways, I have not explicitly referred to empirical research to substantiate this claim. This is partly because the nature of this project is normative, not descriptive. It is concerned with analyzing different justifications why we *should* want affirmative action policies, not with identifying and measuring structural disadvantage or determining which affirmative action policies are most effective at attaining its goals. Nonetheless, a discussion of empirics is warranted here, because the plausibility of the equality of opportunity model hinges on two empirical claims. First, it should be determined whether women and minorities actually have fewer opportunities than the dominant group, to what extent and in which contexts. Second, these inequalities should not be attributable to differences in talent or effort, but due to group membership.[90] According to the definition of substantive equality of opportunity, inequalities are justified if they depend exclusively on a mix of talents and ambitions. Therefore, it is important to shortly discuss some of the evidence that generally, inequality of opportunity adhering to women and minorities is *not* due to differences in talent or ambition and is therefore unjust. If this is the case, this justifies affirmative action as a means for reducing unjust inequality of opportunity.

A full discussion of all empirical research conducted to point out the different ways that group membership influences the opportunities of members of these groups would be an impossible endeavor. What follows here, are some examples of relevant ways this influence manifests itself. For women, a well-known example is the 'glass ceiling effect', where gender disadvantages seem stronger at the top of corporate hierarchies and at the end of careers. Warren already introduced some of its potential causes, but Cotter et al. (2002) show that it is a phenomenon that applies specifically to women, not to minorities. Another, similar observed phenomenon is that of the 'glass escalator', where Hultin (2003) shows that men in female-dominated occupations have better internal promotion chances than females. Huffman & Torres (2002) have pointed out that different social networks and job search methods decreases the likelihood of females accessing male-dominated jobs. With respect to minorities, Bertrand & Mullainathan (2004) have demonstrated that resumes with African-American sounding names receive 50 percent less responses than white-sounding names. Collins et al. (2018) show that there is a persistent and significant 'racial wealth gap' in the United States that continues to grow: the median wealth of black and latino families is 2-4% of that of white families. Finally, black Americans have a greater chance of developing chronic health problems, which Hayward et al. (2000) show is attributable to average socioeconomic conditions of blacks, not different behavior that leads to additional health risks.

What these studies have in common is that they show that the observed inequalities cannot be explained by reference to the distribution of talents or ambitions. The fact that these studies are so numerous also indicates that alternative explanations of these

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[90] Lippert-Rasmussen, *Sense*, 73.

inequalities are likely to be implausible. As Lippert-Rasmussen points out, "a special account of why the relevant inequalities of outcome have arisen innocently" is missing. Therefore, "we have good reason to believe that discrimination accounts for a good part of the difference."[91] Therefore, it is likely that current, substantial inequality of opportunity has arisen at least partially due to discriminatory mechanisms that track group membership. Moreover, all of these studies except for that of Collins et al., are directly concerned with the impact of group membership on the opportunities that group members have. Even the magnitude of the racial wealth gap signals that blacks are likely to enjoy less opportunities due to factors beyond their control. Thus, empirical evidence substantiates the claim that women and minorities suffer from substantial inequalities of opportunities in that affirmative action may help remediate these inequalities if they can be measured and targeted accurately.

Second, the argument made by Leif Wenar (2006) serves as an intuition pump for the primacy of a concern for a just *distribution* of opportunities in the affirmative action debate. While the aforementioned empirical studies demonstrated the variety of ways that group membership impacts members' opportunity level, this argument demonstrates our latent concern with unjust socio-economic inequalities when arguing for affirmative action policies. His argument consists of two parts. First, he argues against the compensation model of affirmative action on practical grounds, similar to the ones that I mentioned in the previous section. However, the contribution that is relevant for my purposes is his introduction of a limited principle of reparations. Roughly, he claims that the compensation model is based on a limited principle, namely that those who harm have a duty to repair that harm. Because this principle is more widely accepted than the duty of better-off citizens to care those who are worse-off, it is often used to justify affirmative action policies, even if other models provide a more adequate justification. However, he claims that by adopting this strategy, proponents of affirmative action get stuck in a web of practical difficulties that the model cannot resolve (which is similar to my conclusion).[92]

Second, he argues that it is likely that the intuitive plausibility of the principle for the case of affirmative action actually comes from an underlying concern we have with distributive justice. He demonstrates this with the following thought experiment.

> "Take some distributive principle […]. Imagine this favored distributive principle to be instantiated in the world as it is now. Now imagine that [compensation] beyond the limited principle would require us to dislodge this distribution of perfect justice, so that the world would become distributively less just. I doubt that many of my fellow theorists would be willing to make that transition."[93]

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[91] Ibid., 88.
[92] Leif Wenar, "Reparations for the Future," *Journal of Social Philosophy* 37, no. 3 (2006): 399-401.
[93] Ibid., 402.

The point that Wenar makes can be made more concrete by considering the example that he supplements it with. Imagine that in the United States, blacks and whites possessed equal wealth, power and prospects. If this were the case, would one then still insist on compensation for past injustices of slavery? Or, in other words, would one require white citizens to be made worse-off to improve the situation of blacks? Apart from its symbolic value, such a policy contradicts intuitions about justice and thus is unlikely to enjoy a wide range of support. Beyond the limited principle, the justice of compensation for past injustice thus seems disputable. This concern seems to apply to the integration model as well. Would there still be a strong case for affirmative action as a means to counteract stigmatization or segregation? If opportunities are equal, it seems that stigmatization, while it may still occur, does not impact the prospects of group members. The case for affirmative action, in this case, seems to be much weaker. Rather, it is the distribution of wealth, power and prospects that we primarily care about when talking about affirmative action. This is because we implicitly associate structural disadvantage of certain group members with these inequalities.

Then, what is the best explanation for the current appeal of affirmative action policies? Numerous empirical studies point out that it is plausible to conclude that currently, socio-economic background factors disturb a just distribution of resources and opportunities. Differences in ambitions and talent do not provide a plausible explanation of the observed inequalities in terms of wealth, income, education and health between demographic groups. Moreover, it seems that we, as proponents of affirmative action, are especially concerned with inequalities in the distribution of resources, power and opportunities. Thus, it seems that the appeal of affirmative action, apart from compensation claims following the limited principle, derives primarily from current group-level inequalities in resources and opportunities and the ability of affirmative action policies to redistribute them in a more just manner. By regulating the distribution of desirable positions, affirmative action has the potential of reducing substantial inequality of opportunity, understood a distribution of opportunities that is influenced by circumstance. Primarily, then, affirmative action should be seen as a tool to achieve distributive justice.

3.3 The Potential of Luck Egalitarianism

In the previous sections, I have shown that the equality of opportunity model, as I conceive of it, provides a justification of affirmative action policies that best captures its problem and why affirmative action is the best means to address it, avoids practical problems and has potential for overcoming the controversy by depersonalizing its approach. To provide a more conclusive assessment of its performance on the latter two aspects, it should be shown how inequality of opportunity can be accurately measured, targeted and counteracted by adjusting selection procedures. Additionally, it seems that reduced degrees of resources and opportunities often coincide with group membership, which empirical research corroborates, and affirmative action could counteract. Thus, just distributions of resources and opportunities seems to be a primary concern when considering adjustments to selection procedures.

Taking these conclusions together, it is surprising that the philosophical literature has of yet not offered any comprehensive account of the potential benefits of understanding affirmative action as a tool for redistribution. Understood in this way, applying theories of distributive justice to affirmative action appears to be a potentially promising line of research. In this section, I will argue why luck egalitarianism – a family of theories of distributive justice – can serve a double function for substantiating how the equality of opportunity model can ground adjustments to selection procedures that are both effective and fair. First, it can specify the goal of substantial equality of opportunity to see when it obtains and how affirmative action can contribute to it. It does this by clarifying he notion of 'circumstance' by understanding it as the unjust impact of 'luck' on distributions. By doing this, it provides a necessary condition for substantial equality of opportunity to obtain and prescribes how opportunities should be redistributed to improve substantial equality of opportunity.

This section serves as a primer for the potential of luck egalitarianism. The next chapter is dedicated to a full discussion of its application to the affirmative action debate. For the purpose of demonstrating its potential, a discussion of the general project of luck egalitarianism suffices. Simply put, luck egalitarianism provides an account of when a just distribution of resources or opportunities obtains. When it does not obtain, it provides a principle for redistribution so that, if followed, it will obtain. A just distribution of resources and opportunities, as understood by luck egalitarianism, does not condemn all inequalities. Rather, it incorporates personal responsibility into its distributive principle in a specific way by claiming that inequalities that arise due to individual choice are just. Because people bear responsibility for outcomes that arise due to their deliberate choices, society does not have a duty to correct these inequalities. For example, if I am broke because I completely voluntarily decided to wager all my savings at the roulette table, I am responsible for this outcome and thus society has no duty to compensate me for this loss. However, it does have such a duty for inequalities that arise due to circumstances I could not prevent nor foresee. If I am broke because the bank where I deposited my savings unforeseeably defaulted due to its risky investment choices and I did not withdraw my savings before it, I am not responsible for this outcome. Therefore, the fact that I have less resources than others is unjust. Because of this, redistribution from others to me is justified, for instance through social welfare payments. The excusing condition of choice that luck egalitarianism advances also applies to good outcomes that arise due to choice, for instance, if my wager at the roulette table turned out well. Analogously, individuals are not responsible for good outcomes that arise due to luck, such as the inheritance of wealth at birth. The implication of this, is that redistributions for the adverse effects of bad luck may only come for the part of others' good luck.

Thus, according to luck egalitarianism, a just egalitarian distribution of resources or opportunities should not be influenced by unchosen circumstance, but only by individual choice. When it is influenced by circumstance, redistribution is justified from those having good luck to those having bad luck. In applying this general characterization of luck egalitarianism to the affirmative action debate, three conclusions can be drawn. First,

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luck egalitarianism can be understood as putting forth a specific conception of equality of opportunity. Namely, equality of opportunity obtains if the opportunities someone has is not influenced by unchosen luck. Advantages and disadvantages due to involuntary group membership fit this characterization, as their influence arises, by definition, due to circumstances beyond individual choice. Thus, luck egalitarianism, understood as defending a specific conception of equality of opportunity, provides a specific version of the equality of opportunity model and can specify when the distribution of opportunities is not influenced by circumstance. Second, as a distributive theory, it can make precise in what way the distribution of opportunities should be modified in order to achieve equality of opportunity. Its principles, when applied in practice, can provide a means for determining *when* and *where* affirmative action is required, namely, when the distribution of opportunities is demonstrably influenced by circumstance. Thus, it provides benefits in terms of justifying when and where affirmative action is required. Third, it is a general theory of distributive justice, which is not restricted to the unjust influence of group characteristics as providing a reason for redistributing opportunities. It considers the influence of discrimination as a specific instance of a general notion of undeserved inequality. Nor is it restricted to the distribution of desirable positions, but concerned with the distribution of resources and opportunities in general. Thus, through luck egalitarianism, the affirmative action debate can be embedded within a larger project of achieving a just distribution of resources and opportunities among a population. This has favorable implications for overcoming the controversy, which I will discuss in the next chapter.

Thus, *prima facie*, luck egalitarianism seems to be a promising way to specify and supplement the equality of opportunity model. This is because it makes specific what a substantially equal distribution of opportunities requires and how it can be obtained through affirmative action. I will also argue that it helps to demonstrate why addressing inequality of opportunity at the group level leads to improvements in equality of opportunity at the individual level. A luck egalitarian justification of affirmative action can provide the equality of opportunity model with the conceptual tools to provide a reply to its critics.

3.4 Chapter Conclusion

To generate a wider range of support, a justification of affirmative action policies is needed that is able to provide a reply to its critics. To do this, the grounds that a good justification advances should be able to take away concerns voiced with the effectiveness and fairness of adjustments to selection procedures. In order to assess which justification best meets these requirements, four of the most common types of arguments advanced in favor of affirmative action policies were evaluated based on their ability to provide a basis for such adjustments. The equality of opportunity model seems to be the most promising argument in this respect. However, its promise hinges on its ability measure, identify and counteract substantial inequality of opportunity. By understanding affirmative action as a redistributive policy, luck egalitarianism provides promising conceptual tools for

overcoming the controversy. The application of luck egalitarianism to affirmative action will be worked out in detail in the next chapter.

4. The Luck Egalitarian Case for Affirmative Action

In the previous chapter, I have shown that the equality of opportunity model offers the most compelling defense of affirmative action policies, for three reasons. First, it avoids the debilitating practical challenges that the compensation model suffers from. Second, it does not require interpersonal justifications that point out potential flaws or faults of rejected candidates, which may conflict with their beliefs or may not apply to them, causing controversy. Third, it fits widespread intuitions about what is problematic about current practice and why affirmative action is necessary to counteract these problems. Most importantly, I have shown that we have reason to believe that current inequalities in distributions of resources and opportunities for welfare can largely explain the current appeal of affirmative action.

In this section, I will show that luck egalitarianism can specify and supplement the equality of opportunity model in several ways, which provides benefits in terms of overcoming the controversy§. First, by introducing the concept of 'group brute luck', it can help to specify the goal of substantial equality of opportunity. It provides the conceptual tools for distinguishing between choice and circumstance in a standardized, practically feasible way. By doing this, it becomes possible to identify for whom, when and where substantial equality of opportunity does not obtain, which implies that affirmative action is justified. Second, it specifies how redistribution should proceed, namely by redistributing from those who are better-off in terms of opportunities due to circumstance, to those who are worse-off in this respect. The luck egalitarian specification also has an additional potential for curbing the affirmative action controversy in two ways. First, it provides an uncontroversial ground for interpersonal justification in selection decisions, as it relies on a general notion of unchosen circumstance instead of individual characteristics. Second, the main luck egalitarian claim, namely that the undeserving lucky have a duty to take care of the undeserving unlucky is familiar, already serves as an uncontroversial principle underlying many social welfare policies. It allows us to understand affirmative action policies as a subclass of conditional social welfare policies that rely on this principle, which has the potential of generating a larger degree of consensus among the public.

4.1 What Is Luck Egalitarianism?

4.1.1 Definition and Intellectual History

Luck egalitarianism is a family of theories of distributive justice that share core concepts and views on what egalitarian justice consists in and when distributions are just. The term was coined by Elizabeth Anderson, and she takes luck egalitarians to either explicitly or implicitly put forward a view on 'what the point of equality is' through their theories. According to Anderson, luck egalitarians take the most important injustice to be "the natural

inequality in the distribution of luck."[94] In a nutshell, its core claim is that it is unfair that some people through sheer good or bad luck, end up better or worse off than others in terms of resources or opportunities for welfare.[95] This type of inequality is what egalitarian justice should be principally concerned with, according to luck egalitarians. How should it be dealt with? Luck egalitarian justice requires that "people should be compensated for undeserved misfortunes and that the compensation should come only from that part of others' good fortune that is undeserved."[96] In other words, opportunities or resources should be redistributed in a way that corrects for the unfair effects that luck can have on individual lives. How luck egalitarians conceive of luck will become clear in section 4.1.2.

In the following, I outline a specific account of the intellectual history of luck egalitarianism. To do this, I make use of the way that Samuel Scheffler (2003) describes it which, according to him, represents the dominant view. According to this view, its theoretical foundations were laid down by John Rawls' famous 1971 work *A Theory of Justice*, which reinvigorated and reinstated political philosophy as a legitimate academic discipline. One of the main intuitions that his argument builds on, is that the distinction between choice and circumstance is of fundamental importance for distributive justice.[97] The fact that someone is worse off than someone else due to a deliberate choice that they made, is not problematic because they can (reasonably) be held responsible for this outcome. However, when that difference in outcome arises due to circumstances for which one cannot be held responsible, such as one's natural attributes, social contingencies or being in the wrong place at the wrong time, it becomes problematic. Rawls argues that natural and social endowments are morally irrelevant and cannot justify differences in people's well-being or, in his case, access to basic goods and that they provide grounds for compensation. The difference principle he proposes states that an unequal distribution of social or economic goods is only justified if it benefits the worst-off in society.

One critique that Rawls has received after the publication of *Theory*, is that his own difference principle violates the choice-circumstance distinction that he himself provided the intellectual basis for.[98] Scheffler's paper calls into question the view that the distinction was one of the main insights of Rawls' work and whether it is something his theory intended to respect. Nonetheless, the distinction became widespread and important after Ronald Dworkin proposed a theory that fully incorporated and respected it. According to

[94] Anderson, "Equality," 289.

[95] Kasper Lippert-Rasmussen, *Luck Egalitarianism* (London, UK: Bloomsbury Academic, 2016), 1-2.

[96] Anderson, "Equality," 290.

[97] Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford, UK: Oxford University Press, 1990), 70.

[98] Ibid., 74.

Dworkin, distributions should be 'ambition-sensitive' and 'endowment-insensitive'.[99] What he means by this is that "people's fates should, as far as possible, depend upon their choices, including their ambitions and life plans, but should not depend on their endowments."[100] All philosophers that agree with the general idea underlying this claim and contribute to the project of constructing a theory that respects it can be dubbed 'luck egalitarians'.

4.1.2   Main Concepts and Disagreements

Now that the main claim and its historical background is clear, I introduce some of the relevant, conceptual distinctions that luck egalitarianism invokes. Richard Arneson (2011), who champions his own distinct version of luck egalitarianism, states that fundamentally, all luck egalitarian theories consist of an 'egalitarian' and 'luckist' component. This becomes clear from the broad formulation of luck egalitarianism he gives: "some form of egalitarianism modified by responsiveness to [choice or] desert."[101] The first part, which is the egalitarian component of luck egalitarianism, refers to the observation from which all of these theories depart, which is that it is to some degree unjust that some are worse-off than others and that some compensation from those who are better-off may be in order. The second part, the luckist component, then claims that the degree to which this situation is actually unjust is reduced when (i) differences in outcome between better- and worse-off individuals came to be through voluntary choice, or (ii) their conduct qualifies them as deserving the outcome. The choice-formulation of the luckist component is generally taken to be the 'standard' formulation of luck egalitarianism, as it follows Dworkin's theory more closely. The desert-formulation is more elusive. Deservingness can depend on possessing certain desirable character traits or adhering to a certain standard of behavior.

Dworkin, who most take to be the first "real" luck egalitarian (even though he rejects this term) is also responsible for one of the most important conceptual distinctions that according to him, distributive justice should respect. Namely, egalitarians need not consider all instances of luck to be unjust. There is a difference between one type of luck, for which one can be held responsible, which he calls 'option luck', and one for which one cannot be held responsible, called 'brute luck'. The way he defines it is as follows. Option luck is "how deliberate and calculated gambles turn out", and brute luck is "how risks fall out that are not ... deliberate gambles."[102] What does he mean by deliberate gamble? It is

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[99] I do not adopt Dworkin's distinction between ambitions and endowments in this thesis, but rather the more general distinction between choice and circumstance, which I will not specify further. It suffices to say that the involuntary influence of group membership is not a matter of choice.

[100] Ronald Pierik, "Reparations for Luck Egalitarians," *Journal of Social Philosophy* 37, no. 3 (2006): 424.

[101] Richard Arneson, "Luck Egalitarianism – A Primer," in *Responsibility and Distributive Justice*, ed. Carl Knight and Zofia Stemplowska (Oxford, UK: Oxford University Press, 2011), 34.

[102] Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000), 73.

an "isolated risk [someone] should have anticipated and might have declined, [but decided to accept]."[103] So both option luck and brute luck involve uncertainty. The difference between them lies in the fact that for the former, outcomes could have reasonable been foreseen and predicted by the agent, while not possible for the latter. Most egalitarians agree that justice requires that brute luck should be neutralized, while option luck need not. Disagreement exists on the exact specification of brute luck, and what should be done with option luck.[104]

The distinction between option luck and brute luck does not always overlap precisely with voluntary and non-voluntary choice respectively. For instance, Arneson introduces the example of a 'misinformed choice'. This is a voluntary choice, but because one is misinformed it is not a deliberate gamble as one could not reasonably foresee its consequences. However, one can be held responsible for being well-informed, which can be considered a voluntary choice. Thus, it is sometimes not entirely clear on which side of the option-brute luck distinction a certain situation falls. As Arneson points out, choices can be voluntary to a certain extent, or voluntary in different ways. There is a lot of ambiguity adhering to the concept of 'voluntary', which leads to boundary cases such as above. Similar problems arise when determining whether or not one could 'foresee' ending up in good or bad outcomes. It is murky conceptual territory, which is even more difficult to do in practice. Luck egalitarianism is often criticized for this, that determining whether an outcome arose due to brute or option luck requires a lot of information that administrators do not have. And if they would be able to, they cannot collect it without violating individuals' privacy and 'branding them as inferior'. This can be called the 'information problem' of luck egalitarianism'.[105]

Staying on the topic of luck, there are also different ways to conceptualize luck. One is 'responsibility luck', which understands luck roughly as 'something that has happened for which an agent is not responsible'.[106] This can be understood in two different ways. One way is 'control luck', which means that an agent is not responsible for something that has happened if they could not control or change this outcome. Another way is 'choice luck', which means that something is luck "if it is not the result of a choice that the agent made."[107] Control and choice luck overlap to a certain extent but are conceptually distinct. Luck can also be understood as tracking desert, so that 'desert luck' is something, for instance a certain outcome, that an agent does not deserve. I will not explore further the desert notion of luck here due to reasons of simplicity.

The implications of luck egalitarian theories hinge on how they conceive of luck, and what they consider to be the relation between luck and justice. One could consider

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[103] Ibid., 73.

[104] See Lippert-Rasmussen (2016): 67-69.

[105] Anderson, "Equality", 306, and Jonathan Wolff, "Fairness, Respect, and the Egalitarian Ethos," *Philosophy & Public Affairs* 27, no. 2 (1998): 114.

[106] My own terminology, based on Lippert-Rasmussen (2016): 57.

[107] Lippert-Rasmussen, *Luck Egalitarianism,* 57.

this a relatively minor disagreement among luck egalitarians, as they generally agree that there are different types of luck that justice may or may not require to be neutralized. However, there are also different, more fundamental issues that luck egalitarians, and egalitarians in general, disagree over. I will discuss two of these disagreements here. First, they disagree on what can be called the 'currency of egalitarian justice'. Lippert-Rasmussen phrases this question in the following way: "what are the kinds of good or goods it is bad, if some are worse off [in] than others are through their bad luck?"[108] Generally speaking, luck egalitarians give three different answers to this question: resources, (opportunities for) welfare and capabilities. Dworkin represents the first position, Richard Arneson the second, and Amartya Sen the third. I will not go into detail here on the advantages and disadvantages of each position and the objections that each of them raises against the others. However, it may be relevant to note that Lippert-Rasmussen remarks that the question of the currency of egalitarian justice may be a question that all theorists concerned with distributive justice need to answer. In this case, the fact that luck egalitarians find it difficult to formulate a plausible answer to this question may not be a weakness of luck egalitarianism as a theory.[109] For my purposes, opportunities certainly are a plausible currency for distributions, albeit that it is not the only aspect egalitarians should care about.

Finally, some authors, such as Elizabeth Anderson and Samuel Scheffler, argue that luck egalitarianism has lost track of the original point of egalitarianism, which comes from a concern with grounding justice in moral and political equality rather than finding the best principle to assess whether or not goods were distributed justly. They argue, roughly, that distributive justice is important, but it is only a secondary concern for egalitarianism. Its primary concern should be with treating people as individuals with equal worth that deserve equal respect. Luck egalitarianism fails in this respect. For example, by distinguishing between those who are responsible or irresponsible, the irresponsible are (under some versions of the theory) abandoned, and those who are responsible can only claim benefits on grounds of being inferior to others.[110] A handicapped person is only entitled to benefits because she suffers from brute luck and therefore cannot help being in that state. She is helpless, and therefore needs help. The grounds for granting that help are not that she is equal and deserves a decent life, just as everyone else, but that she cannot help being unable to be self-sufficient like other, more capable people. According to Anderson, considering citizens as inferior and helpless is not compatible with the requirement of 'expressing equal respect and concern' for each of its citizens.[111] Therefore, luck egalitarianism fails as an egalitarian theory.

4.2 A Luck Egalitarian Justification of Affirmative Action

4.2.1   *Luck Egalitarian Substantive Equality of Opportunity*

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[108] Ibid., 77.
[109] Ibid., 77.
[110] Anderson, "Equality," 296
[111] Ibid., 306.

Now that we have a sufficient understanding of the main claims, common concepts and current debates of luck egalitarianism, it is time to put it to work by demonstrating it can be used to specify substantial equality of opportunity. The equality of opportunity model of affirmative action, in its general form, does not specify for whom, when and where discrimination negatively impacts the distribution of opportunities. Remember the example of the Irish that I gave in the first section: a good justification for affirmative action provides specific criteria for distinguishing among groups in terms of the disadvantage they suffer now due to their group membership. It also does not involve an explanation how affirmative action improves overall equality of opportunity by targeting group characterstics. In its general form, the equality of opportunity model simply claims that this kind of disadvantage does adhere to some groups, that this disadvantage takes many forms, and poses that affirmative action is an effective tool if it counteracts it without explaining why this is the case.

Luck egalitarianism provides the conceptual tools for specifying for whom, when, where and how affirmative action would promote substantial equality of opportunity. It does this by clarifying the notion of 'circumstance', by substituting it for the undeserved influence of luck on distributions. As mentioned, substantial equality of opportunity requires that only internal factors of effort and talent can justify differences in individuals' chances at access to certain opportunities. External circumstances may not influence these chances. By clarifying the meaning of 'external circumstance' and its current distributive implications, luck egalitarianism provides substance to the question of identification, measurement and effectiveness of affirmative action.

As the previous section demonstrated, there is no single, generally endorsed version of luck egalitarianism. However, luck egalitarian theories do overlap in some fundamental respects. The claims I defend will therefore only depend on features that enjoy a large degree of consensus among luck egalitarians. These features are the following. First, as Arneson pointed out, all luck egalitarian theories have an egalitarian and a luckist component. Regardless of how luck egalitarians conceive of luck, they agree that the occurrence of particular types of luck influences the degree to which distributions of outcomes are unjust. Disagreement, then, lies mainly with the specification of the luckist component. Second, many agree that brute luck should always be corrected as it is the type of luck whose influence we do not control nor choose. Third, they agree that justice requires correcting unjust distributions of outcomes by redistributing from those undeservingly better-off through luck to those worse-off because of it. Fourth, it is clear that luck egalitarians, regardless of their preferred currency of justice, should be concerned with the distribution of desirable positions. Because of the large impact of employment, education, and especially good-quality positions on individual welfare, desirable positions certainly fall within the scope of the luck egalitarian project. For my purposes, I will simply assume that desirable positions count as an instance of 'opportunity for welfare', without defending this further.

Thus, a relatively uncontroversial luck egalitarian specification of substantial equality of opportunity for practical purposes requires the eradication of the influence of

brute luck on the distribution of desirable positions by redistributing from those having good brute luck to those having bad brute luck. The consensus among luck egalitarians concerning the injustice of the differential effects of brute luck provides a normative baseline for the distribution of opportunities. As luck egalitarians agree on the normative import of brute luck, such distributions can be considered just when they are not influenced by brute luck. When applying this to the affirmative action debate, a just distribution of opportunities would *at least* require the eradication of the unchosen influence of group membership. Because this is not the case, as empirical research shows, affirmative action policies are justified if they counteract this influence.

The luck egalitarian argument for affirmative action can thus be formulated as follows:

(1)   A just distribution of desirable positions is one that is not influenced by brute luck.
(2)   The unchosen influence of group membership is an instance of brute luck.
(3)   Current distributions of opportunities are influenced by unchosen group membership.
(4)   If (1) does not obtain, opportunities should be redistributed from individuals who are better-off due to group membership to those who are worse-off due to group membership.
(5)   Affirmative action is justified when it eradicates the unchosen influence of group membership on distributions of opportunities and respects (4).

Now, recall that substantial equality of opportunity, according to the definition by Lippert-Rasmussen, obtains when two individuals who have the same native talents and ambitions enjoy an equal chance at getting a certain position. When generalized to all individuals in a population, luck egalitarianism allows us to formulate a minimal requirement for just distributions:

(6)   Substantial equality of opportunity can obtain, if and only if, the distribution of opportunities is not influenced by unchosen group membership.

Note that a full conception of luck egalitarian substantial equality of opportunity would likely be much more demanding. Namely, it would require eradicating the influence of native talent as well, being another clear instance of brute luck. Thus, affirmative action, justified in this way, does not lead to full substantial equality of opportunity. I deal with this objection in more detail in section 4.2.3. For now, I want to emphasize that I merely argue that luck egalitarianism would *at the very least* would require eradicating the influence of group membership on selection processes because when successful, it brings about a *more* just distribution of opportunities. It does not bring about a distribution that is perfectly just, as there may be other unjust circumstances, not involving discrimination, that influence individuals' degree of opportunities. Rather, I only argue that affirmative

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action, by providing a means for eradicating specific instances of brute luck, would constitute an improvement in terms of distributive justice, understood by luck egalitarianism.

Here, it helps to recall that affirmative action has two goals: eradicating the influence of discrimination on people's lives and bringing about equality of opportunity. Affirmative action of the type that this thesis discusses, cannot fully achieve the latter as the degree of opportunities someone has can be influenced in many unjust ways not involving discrimination. For example, when one has had a difficult upbringing or a lack of marketable talent, this is an instance of bad brute luck. However, its negative influence cannot be attributed to membership of a certain demographic group. Inequality of opportunity, according to the above justification, should not be counteracted through affirmative action, understood as a means to eradicate the influence of discrimination. However, because eradicating the influence of this type of brute luck would constitute an improvement in terms of substantial equality of opportunity, affirmative action policies are justified. Other policies may then still be justified to establish full equality of opportunity and eradicate other instances of brute luck, but this is beyond the scope of affirmative action. How the eradication of brute luck at the group level provides improvements at the individual level will be explored in the next section.

4.2.2 Group Brute Luck

In the previous section, I formulated a luck egalitarian justification of affirmative action and reformulated substantial equality of opportunity in terms of brute luck. At this point, one could object that specifying the equality of opportunity model through luck egalitarianism brings back a familiar practical challenge. Namely, while it is indeed the case that generally, members of disadvantaged groups suffer from bad brute luck, not all individuals in this group suffer from it to the same extent. The same thought applies to members of the dominant group: not all of them enjoy the same level of good brute luck. Some members of the dominant group may actually, all things considered, suffer from a larger degree of bad brute luck than some individuals favored through affirmative action. This is a weaker formulation of one of the criticisms I discussed in section 2.3, namely that affirmative action may fail to target truly disadvantaged individuals and make some who are disadvantaged even worse off. In order to assess an individual's degree of brute luck, selection processes would need to look into each individual's causal history. This is practically unfeasible, as administrators do not have full access to this causal history, nor can they reliably judge from an external perspective to what extent a specific outcome is due to brute luck. If this objection holds, then implementing the equal opportunity model, specified by luck egalitarianism, would suffer from the same practical problems as the compensation model.

Luckily, there is a way out of this problem. While it is indeed difficult to determine the exact extent of influence of brute luck at the individual level, it is sufficient for affirmative action to determine this at the group level. At the level of policy, one only needs to determine whether there is brute luck at the group level and whether the implementation

of affirmative action in a certain context is likely to have a positive effect on equality of opportunity.

How this may be done, can be clarified through the following example. Let us assume that a specific minority group B, compared to majority group A, has significantly lower average level of wealth, income, education level and health. While this does not mean that all members of group B have less resources than those in A, an average difference can nonetheless be observed. While in-group differences can be explained through a mix of differential choice, talent, and circumstance, I have argued in 3.2. that it is unlikely that generally observed inter-group differences can be explained by reference to general differences in choice or talent. Without the influence of social and economic background factors, it is unlikely that significant differences among demographic groups would be observed. Moreover, if such background factors were not in play, the in-group distributions of opportunities in group A and B would exhibit very similar patterns. Roughly the same percentage of bad-off, reasonably-off, and well-off individuals would be observed if these factors did not have any influence. Thus, general, group-level differences are indicative of the influence of brute luck, understood as the unchosen influence of group membership, on the distribution of resources and opportunities. To refer to this, I introduce the notion 'group brute luck'. The existence of group brute luck implies that members of group B are generally suffering from some degree of bad brute luck at the individual level, which is sufficient for effective and fair affirmative action policy. In what follows, I will argue that this is the case.

Introducing the notion of group brute luck does not take away all the critic's doubts. When using group brute luck as a guide for affirmative action policy, does this not imply that on the individual level, there may be still instances of unfair selection decisions. Assuming we could measure the level of opportunities someone has at the individual level, affirmative action can lead to selection decisions that favor a minority candidate that is better-off in terms of opportunities than some majority candidate. It is hard to see that such a selection decision would improve substantial equality of opportunity, and it seems unfair to the majority candidate.

To make this objection more precise, let us assume that group A and B both consist of three individuals, each of which has a specific level of opportunities (see Figure 1 for a visual representation). Group A consists of individuals A1, A2 and A3, who respectively have opportunity levels of 2, 3 and 4. Group B consists of B1, B2 and B3, who respectively have 1, 2 and 3. I will assume that all individuals are equally qualified for a specific job in which group B is currently underrepresented due to structural disadvantage. Note that, according to my previous claim, group-level differences in terms of average level of opportunities indicates that group brute luck is in play. Namely, group B has an average of 2 while group A has an average of 3. Then, I have argued, implementing affirmative action would improve substantial equality of opportunity by moving opportunities from group A to group B in such a way that both end up at an average of 2.5. However, suppose that in a specific selection decision, candidate B3 is favored over candidate A1 due to group brute luck, who respectively have opportunity levels 3 and 2. This decision brings B3 at a

level of opportunity of 3.5, and A1 down to 1.5. This seems unfair, as A1 already had less opportunities than B3. Should affirmative action have favored A1 instead? Or should it not have been applied?
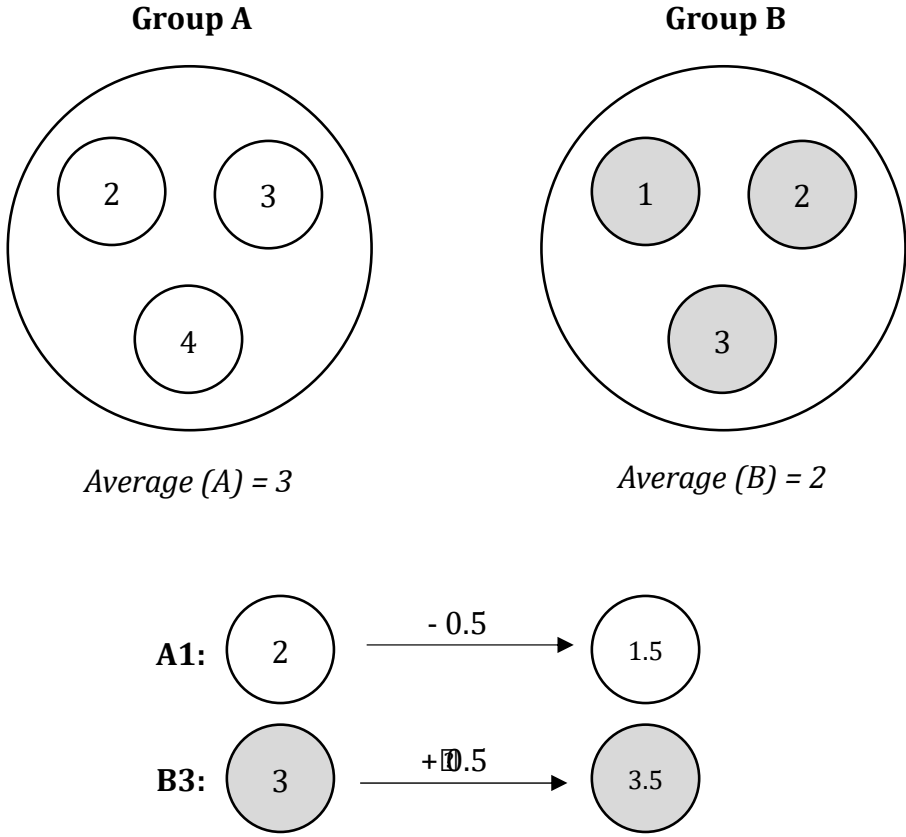

Figure 1: Visual representation of objection

My reply is the following (see Figure 2 for a visual representation). It is misleading to focus on a specific selection decision, as the same policy applied to all candidates in group B. All of them were favored over those in group A. This means that B1 and B2, having opportunity levels of 1 and 2, were favored over A2 and A3, having opportunity levels of 3 and 4. Because of these selection decisions, B1 and B2 now have opportunity levels 1.5 and 2.5, while A2 and A3 have levels 2.5 and 3.5. On the individual level, for them affirmative action improved equality of opportunity. Moreover, after affirmative action has been implemented, some level of inequality of opportunity remains on this level. But when considering the overall impact of affirmative action, it has equalized the average equality level on the group level.

While this distribution of opportunities on the individual level is still not strictly equal, it becomes possible to see that affirmative action, here, has established a distribution of opportunities that would have obtained had group-level background factors not exhibited any influence. Assuming all individuals in B were worse-off to some extent due to group membership, affirmative action eradicated this specific influence for all

individuals. This also implies that A1 had some level of advantage due to group membership. While a policy that would not make A1 worse off would certainly be preferable, affirmative action brought him down to the opportunity level he would have been at without these advantages.

At this point, it also becomes possible to see that redistribution of opportunities according to group brute luck follows the luck egalitarian pattern. Namely, *overall* substantial equality of opportunity is improved by moving opportunities from those with good brute luck to those with bad brute luck. The fact that one group is, on average, suffering from bad brute luck implies that another must be experiencing good brute luck. Returning to the example, it is only *because* group A has an above-average opportunity level and B has a below-average level, that redistribution is warranted.
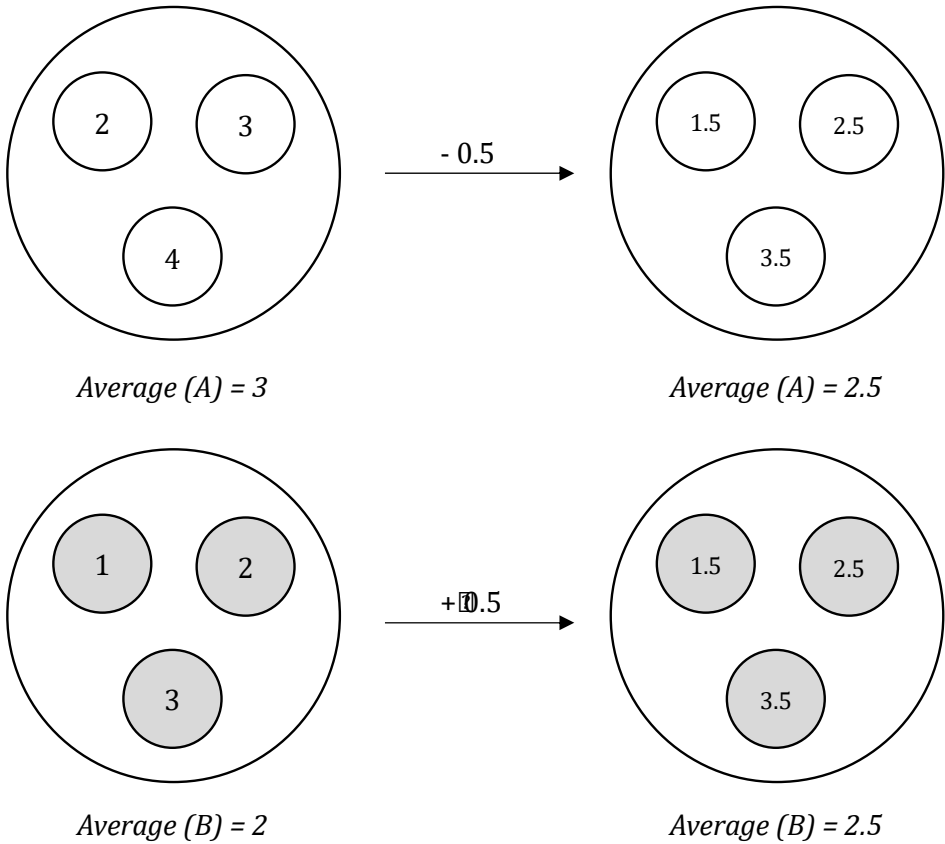

Figure 2: Visual representation of reply

The objection, then, was that relying on group brute luck implies that it is possible that a candidate from group A who is already worse-off than many candidates in group B is made even worse off if a better-off candidate from group B is favored. With the above reply, I have demonstrated that making worse-off majority candidates even worse off is warranted because it still improves *substantial* equality of opportunity. As in-group distributions of opportunities would be roughly equal absent the influence of group membership, even the worse-off individual from the majority group is advantaged to a certain

extent. Affirmative action grounded in group brute luck brings him back to the level he would have been at had these background factors not been in play.

To summarize, because affirmative action is only concerned with the unchosen influence of group membership, it is justified when it helps to eradicate this specific type of brute luck. While observed differences at the group level indicate that group brute luck is influencing distributions of opportunities and resources, this does not provide any information about its influence on the individual level. However, I have shown that especially because affirmative action is only concerned with the unchosen influence of group membership, it does not matter how much each individual suffers or benefits from it. As long group brute luck is observed, implementing affirmative action will improve substantial equality of opportunity, both at the group and individual level. This may involve reducing the opportunity level of some majority candidates who already have an unequal share of opportunities on the individual level. However, this is justified when they too, have had a certain level of advantage due to group membership, which implies that the decision was fair and effective.

Focusing on brute luck on the individual level may be preferable for the purpose of achieving full substantial equality of opportunity. Affirmative action grounded in group brute luck, then, may only be second-best as a policy for achieving this goal. However, because it is impossible and undesirable for administrators scrutinize individual's causal histories, such individualized judgment of unchosen brute luck is not practically feasible nor desirable. Also, at this point it helps to emphasize once again that affirmative action is not the only tool for addressing inequality of opportunity. Social welfare policies, for instance, can serve to address inequalities that cannot be attributed to group brute luck. Thus, while affirmative action policies grounded in group brute luck may sometimes disfavor the worse-off, this is justified by the overall gains in substantial inequality of opportunity it achieves.

4.2.3 Objections

I now consider two possible objections to my attempt at using luck egalitarianism to specify and supplement the equality of opportunity model of affirmative action. First, one could object at this point that native talents are clearly also an instance of brute luck. Does luck egalitarian substantial equality of opportunity, understood in this way, not also require the eradication of the influence of talent on the distribution of opportunities? Shlomi Segall (2013) defends this position, which he describes as radical equality of opportunity. According to Segall, substantive equality of opportunity is too narrow because it is only concerned with equal chances for equally talented and ambitious candidates to receive a certain position. If the luck egalitarian project requires the eradication of all brute luck, luck egalitarians should favor a conception of equality of opportunity that requires eradicating all of it, not only that which can be attributed to social endowments. It should include natural endowments as well.

I have two replies to this objection. First, Segall does not consider the legitimate interests that different stakeholders in an organization have in selecting qualified

candidates. A radical conception of equality of opportunity, at its extremes, may require selecting completely unqualified candidates for desirable positions because this would lead to the largest gain in radical equality of opportunity. This is absurd, as this would completely subsume all efficiency concerns under social goals in selection processes, which should minimally lead to selecting a candidate that is able to perform a task. Demanding employers to select someone who is unable to perform that task cannot be legitimately required of them. Moreover, co-workers and clients (or students) also have a legitimate claim to good-quality work or education. Radical equality of opportunity fails to respect their claims, which substantial equality of opportunity does. For the purpose of generating public support, this is a large disadvantage. Second, radical equality of opportunity would require a complete revision of selection processes by presenting need as the primary criterion for hiring.[112] This makes it a fifth-stage critique. As this thesis is concerned with fourth-stage policies, which involve mere adjustments to current hiring procedures, I can restrict myself to investigating how luck egalitarianism can contribute to achieving substantial equality. While the realization of full luck egalitarian equality of opportunity may require rejecting meritocracy as such, this is not a position that can currently be expected to gather a large extent of public support.

Second, relational egalitarians such as Scheffler and Anderson can object that the project of affirmative action as a means to establish substantial equality of opportunity is misconceived. The project of eradicating group brute luck will not be sufficient for bringing about a society grounded in equal concern and respect for all citizens. I reply that I agree that it may be not sufficient for achieving this ambitious goal, but as the argument of Wenar in section 3.2. demonstrated that, absent substantial inequality of opportunity, a strong justification for affirmative action seems unavailable. Some compensation may be in order for those suffering from discrimination in ways that do not impact their level of opportunities. Achieving democratic equality justifies this. But it is not clear that it justifies preferential treatment that dislocates a distribution of opportunities that is already just. It also does not mean that affirmative action, as I understand it, will lead to a democratically equal society by itself. Inequalities in civil society may persist, while they may not necessarily adhere to members of (previously) structurally disadvantaged groups. As Michael Sandel points out, a fully meritocratic society where one's opportunities depend only on talent and efforts can bring about an ethos that disrespects the losers and praises the winners.[113] This is a violation of equal respect and concern for all citizens on grounds of their talents and ambitions that may require some means to counteract it. But adjustments to selection procedures do not seem to be the appropriate way to do this.

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[112] Segall, *Equality*, 86.
[113] Michael Sandel, *The Tyranny of Merit* (London, UK: Penguin Books, 2020), 24-25.

4.3 Practical Advantages of Luck Egalitarianism

In the previous section, I have shown that grounding adjustments to selection procedures in group brute luck makes it possible to formulate a minimal condition for substantial equality of opportunity to obtain, and allows administrators to measure, identify and counteract the unchosen influence of group membership in an accurate way. Now, I want to discuss the benefits that the luck egalitarian justification of affirmative in terms of providing more effective and fair adjustments to selection procedures.

Building on the discussion in the previous section, targeting group brute luck has advantage of flexibility with respect to determining for which group affirmative action is required, and what kind of policy would be most appropriate for improving equality of opportunity. With respect to the former, some group members may suffer from brute luck in one domain, but not in another. To demonstrate this, the degree of inequality of opportunity that women experience seems to increase as they move further up the corporate hierarchy. Similarly, they may have roughly equal opportunities as men with respect to part-time positions, while this may not be the same for full-time positions. Focusing on inter-group differences in terms of opportunities can guide administrators in determining who and where affirmative action is necessary to improve substantial equality of opportunity. With respect to the latter, the size of the discrepancy between groups in terms of opportunities can help determine the severity of the affirmative action policy that is necessary. For instance, in South Africa, strict quotas for black students for university applications are put in place. This means that many white students, who demonstrably have much higher final grades than many black students, may fail to get into university. While this is surely a very severe policy and a difficult pill to swallow for white students, the lingering effects of the relatively recent abolishment of apartheid may justify such radical means of boosting substantial equality of opportunity. However, the policy of Eindhoven Univeristy of only admitting female applicants, may have been disproportionate as the difference in terms of opportunities of female candidates when compared to males may be much smaller. Thus, a focus on group brute luck, understood in terms of group-level differences in opportunities, can help to determine for whom, where and how affirmative action should be implemented.

Focusing on substantial equality of opportunity also provides a limit to the duration of affirmative action policies. As mentioned in the beginning, affirmative action policies are defended as being temporary. As long as group membership continues to influence the prospects of specific groups in clear ways, affirmative action is necessary. Exclusively meritocratic selection processes only become possible once this influence is eradicated. By focusing on inter-group differences in terms of opportunities, monitoring these differences on a regular basis can show when affirmative ceases to be necessary. If inter-group differences become negligible and intra-group differences show roughly equal distributions, this indicates that group characteristics are unlikely to significantly influence the distribution of opportunities. Thus, group brute luck, by specifying the goal of affirmative action and allowing for evidence-based policy, allows administrators to monitor its effectiveness and appropriateness.

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After such an extensive discussion of substantial equality of opportunity and how luck egalitarianism specifies it, it is easy to forget that one of the main goals of this thesis was to provide a justification of affirmative action that generates less controversy. With respect to the interpersonal justification test, the focus on group brute luck has an additional advantage. Because luck egalitarianism relies on a generalized notion of disadvantage, the decision to reject a majority candidate is depersonalized. This means that it does not rely on claims about discriminatory beliefs, attitudes or behaviors on behalf of the rejected candidates. It needs only to rely on general empirical data that, on average, members of a certain group experience structural disadvantage. This structural disadvantage then implies that the majority group has structural advantage. On average, then, while affirmative action grounded in equality of opportunity reduces the number of opportunities of qualified majority candidates, it is constrained by data that demonstrates the overall advantages in terms of opportunities they have. When this demonstrable advantage fades, the case for affirmative action does too. As long as it is possible to implement affirmative action, the *overall* opportunity level of majority candidates does not drop below the societal average. This, in turn, takes away many of the doubts and complaints raised against the fairness of affirmative action.

Moreover, the complaint that affirmative action implies unfair selection decisions that give minority candidates an unfair advantage is not justified. This is because affirmative action is only justified if it leads to a more equal distribution of chances at opportunities. As reduced opportunities on the group level indicate that minorities are suffering from bad brute luck, at the same time it indicates that the majority is experiencing good brute luck. Disadvantages on one side translate to advantages on the other. As luck egalitarianism only allows redistribution to take place from that part of good luck that is undeserved, it does not allow candidates to have unequal chances at accessing desirable positions. It does not accept redistribution when talent or differential choice explains inequalities in opportunities. Therefore, it would not imply hiring unqualified candidates and would never fully reject merit of majority candidates. It would only imply hiring less qualified candidates if these candidates demonstrably have structurally unequal chances at obtaining a certain position, if not for affirmative action policies.

4.4 Affirmative Action as Social Welfare
In the previous section, I have argued that a luck egalitarian specification of the equality of opportunity model provides several practical advantages in terms of measurement and legitimacy. Now, I want to argue that, by extension, conceiving of affirmative as the project of eradicating group brute luck, allows us to understand affirmative action as a specific instance of a greater project of many social-democratic societies. Namely, contemporary social welfare policy also can be understood as grounded in a project of eradicating brute luck, for which there is already a large level of support.

Social welfare policies come in two types: conditional and unconditional. All social welfare policies require some level of conditionality, so this distinction cannot be drawn so strictly in practice; having citizenship of a particular country is an example of such a

minimal condition. However, contemporary conditional social welfare policies generally condition benefit entitlement on certain behavioral requirements. As Beth Watts and Suzanne Fitzpatrick (2018), in their elaborate survey of conditional welfare, claim that the essence of contemporary welfare conditionality "lies in requirements for people to behave in prescribed ways in order to access cash benefits or other welfare support."[114] Unconditional social welfare, then, does not require conditions of this specific type, but they may rely on conditions of status, such as citizenship, or need.[115]

Such behavioral conditions can take various forms. They can determine only initial access to benefits but also continued access to it. An example of the former is that access to benefits is often restricted when unemployment is judged to be 'voluntary', that is, when individual is not fired but quits due to personal motives that involve differential choice.[116] Examples of the latter include spending a minimum amount of time searching for work, which demonstrates availability for employment, attending trainings or participating in other compulsory meetings.[117] Failing to fulfil these conditions can trigger sanctions, while the severity of such sanctions differs among countries. Such conditionality is not restricted to unemployment benefits. There are examples of imposed conditionality on homeless people, social tenants, the disabled and single-parent families.[118]

The point of this discussion of the various forms of welfare conditionality is to show that while the specifics of conditional social welfare policy are hotly debated, a widespread consensus exists among administrators and the public alike that some form of behavioral conditionality is required. The origin of this consensus can be traced back to the conservative critics of the welfare state in the 1980s. They claimed that the unconditional nature of welfare benefits had adverse behavioral effects, leading to a self-perpetuating cycle of dependency. Welfare state arrangements around that time included only limited requirements for receiving aid, which often offered little incentive to reduce one's dependency on these benefits. As a response, increasingly severe behavioral conditionality was introduced, at least partially as a measure to reduce the cost of these policies. Today, behavioral conditionality enjoys a wide range of political and public support.

This wide range of support can be explained through the intuitions that underlie it. These intuitions can be made more specific through luck egalitarianism. While early, unconditional welfare regimes conceived of responsibility as a duty of others to care for the worse-off in society, luck egalitarianism adds a degree of personal responsibility for one's own welfare into the mix. Society, then, only has a duty to care for the worse-off if they cannot be held accountable for adverse outcomes. While it is possible to defend both conditional and unconditional social welfare policies from a luck egalitarian

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[114] Fitzpatrick and Watts, *Conditionality*, i.
[115] Ibid., 2; 18-19.
[116] Ibid., 33.
[117] Ibid., 32-33.
[118] Ibid., 51-73.

perspective,[119] Yascha Mounk argues that luck egalitarianism is especially conducive to the former. As luck egalitarians believe that "the choices that individuals have made in the past can justify significant material inequalities in the present" and believe that individuals only "should be compensated for ... inequalities that are unchosen", they support a specific notion of responsibility.[120] While the notion of responsibility that current social welfare policies is rather crude and may not accurately reflect the choice-circumstance distinction, luck egalitarians would nonetheless support its underlying project of making social welfare policies track personal responsibility, at least to a certain extent.

Contemporary social welfare policies, thus, already incorporate the choice-circumstance distinction in particular ways. By introducing behavioral conditionality, administrators try to distinguish among those who are in that situation due to their choice from those who are not. Whether or not they do so successfully, is not at issue in this thesis. However, it is possible to see that current social welfare policies rely on the same principle that the model of affirmative action defended in this thesis does. Both attempt to eradicate the influence of brute luck on the distribution of resources or opportunities for welfare. Affirmative action is merely restricted to a specific type of brute luck, namely the kind that can be attributed to unchosen group membership. Thus, affirmative action, grounded in luck egalitarianism, can be considered part of the greater project of contemporary social welfare policy. Solidarity, according to luck egalitarianism, requires eradicating brute luck in society, establishing real substantial equality of opportunity. In such a society, only choice may influence the resources and opportunities one has.

This conclusion has two implications. First, conceiving of affirmative action as a type of social welfare policy has the benefit of grounding the policy in an already pre-existing social consensus. As brute luck is the kind of disadvantage that all citizens are entitled to compensation for, affirmative action does not involve a 'special kind' of reverse discrimination. It is not unfair to rejected candidates, because the policy is of a similar type as special education or trainings for the long-term unemployed or blind people. It is not different from cash benefits for people who have been laid off due to necessary reorganizations of large firms. It is not different from jobs reserved for the unemployed or mentally challenged. All of these polices are widely supported, and all of them together make up the general, societal project of eradicating the influence of brute luck on the distribution of goods. Affirmative action only addresses a specific type of brute luck, namely that which arises due to discrimination.

Second, one can also argue the other way around. If affirmative action can be understood as a type of conditional social welfare policy, then some of these policies can also be understood as affirmative action. Reserved spots for physically or mentally disabled people are an example of quotas, which are justified because they correct for the influence of brute luck on the distribution of opportunities. Language training and integration

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[119] Bou-Habib and Olsaretti (2004) argue that this is the case.
[120] Mounk, *Responsibility*, 50.

courses for war refugees can be understood as correcting for the brute luck of having to flee from their home country having more difficulty integrating into a new one. While I am not able to explore this conclusion further, it is clear that grounding affirmative action in widely shared conception of solidarity offers additional promise for a less controversial, public justification.

4.5 Chapter Conclusion

In this section, I have shown that luck egalitarianism can specify and supplement the equality of opportunity model in several ways, which provides several benefits for overcoming its controversy. First, by introducing the concept of 'group brute luck', it can help to specify the goal of substantial equality of opportunity. It provides conceptual tools for identifying, measuring and targeting the unchosen influence of group membership in a standardized, practically feasible way by understanding it as 'group brute luck'. In this way, it becomes possible to identify for whom, when, and where substantial equality of opportunity does not obtain, which implies that affirmative action is justified. Second, it specifies how redistribution should proceed, namely by redistributing from those who are better-off in terms of opportunities due to group membership, to those who are worse-off in this respect. Affirmative action, by redistributing opportunities in this way, promoted equality of opportunity both at the group and individual level, and thus is effective and avoids unfair treatment of candidates. The luck egalitarian specification also has an additional potential for overcoming the affirmative action controversy in two ways. First, it provides an uncontroversial ground for interpersonal justification in selection decisions, as it relies on a general notion of undeserved disadvantage instead of individual characteristics. Second, the main luck egalitarian claim, namely that widely shared duty to take care of the undeserving unlucky, is a familiar principle underlying many contemporary welfare policies. It allows us to understand affirmative action policies as a subclass of conditional social welfare policies that rely on this principle, which also has the potential of generating a larger degree of consensus among the public.

5. Conclusion and Final Remarks

5.1 Conclusion

Arriving at this point, I hope to have convinced the reader that the project of developing a luck egalitarian justification of affirmative action is a worthwhile endeavor as a means to overcome its controversial status. My aim has been to show that considering it as a redistributive policy grounded in luck egalitarianism has particular, favorable theoretical and practical benefits with respect to generating more widespread public support. To recap, my argument has proceeded as follows.

In the first chapter, I have shown what affirmative action is, why it is important, the different types of policy it encompasses and that policies that propose introducing adjustments to meritocratic selection processes provide the locus of current controversy. Critics of this kind of policy have two main concerns that explain its controversial status. First, they doubt whether it is an effective tool for reaching its goals, as they claim that it fails to help the truly disadvantaged and may make them even worse off. Second, they have concerns about the fairness of introducing non-merit criteria for selection, as it treats members of dominants groups unequally due to factors beyond their control. This controversy can be overcome through a justificatory model for affirmative action that explains why membership of structurally disadvantaged groups provides an adequate basis for effective preference policy, how it targets structurally disadvantaged individuals accurately and avoids treating disfavored candidates unequally.

In the second chapter, I discussed and assessed the potential of four different justificatory models for overcoming the controversy: 'compensation', 'diversity', 'equality of opportunity' and 'integration'. I argued that the compensation, diversity and integration models are lacking in several, different respects. The compensation and diversity model offer no clear justification of affirmative action and the former suffers from debilitating practical problems due to its requirement to scrutinize individuals' causal history. Additionally, the grounds that each of these models provide for adjusting selection procedures risk alienating disfavored candidates when used as an explanation for why they were disfavored. Compared to the other three, the equality of opportunity model, I argued, is the most promising model for overcoming the controversy. It offers a clear justification of affirmative action, avoids the practical problems pertaining to the compensation model, employs uncontroversial grounds due to widely shared concerns with substantial inequality of opportunity and aligns with empirical research. However, the potential of the equality of opportunity model hinges on its ability to measure and target substantial inequality of opportunity and demonstrating how adjusting selection procedures improves it. To do this, further specification of the model is required that shows for whom, when and where exactly substantial inequality of opportunity obtains, and that addressing group-level inequality of opportunity also decreases individual-level inequality of this type.

The third chapter shows that luck egalitarianism, when used to specify and supplement the equality of opportunity model, addresses these worries, which is the main, novel contribution of this thesis. I show that the conceptual tools it offers, provide the basis for

a compelling defense of affirmative action with additional advantages in terms of controversy-reduction. By introducing the notion of 'group brute luck', it can help to specify the goal of substantial equality of opportunity. This makes it possible to identify and measure for whom, when and where substantial equality of opportunity does not obtain, which implies that affirmative action is justified. It also specifies how redistribution should proceed, namely by redistributing from those who are better-off in terms of opportunities due to group brute luck, to those who are worse-off in this respect. Redistribution of opportunities at the group level, I argued, also leads to a more just distribution at the individual level. Therefore, affirmative action grounded in luck egalitarian is an effective tool to counteract structural disadvantage. Additionally, introducing group brute luck as a ground for adjusting selection procedures depersonalizes the decision and provides inherent limits to when affirmative action is appropriate. Therefore, it can address concerns of unfairness. To this, I add that grounding affirmative action policy in luck egalitarianism also has additional potential for reducing its controversial status due to its compatibility with intuitions underlying current social welfare policies.

5.2 Final remarks

The discussion in this thesis has been limited in several respects. First, it has not explored differences between luck egalitarian theories. Luck egalitarians disagree on the normative import and specification of different types of luck. I grant that I have used the term 'brute luck' somewhat loosely and introducing different kinds of luck may have different distributive implications. The type of luck one favors and the extent to which it gives rise to a redistributive claim may also have implications for when and which kind of affirmative action is justified. For instance, as mentioned before, some theorists interpret luck as 'desert', which looks more closely at the way individual behavior and character traits qualify an individual as 'deserving' of being in a certain situation. This is different from 'responsibility' luck, which is the position I have taken here as it is most common.

Analogously, it has not explored how luck egalitarianism can also justify adjustments to selection processes based on different kinds of brute luck than the influence of group membership, which aligns more closely with Shlomi Segall's project of radical equality of opportunity. If luck egalitarianism requires all brute luck to be eradicated, then affirmative action may also be an appropriate tool for addressing differences in talent, intelligence and wealth, as they are also not the result of deliberate gambles. As this thesis has provided a largely non-ideal defense, I have left out critiques of this kind as they are unlikely to be implemented in current practice.

Finally, it has not discussed how exactly the equality of opportunity model should be operationalized for practical purposes. This thesis has claimed that the model is practically feasible but has provided no specific guidelines on how it is to be implemented as it merely looks at different justificatory grounds. It provides a starting point for future research on how the model can be implemented in practice. For example, a question that remains to be answered is whether there may be differences between the duties of public and private sector employers for providing data on substantial equality of opportunity

and achieving it. Moreover, administrators and recruiters need to determine the extent of advantage that can be given to members of structurally disadvantaged groups so that equal treatment is not violated. A survey of existent tools for the purpose of measuring equality of opportunity may provide a promising supplement to my analysis.

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