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What Indirect Affirmative Action Can Do

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Affirmative action is under pressure in the United States. At the moment, affirmative action is both legally prohibited and politically ill advised. For an egalitarian, this is not good news. What to do? This paper aims to show that indirect affirmative action can be useful for the egalitarian. It does so in two steps. First, it explains what indirect affirmative action is. Providing a paradigm-based definition, it argues that an intention to disproportionately benefit a minority is not a necessary, but a paradigmatic, condition of indirect affirmative action. Second, it shows that (i) indirect affirmative action survives prominent objections to affirmative action, (ii) reasons of equality of opportunity and integration give us reason to pursue indirect affirmative action, and (iii) in a politically inegalitarian climate like the current one in the US, indirect affirmative action is particularly strategically useful vis-á-vis direct affirmative action for the egalitarian, and it provides a preliminary case for why it is sometimes permissible to pursue indirect affirmative action as a form of *egalitarian gamesmanship*.

What Indirect Affirmative Action Can Do

Andreas Bengtson

I. INTRODUCTION

It would probably be an understatement to say that affirmative action is under pressure in the United States. At the moment, affirmative action is both legally prohibited and politically ill advised. The legal prohibition is a result of the recent Supreme Court Case—*Students for Fair Admissions, Inc v. President and Fellows of Harvard College*[1]—in which affirmative action, as it has been practiced at prestigious universities, has been struck down as unconstitutional due to violating the Equal Protection Clause of the 14th Amendment. Additionally, and more recently, President Trump signed an executive order to roll back diversity, equity, and inclusion (DEI) programs and initiatives.[2] So even if we set aside the legal prohibition, pursuing affirmative action in the United States at this moment would be politically ill advised. Nobody involved with federal agencies or receiving federal funding wants to be branded as someone engaged in affirmative action.

If you, like me, are an egalitarian, you will lament this state of affairs. Women and racial minorities still suffer from grave injustices, and this attack on justice-promoting policies like affirmative action will only take us further away from justice. What should the egalitarian do? In this paper, I'll suggest that *indirect affirmative action* may be part of the solution.

Now, you might wonder, what is *indirect* affirmative action? And this is for good reason since, aside from a couple of treatments,[3] the distinction between direct and indirect affirmative action has received relatively little attention. Basically, the main difference between the two is that direct affirmative action is not facially neutral—it uses a protected characteristic, such as race or gender, as an explicit criterion—whereas indirect affirmative action is facially neutral. Almost exclusively, what is discussed academically and politically is direct affirmative action. And this is why there

[1] Students for Fair Admissions, Inc v. President and Fellows of Harvard College, 600 U.S. 181 (2023).

[2] Tracy R. High, Julia M. Jordan, and Ann-Elizabeth Ostrager, "President Trump Acts to Roll Back DEI Initiatives," *Harvard Law School Forum on Corporate Governance*, February 10, 2025, https://corpgov.law.harvard.edu/2025/02/10/president-trump-acts-to-roll-back-dei-initiatives/.

[3] Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford: Oxford University Press, 2015); Daniel Sabbagh, "The Rise of Indirect Affirmative Action: Converging Strategies for Promoting 'Diversity' in Selective Institutions of Higher Education in the United States and France," *World Politics* 63, no. 3 (2011): 470–508, https://doi.org/10.1017/s0043887111000128.

doesn't seem to be much hope for the egalitarian, in the inegalitarian political climate mentioned above, when it comes to affirmative action. This paper aims to provide hope to the egalitarian through indirect affirmative action.[4]

My treatment of indirect affirmative action is novel in several ways. First, I provide a paradigm-based definition of both direct and indirect affirmative action. These definitions will help us see that although an intention to disproportionately benefit a minority group is not a necessary condition for affirmative action—*pace* what has been suggested in the literature[5]—paradigmatic forms of direct and indirect affirmative action do involve an intention to benefit a minority group. Indeed, I argue, we must distinguish between paradigmatic and non-paradigmatic direct and indirect affirmative action (there are four types; not just two). Second, I argue that indirect affirmative action is a useful policy tool for the egalitarian, both (i) generally speaking, and (ii) particularly, in an inegalitarian political climate like the current one in the US. Regarding (i), I do two things. First, I argue that indirect affirmative action is not vulnerable to prominent objections put forward against affirmative action in both legal and philosophical discussions, such as the merit objection and the publicity objection. Second, I argue that common justifications in favor of affirmative action—having to do with equality of opportunity and integration—can be used to justify indirect affirmative action as well. Regarding (ii), I raise strategic reasons for indirect affirmative action: I argue that, in a politically inegalitarian climate like the current one in the US, indirect affirmative action is particularly strategically useful vis-*á*-vis direct affirmative action for the egalitarian, and I make a preliminary case for why it is sometimes permissible to pursue indirect affirmative action as a form of *egalitarian gamesmanship*.

II. DIRECT AND INDIRECT AFFIRMATIVE ACTION

So, how should we draw the distinction between direct and indirect affirmative action? To get some inspiration, we may start by looking at how the distinction between direct and indirect discrimination is usually drawn. One way in which this distinction is drawn is to say that whereas direct discrimination is *intentional*, indirect discrimination is *non-intentional*. Lippert-Rasmussen puts forward this understanding, defining direct discrimination as "treatment where the discriminator treated people – say, job applicants – differently, because he intended to exclude people on the basis of

[4] Another way of illustrating what I'm doing is as follows. In the current legal and political discourse, the alternatives to combating inequality are usually (i) direct affirmative action, or (ii) focusing on improving the prospects of the economically disadvantaged. I point to and justify a third option: indirect affirmative action.

[5] Khaitan, *A Theory*, 80.

membership of a particular socially salient group, whose members he thought inferior in certain ways or to whom he was hostile."[6] A paradigmatic example is the racist employer who intends to exclude Black job applicants.

Indirect discrimination, on the other hand, "does not involve any intentions to exclude, but does in fact exclude because of how rules, practices, institutions etc. have been designed in a context where they serve the needs and match the capacities of particular groups."[7] An example here may be an employer who requires high school education as a job qualification at a point when Black people did not have proper access to high school education, but where the employer had no intention of excluding Black people from the job. Moreau also lays out the distinction in this way when she defines indirect discrimination as cases in which "a policy is not intentionally implemented so as to exclude a certain group, but rather has unforeseen but disproportionately negative effects upon them relative to other groups."[8] So, on this way of drawing the distinction, intentions (or lack thereof) are central. If the discriminator has an intention to exclude people with certain traits, it amounts to direct discrimination. If the discriminator has no such intention, but the practice nevertheless excludes people with certain traits, it amounts to indirect discrimination.[9]

A second way of drawing the distinction—the facial neutrality approach—is what is known in the US as the difference between *disparate treatment* and *disparate impact*. Campbell and Smith describe the difference well: "If a reference to the protected characteristic is apparent on the face of the provision or criterion, the case should be treated as one of direct discrimination. If, by contrast, the provision or criterion does not make reference to the protected characteristic (and so is 'neutral on its face'), then the case may be one of indirect discrimination."[10] Whereas indirect discrimination is facially neutral (but has a disparate impact), direct discrimination is not. Moreau also points to this way of drawing the distinction: "direct discrimination explicitly singles out a certain group or person using a prohibited ground of discrimination (or some trait that is closely connected to such a ground), whereas practices that discriminate indirectly do not."[11]

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[6] Kasper Lippert-Rasmussen, "The Philosophy of Discrimination: An Introduction," in *The Routledge Handbook of the Ethics of Discrimination*, ed. K. Lippert-Rasmussen (New York: Routledge, 2017), 3.

[7] Lippert-Rasmussen, "Philosophy of Discrimination," 3.

[8] Sophia Moreau, "Discrimination and Freedom," in *The Routledge Handbook of the Ethics of Discrimination*, ed. K. Lippert-Rasmussen (New York: Routledge, 2017), 167.

[9] For criticism of this way of drawing the distinction, see Colin Campbell and Dale Smith, "Distinguishing Between Direct and Indirect Discrimination," *Modern Law Review* 86, no. 2 (2023): 310–13, https://doi.org/10.1111/1468–2230.12760.

[10] Campbell and Smith, "Distinguishing," 314.

[11] Sophia Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* (Oxford: Oxford University Press, 2020), 193. See also Bastian Steuwer and Kasper Lippert-Rasmussen, "The Poverty Discrimination Puzzle," *Political Philosophy* 1, no. 2 (2024): 304, https://doi.org/10.16995/pp.16493.

We have seen two ways of drawing the distinction between direct and indirect discrimination, namely the intentionality approach and the facial neutrality approach. And there is disagreement as to which one is preferable. But as if that was not enough, it has been argued that the concept of discrimination is more complex than the dyadic distinction between direct and indirect discrimination suggests. Indeed, Berndt Rasmussen argues that we should cross-cut the distinctions from the intentionality approach and the facial neutrality approach—intentional/non-intentional and facially neutral (disparate treatment)/non-neutral (disparate impact)—to distinguish between four forms of discrimination.[12] This can be captured in the following table (1):[13]

Table 1. Four forms of discrimination.

	Facially non-neutral (disparate treatment)	**Facially neutral (disparate impact)**
Intentional	(1)	(2)
Non-intentional	(3)	(4)

Her reasoning behind distinguishing four, instead of two, forms of discrimination is that, first, one may employ a facially neutral policy intentionally, e.g., if one knows that a facially neutral test disadvantages Black people, one may implement this test with the intention to disadvantage Black people (cf. 2), and, second, one may employ a facially non-neutral rule unintentionally, e.g., in cases of implicit bias (cf. 3).[14]

My aim here is not to evaluate whether we should employ Berndt Rasmussen's solution or maintain the dyadic distinction (and if so, in which form). My aim is, instead, to illustrate that there is disagreement about discrimination's conceptual structure. This suggests that, while keeping these distinctions in mind, it might be fruitful to (also) look elsewhere to arrive at a distinction between direct and indirect affirmative action. This is exactly what I will do. I suggest that we start by looking at what seems to be paradigmatic cases of the two forms of affirmative action, identifying their features, and building a definition which captures these features. This is to say that I suggest that we at least start by using a *paradigm-based method*, as opposed to traditional *conceptual analysis*. In the latter, the aim is to identify necessary and sufficient conditions by consecutively going through cases that eliminate more and more features—"trial by

[12] Katharina Berndt Rasmussen, "Implicit Bias and Discrimination," *Theoria* 86, no. 6 (2020): 727–48, https://doi.org/10.1111/theo.12227.

[13] See ibid., 738, for the table.

[14] Ibid., 736–37.

counter-example," as Fricker calls it.[15] On the former, instead, the aim is to capture the paradigmatic features of the phenomenon—the paradigmatic cases, the concept in its basic form—knowing full well that it might be possible to provide a thinner account if we were interested in identifying necessary conditions. Why use the former instead of the latter? Fricker explains it well:

> Why adopt this paradigm based method when one could engage in the cleaner business of conceptual analysis? The answer, in short, is that analysis—understood as the attempt to achieve necessary and sufficient conditions—is not an appropriate method for any subject matters which have philosophically important features that are not necessary conditions. Such features will not figure in any strict definition, for the requisite trial by counter-example must ultimately eliminate them. And yet if these are explanatorily basic features, they are just the sort of thing that needs to be preserved in a philosophical account that aims to explain the nature of the practice in all its internal diversity. Successful analysis delivers the highest-common-denominator set of features of X; but where X is an internally diverse practice there is a significant risk that the highest common denominator will turn out to be very low, delivering an extremely thin account.[16]

I suspect that affirmative action is precisely a subject matter where some of its philosophically important features are not necessary conditions. After all, that is often the case with complex social phenomena.[17] So I will start by providing a definition using the paradigm-based method. Having done that, we can explore whether there is a thinner account to be had.

Let us thus start with what I take to be a paradigmatic example of direct and indirect affirmative action, drawing from US case law:

> *Grutter*. Because of a lack of diversity in its student body—particularly, due to the low number of Black students—a prestigious public university uses race as a factor in admissions to admit more Black students.[18]
>
> *The Texas Ten Percent Rule*. Due to the low number of Black students at the most prestigious public universities, and due to the existence of de facto school segregation,

[15] Miranda Fricker, "What's the Point of Blame? A Paradigm Based Explanation," *Noûs* 50, no. 1 (2016): 166, https://doi.org/10.1111/nous.12067.

[16] Fricker, "What's the Point?" 166.

[17] And as we will see later in this section, intentionality is not a necessary condition of direct and indirect affirmative action.

[18] As the name indicates, this is loosely based on Grutter v. Bollinger, 539 U.S. 306 (2003).

> the legislature enacts a law instructing all public universities in the state to admit the top 10 percent of every high school's graduates.[19,20]

Grutter is a paradigmatic example of direct affirmative action, and the Texas Ten Percent Rule is a paradigmatic example of indirect affirmative action. What can we say about the cases? In both cases, the initiative is taken, at least partly, as a *response* to a state of affairs which is deemed unsatisfactory in some sense: the particularly low number of Black students at prestigious universities. Affirmative action, whether direct or indirect, is pursued to alter this state of affairs. And this gives us reason to think that affirmative action, in its basic form at least, is *intentional*.[21] If so, it is not intentionality which distinguishes direct from indirect affirmative action. They have another thing in common as well. Both are reasonably expected to distribute *benefits*—places at prestigious universities—to members of a *disadvantaged* (designated) group, and to do so disproportionately, both compared to the majority group and the status quo.[22] What instead distinguishes Grutter and the Texas Ten Percent Rule is that the latter is *facially neutral*, but the former is not. Grutter is facially non-neutral: it uses race as an explicit criterion, giving additional points if one is a Black applicant, but not if one is a White applicant. The Texas Ten Percent Rule, on the other hand, is facially neutral. It does not matter whether you are a Black or a White applicant: as long as you are among the top ten percent of your graduating class, you will be admitted. This seems to be the central difference between the two forms of affirmative action: direct affirmative action is not facially neutral; indirect affirmative action is. These considerations suggest the following definitions:

> *Direct Affirmative Action*. A facially non-neutral initiative (a policy, law, etc.) pursued at least partly with the intention and reasonable expectation of disproportionately

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[19] As the name indicates, this is loosely based on the Texas top ten percent rule; see H.B. 588, 75th Tex. Leg. (1997). Both Khaitan, *A Theory*, 84–85, and Sabbagh, "The Rise," 486–87, point to the Texas top ten percent rule as an example of indirect affirmative action.

[20] There is a difference between *Grutter* and the Texas Ten Percent Rule. The former is pursued by a particular university, whereas the latter is pursued, first and foremost, by the legislature. This is not a paradigmatic difference between direct and indirect affirmative action. In the direct case, it could just as well have been the legislature enacting a policy, and in the indirect case, the policy could have been pursued by a particular university. So I set this difference between the two cases aside.

[21] This is in line with the definitions of affirmative action provided by Elizabeth Anderson, *The Imperative of Integration* (Princeton: Princeton University Press, 2010), 135; Carl Cohen and James Sterba, *Affirmative Action and Racial Preference: A Debate* (Oxford: Oxford University Press, 2003), 200; Robert Fullinwider, "Affirmative Action," in *The Stanford Encyclopedia of Philosophy*, ed. E. N. Zalta (2024), https://plato.stanford.edu/archives/fall2024/entries/affirmative-action/; Khaitan, *A Theory*, 216; Sabbagh, "The Rise," 470.

[22] See also Khaitan, *A Theory*, 84. "Designated" groups as in those composing the prohibited grounds of discrimination in discrimination law, such as race, religion or sex.

> benefiting members of a disadvantaged (designated) group due to their position in the current state of affairs.
>
> *Indirect Affirmative Action*. A facially neutral initiative (a policy, law, etc.) pursued at least partly with the intention and reasonable expectation of disproportionately benefiting members of a disadvantaged (designated) group due to their position in the current state of affairs.

This is how I propose that we understand direct and indirect affirmative action in their paradigmatic forms.[23] Again, that the initiative is facially non-neutral means that it is "directly sensitive to a prohibited ground,"[24] such as race, and that the initiative is facially neutral means that it is not directly sensitive to such a ground. Grutter is directly sensitive to such a ground: it is sensitive to whether the applicant is Black or White. The Texas Ten Percent Rule is not sensitive to race in this way. It is facially neutral. And I parenthesize "designated" to point out that one can go narrower or broader here—narrower if one limits the relevant groups to those who qualify as protected in discrimination law (such as those based on race or sex), or broader if one wants to capture, say, socioeconomic status as a potentially relevant category.[25]

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[23] I do not want to pretend that I am the first to put forward definitions of direct and indirect affirmative action. In fact, as terms, direct and indirect affirmative action are twice borrowed. They originate from ordinary anti-discrimination law provisions, targeting direct and indirect discrimination (as mentioned above), and have then been co-opted to describe two forms of affirmative action, both by some empirical scholars (such as Sabbagh), and, most prominently, by Tarunabh Khaitan in his book on discrimination law. According to Khaitan, "direct affirmative action measures are, as the name suggests, directly sensitive to a prohibited ground," whereas "indirect affirmative action measures do not distribute benefits based on protected grounds, but they are nonetheless designed to have a disproportionately beneficial impact on protected groups" (Khaitan, *A Theory*, 84–85; see also Sabbagh, "The Rise," 471–472). The main difference between our definitions is that whereas I provide a paradigm-based definition, Khaitan does not. And whereas Khaitan takes an intention to benefit a minority group to be a necessary condition for affirmative action, I take it to be a paradigmatic, but not a necessary, condition. There are also some smaller differences between our definitions. For instance, according to Khaitan, for a measure to count as affirmative action, "securing some benefit to members of protected groups must be the *main* purpose of the measure" (Khaitan, *A Theory*, 217; my italics). That is not the case on my definition of paradigmatic affirmative action. An affirmative action policy may be pursued for several reasons. If some politicians implement a facially non-neutral scheme partly to benefit members of a disadvantaged group, and partly to get reelected because they know that the voters are in favor of this policy, the measure counts as paradigmatic direct affirmative action on my definition (cf. "at least partly" in my definition), but it doesn't count as direct affirmative action on Khaitan's definition. In terms of our aims, Khaitan is primarily interested in showing how direct and indirect affirmative action may serve the same goal—eliminating relative group disadvantage—whereas I primarily explore some of the special features of indirect affirmative action. I thank two anonymous readers for urging me to address this and for useful suggestions.

[24] Khaitan, *A Theory*, 84.

[25] On whether discrimination law should be extended to include socioeconomic status, see Steuwer and Lippert-Rasmussen, "Poverty."

But this is direct and indirect affirmative action in their paradigmatic forms. They also come in non-paradigmatic forms, as I will now show. To see this, we must consider the place of intentions in affirmative action. Consider the following:

> a suitable definition [of affirmative action] should allow for certain schemes to count as affirmative action whatever the intention behind them. Most people feel a strong pull toward calling, say, quotas for women and minorities cases of affirmative action, even when we learn that the intentions behind the schemes were totally unrelated to the situation of women and minorities, but simply, say, implemented with the aim of getting re-elected.[26]

Lippert-Rasmussen's point is, to phrase it in my terms, that an initiative can amount to affirmative action even if it is not taken with the intention of benefiting members of a disadvantaged group. A quota for women is affirmative action even when it is not implemented to benefit women. What should we think of this suggestion? I am not sure that his example—quotas implemented with the aim of getting re-elected—actually shows that particular intentions are not necessary for something to count as affirmative action. Suppose that the voters want quotas for women to benefit women from the injustices they face, and the politicians implement the quotas to satisfy the voters' preferences with the aim of getting re-elected. Although it is true that the politicians themselves do not have the intention of benefiting women, they are acting based on the voters' intention of benefiting women. The intention of benefiting women is at least part of the story here. It would be better with a cleaner example, one where the intention of benefiting women is not present at all. So, suppose instead that the politicians implement the top 10% rule to motivate students across the state to work harder, with no intention to benefit racial minorities. It just so happens that the policy also ends up disproportionately benefiting racial minorities (this was not in any way foreseen, let us assume). Does this amount to affirmative action in favor of racial minorities? I think it does, but it is not a paradigmatic instance of affirmative action in favor of racial minorities. Indeed, the example suggests that we may distinguish two different forms of indirect affirmative action:

> *Intentional Indirect Affirmative Action* (paradigmatic). A facially neutral initiative (a policy, law, etc.) pursued at least partly with the intention and reasonable expectation of disproportionately benefiting members of a disadvantaged (designated) group due to their position in the current state of affairs.

[26] Kasper Lippert-Rasmussen, *Making Sense of Affirmative Action* (Oxford: Oxford University Press, 2020), 4.

> *Non-intentional Indirect Affirmative Action* (non-paradigmatic). A facially neutral initiative (a policy, law, etc.), which disproportionately benefits members of a disadvantaged group due to their position in the current state of affairs, but which is pursued without an intention and reasonable expectation of disproportionately benefiting members of this disadvantaged (designated) group.

In response to the example above, I would say that the policy amounts, not to intentional indirect affirmative action, but to non-intentional indirect affirmative action in relation to racial minorities. I think this is a plausible result. And it is an expected result of providing a paradigm-based definition. When doing so, one is aware, as I pointed out above, that there could be a thinner definition to be had. After all, one is not seeking to identify necessary and sufficient conditions. And as this discussion shows, there is a form of indirect affirmative action which is non-paradigmatic: a form on which an intention to disproportionately benefit members of a disadvantaged group is not a necessary condition. Thus, I suggest that we distinguish between intentional indirect affirmative action (the paradigmatic form) and non-intentional indirect affirmative action (the non-paradigmatic form). This shows that an intention to benefit is not a necessary condition for indirect affirmative action.

We may do the same in relation to direct affirmative action. Recall Berndt Rasmussen's example of discrimination which is facially non-neutral and non-intentional: due to implicit racist bias, an employer may employ a facially non-neutral rule unintentionally, e.g., unintentionally ranking applications by White applicants better than equally good applications by Black applicants. Now, imagine that an employer has an implicit *egalitarian* bias: they unintentionally rank applications by Black applicants better than equally good applications by White applicants. This case suggests that we also distinguish paradigmatic and non-paradigmatic forms of direct affirmative action:

> *Intentional Direct Affirmative Action* (paradigmatic). A facially non-neutral initiative (a policy, law, etc.) pursued at least partly with the intention and reasonable expectation of disproportionately benefiting members of a disadvantaged (designated) group due to their position in the current state of affairs.
>
> *Non-intentional Direct Affirmative Action* (non-paradigmatic). A facially non-neutral initiative (a policy, law, etc.), which disproportionately benefits members of a disadvantaged group, but which is pursued without an intention and reasonable expectation of disproportionately benefiting members of this disadvantaged (designated) group.

The case of the employer with an implicit egalitarian bias is an instance of non-intentional direct affirmative action: they unintentionally rank applications by Black applicants better than equally good applications by White applicants. This type of direct affirmative action is different from the paradigmatic form, which is intentional, such as a policy where 10% of the seats are reserved for Black applicants with an intention to disproportionately benefit Black people due to their position in the current state of affairs.[27] Like indirect affirmative action, direct affirmative action also comes in a paradigmatic and a non-paradigmatic form.

In sum: by using a paradigm-based approach, I have put forward a definition of direct and indirect affirmative action. I have argued that what distinguishes direct and indirect affirmative action in their paradigmatic forms is not that one is intentional and the other is not—they are, paradigmatically, both intentional—but that the former is not facially neutral, whereas the latter is. But direct and indirect affirmative action also come in non-paradigmatic forms, I have argued. And this has helped us see that an intention to benefit is not a necessary condition for direct and indirect affirmative action, but only a paradigmatic one. In what follows, I will limit my discussion to direct and indirect affirmative action in their paradigmatic forms. Since there has not been much discussion of the morality of indirect affirmative action, and its relationship to direct affirmative action, to begin with, I think it makes most sense to start with their paradigmatic forms. And then, down the road, we can see whether what I have to say about those travels to direct and indirect affirmative action in their non-paradigmatic forms. But that will be a task for another day. Indeed, a motivating idea underlying this paper is that the distinction between direct and indirect affirmative action deserves a lot more attention than it has received.

III. THE MORALITY OF INDIRECT AFFIRMATIVE ACTION

Direct affirmative action is the type of affirmative action that is usually discussed in the literature. So, the distinction between direct and indirect affirmative action raises

[27] Consider a trickier case. Suppose a university admits equal numbers of men and women, even when men are less qualified, but that it does so to have equal numbers of men and women. But, one might worry, my definitions of affirmative action do not capture this as affirmative action in favor of men because it is a requirement of affirmative action, on my definitions, that it targets disadvantaged groups. Two responses. First, I think there will necessarily be some trade-offs when we define affirmative action. We shouldn't necessarily expect, then, to come up with a definition with which everyone agrees (compare Cohen and Sterba, *Affirmative Action*, 279). Second, if men are not (locally) disadvantaged, I think this policy amounts to *favoritism*. If men are (locally) disadvantaged, the policy may amount to intentional or non-intentional direct affirmative action (depending on whether we count local disadvantage, and whether there is an intention to benefit men).

an interesting question: what is the morality of indirect affirmative action? This is the question that I take up in this section. I do so in three parts. I start by arguing that pursuing indirect affirmative action is not necessarily unjust. This does not yet give us a positive reason to implement indirect affirmative action; it simply establishes the negative point that it would not necessarily be unjust to do so. But I then argue that there is sometimes good reason to pursue indirect affirmative action. And when we add that to the negative part, we get the result that we should sometimes pursue indirect affirmative action.[28] This leads me to the third part, in which I explore the relationship between direct and indirect affirmative action. I argue that, in a politically inegalitarian climate like the current one in the US, indirect affirmative action may be particularly strategically useful vis-*á*-vis direct affirmative action for the egalitarian.

A clarification is in order. As I have pointed out, most of the literature on affirmative action fails to distinguish between direct and indirect affirmative action, and simply takes affirmative action to mean direct affirmative action. Because of this, arguments for and against affirmative action have almost exclusively been discussed in relation to direct affirmative action. My aim in the next two subsections is therefore to extend this discussion to indirect affirmative action: to explore whether indirect affirmative action can survive these objections, and whether some of the reasons to pursue direct affirmative action also provide reason to pursue indirect affirmative action. This is not to suggest that I believe direct affirmative action is necessarily unjust. I do not believe that it is, but I do not have the space to make this argument here.

III.A. Indirect Affirmative Action Is Not Necessarily Unjust

I will start by arguing that indirect affirmative action is not necessarily unjust. This is a matter of defending indirect affirmative action against objections. Obviously, I cannot, in this paper, consider every conceivable objection to indirect affirmative action. Instead, I will consider the most prominent objections put forward against affirmative action, partly because these have played the largest role in discussions of affirmative action, partly because the frequency with which they appear suggests that they may be considered to be the strongest objections to affirmative action. These are the *stigma objection*, the *balkanization objection*, the *merit objection*, the *publicity objection*, and the *mismatch objection*. I will argue that these fail to establish that indirect affirmative action is necessarily unjust. I should clarify immediately that I do not aim to show that indirect affirmative action can *never* be unjust. I do not think that is true. What I instead

[28] Strictly speaking, that does not follow, since it could be that there is not an overlap between the instances in which indirect affirmative action is not unjust and the instances in which we have good reason to pursue indirect affirmative action. I believe they do overlap but don't argue for this claim here.

aim to show is that these objections fail to show that it is necessarily unjust to pursue indirect affirmative action.

The stigma objection. A common objection to affirmative action is that it stigmatizes its recipients. Here is Cohen, dramatically putting forward this objection:

> If some demon had sought to concoct a scheme aimed at undermining the credentials of minority scholars, professionals, and students, to stigmatize them permanently and humiliate them publicly, no more ingenious plan could have been devised than the system of preferences now defended as a social need and great favor to minorities.[29]

The quote clearly illustrates the gist of the stigma objection: affirmative action leads to stigmatization of recipients (and other members of the recipient group). Indeed, it may even threaten the self-esteem of the recipients, e.g., because they start to question whether they got hired because of their race or gender.[30]

To discuss this objection, it may be useful to focus on a particular example of indirect affirmative action. So, suppose we provide a benefit in university admissions to applicants whose parents did not go to university, knowing that members of a particular disadvantaged group are significantly more likely to have parents who never went to university.[31] It is, in the end, obviously an empirical question whether this indirect affirmative action policy would lead to stigmatization of its recipients. But I think there is some reason to think that, at least sometimes, it would not. To stigmatize an affirmative action recipient, the stigmatizer would need to know where to direct their stigma. With facially non-neutral policies, especially when these single out groups with visible characteristics, such as race or gender, it may be fairly easy to identify potential affirmative action recipients and stigmatize accordingly. But it is not visible in the same way whether a person's parents went to university or not. And stigmatizers may not be particularly well-informed: they might not know that there is a high correlation between membership of a protected group and having parents who never went to university. If so, identifying and stigmatizing potential recipients will be much more difficult.[32] Indeed, they might not even be aware that the policy amounts to affirmative action. This will most likely be the case when the policy can be rationalized

[29] Cohen and Sterba, *Affirmative Action*, 121. See also Tom L. Beauchamp, "In Favor of Affirmative Action," in *The Affirmative Action Debate*, ed. S. M. Cahn (New York: Routledge, 2002), 216; Lippert-Rasmussen, *Making Sense*, chap. 9.

[30] Thomas Mulligan, *Justice and the Meritocratic State* (New York: Routledge, 2018), 111.

[31] I borrow this example from Khaitan, *A Theory*, 232.

[32] Insofar as there is a relationship between being stigmatized and feeling stigmatized, this should also help, and importantly so, to reduce the threat of recipients feeling stigmatized. The rationalization point that I mention in the next few sentences should also help reduce feelings of being stigmatized.

independently of the benefits it provides to the protected group.[33] And this seems to be the case in this example, the rationale being that it will be much more difficult to be admitted to university if your parents never went to university than if they did. So, although it is ultimately an empirical question, there is reason to think that indirect affirmative action, precisely because it is facially neutral, will not necessarily lead to stigmatization of its recipients.

Even if we assume that an indirect affirmative action policy would lead to stigmatization of its recipients, it is not clear why this should necessarily make the policy unjust. For one thing, there may be more stigmatization, including feelings of being stigmatized, in the status quo (without affirmative action). If so, pointing to the policy's stigmatizing effect does not seem to be a good argument for the policy being unjust. For another thing, it may be, instead, that it is not the indirect affirmative action policy which is unjust, but the stigmatizing *response* to the affirmative action policy. For instance, it may be that by stigmatizing a potential recipient, the stigmatizer wrongs the potential recipient by disrespecting their individual agency[34] or by committing an epistemic injustice against them.[35] If the stigmatizing response is unjust, then pointing to that stigmatizing response is not a good objection to the policy, especially not if potential recipients would prefer the presence of policy and stigma to the absence of both.[36]

The balkanization objection. In *Shaw v. Reno*,[37] Justice O'Connor put forward the balkanization objection:

> Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions.[38]

Rather than leading to an integrated society, the balkanization objection asserts that affirmative action leads to antagonism between groups; indeed, that "interventions

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[33] Khaitan, *A Theory*, 232.

[34] Cf. Benjamin Eidelson, *Discrimination and Disrespect* (Oxford: Oxford University Press, 2015).

[35] Cf. Lippert-Rasmussen, *Making Sense*, 184–87.

[36] Cf. Andreas Bengtson and Viki Møller Lyngby Pedersen, "Affirmative Action, Paternalism, and Respect," *British Journal of Political Science* 54, no. 2 (2024): 422–36, https://doi.org/10.1017/s0007123423000273.

[37] Shaw v. Reno, 509 U.S. 630 (1993).

[38] Shaw v. Reno, 657. Quoted in Reva B. Siegel, "From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases," *The Yale Law Journal* 120, no. 6 (2011): 1295.

promoting racial integration can become a locus of racial conflict."[39] This objection "attends to the concerns of the dispreferred" and asserts that affirmative action results in a lack of social cohesion in society.[40]

There are similarities between the balkanization objection and the stigma objection in the sense that what is objectionable comes by as a result of how people respond to the affirmative action policy. In the stigma case, because majority individuals stigmatize potential affirmative action recipients. In the balkanization case, because majority individuals respond with animus or something similar to the members of the recipient group, leading to conflict between groups. This similarity is useful in the present context as it suggests that a response to one may also be a response to the other. And we saw in the discussion of the stigma objection that there are instances of indirect affirmative action that are not likely to cause stigmatization. This was the case with the example of providing a benefit in university admissions to applicants whose parents did not go to university. If that was true in the stigmatization case, it is likely true in the balkanization case as well, precisely because both are a result of how advantaged groups respond to the policy. This—that indirect affirmative action may not lead to balkanization—seems to be in line with discussions in the US Supreme Court. As Siegel points out,

> Antibalkanization understands that race-conscious, facially neutral interventions may promote social cohesion by promoting equal opportunity, as Justice Kennedy demonstrates in *Parents Involved* and *Ricci* when he discusses permissible forms of race-conscious, facially neutral action by administrators siting school districts and employers complying with the disparate impact provisions of federal employment discrimination law.[41]

Of course, this is not to deny that some indirect affirmative action policies could lead to balkanization.[42] It is just to say that there is good reason to believe that some will not. And that suffices for our purposes.

Even setting that aside, there are clear limits to the balkanization objection. First, there might be balkanization in the status quo (without affirmative action), such that there would be less balkanization overall with indirect affirmative action than without.

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[39] Siegel, "Antibalkanization," 1300; see also Louis P. Pojman, "The Case Against Affirmative Action," *International Journal of Applied Philosophy* 12, no. 1 (1998): 97–115, https://doi.org/10.5840/ijap199812111.

[40] Siegel, "Antibalkanization," 1301.

[41] Ibid., 1283.

[42] Ibid., 1302.

If so, pointing to the policy's balkanizing effect does not seem to be a good argument for the policy being unjust (as I similarly pointed out in response to the stigma objection). Second, advantaged groups could always threaten that an intervention to mitigate injustice would lead to social discordance. After all, the discordance would follow from their response to the intervention. But this clearly cannot always be a good objection to an intervention. If rich people complained that a taxation scheme would lead to balkanization between rich and poor people, we would not think that would be a good objection to having a taxation scheme. And the main reason for this is that *they would make it true* that there would be balkanization: it would be a result of how they responded to poor people as a result of the taxation scheme, and they could have responded differently. As Cohen has taught us, such a response by rich people would not be a good argument for the scheme being unjust.[43] If so, we should be able to say the same in response to the balkanization objection, at least in relation to some indirect affirmative action schemes (given the similarities between the tax case and the no-parent university case, the latter indirect affirmative action scheme seems to be such a case). Again, it may be the response to the policy that is unjust, and not the policy itself.

The merit objection. Another prominent objection to affirmative action, the merit objection, says that affirmative action violates the entitlement of the best qualified. If we pursue affirmative action in, say, hiring or in admissions to university, and hire or admit a minority candidate who is less qualified than a majority candidate, we wrong the majority candidate by failing to give them that to which they are entitled in virtue of being the best qualified, to wit, the job or the spot. This is, in essence, the merit objection.[44]

It is important first to make certain that we do not confuse the view that the best qualified should be hired with other views with which it is correlated. If we fail to do so, we may give too much credit to the merit objection. We must distinguish the view that the best qualified should be hired from the view that one should not disappoint applicants' *reasonable expectations*.[45] If hiring usually takes place in accordance with merit, people may reasonably expect, when they apply for a post, that the post will be filled according to merit. So if we do not fill the position according to merit, we

[43] G.A. Cohen, "Incentives, Inequality and Community," in *The Tanner Lectures on Human Values*, ed. G. Petersen (Salt Lake City: University of Utah Press, 1992), 263–329; G.A. Cohen, *Rescuing Justice and Equality* (Cambridge: Harvard University Press, 2008).

[44] See, e.g., Matt Cavanagh, *Against Equality of Opportunity* (Oxford: Clarendon Press, 2002), 33; Lippert-Rasmussen, *Making Sense*, 230.

[45] Cavanagh, *Against*, 72–76; Lippert-Rasmussen, *Making Sense*, 234–35.

disappoint the applicants' reasonable expectations. But this does not speak in favor of the view that the best qualified must be hired, as opposed to the view that we should not disappoint reasonable expectations. If indirect affirmative action were announced in advance, it would not disappoint reasonable expectations, and it would thus not be unjust for this reason. We must also be careful not to suppose that the best qualified must be hired because we are afraid that insufficiently qualified candidates will be hired.[46] We may simply restrict indirect affirmative action to those candidates who are sufficiently qualified.[47] The two factors we have just considered—reasonable expectations and (in)sufficient qualifications—may provide an error theory for why the view that the best qualified should be hired seems to have much force. But it is important that we distinguish these considerations; they do not provide support to the merit objection.

I suppose this takes most of the force out of the objection. But even if we assume this is not the case, it is not even clear that indirect affirmative action entails that the best qualified isn't hired. Two distinctions are relevant here. First, merit can be understood in a *narrow* sense or in a *broad* sense. Merit in the narrow sense is technical skills, e.g., how many clams you can collect in an hour. Merit in this sense is unaffected by whether you are a member of a minority group. On a broad understanding of merit, such group membership may be a qualification. As Dworkin says, "there is no combination of abilities and skills and traits that constitutes 'merit' in the abstract … If a black skin will, as a matter of regrettable fact, enable another doctor to do a different medical job better, then that black skin is by the same token 'merit' as well."[48] If a neighborhood with Black people is medically underserved, being a Black doctor may relevantly count as merit.[49] If so, an indirect affirmative action scheme may lead to hiring the best qualified candidate in the broad sense. And there is no reason to believe that the narrow understanding of merit is the most appropriate one in all situations.

Second, there is a difference between being most qualified, *individually speaking*, and being most qualified, *collectively speaking*.[50] Suppose you must work in a team. Whether you are the most qualified, individually speaking, is independent of who else

[46] Brian Carey, "Justice in Hiring: Why the Most Qualified Should Not (Necessarily) Get the Job," *Journal of Applied Philosophy* 41, no. 4 (2024): 731–44, https://doi.org/10.1111/japp.12727; Lippert-Rasmussen, *Making Sense*, 238–41.

[47] Beauchamp, "In Favor," 210.

[48] Ronald Dworkin, "Bakke's Case: Are Quotas Unfair?" in *The Affirmative Action Debate*, ed. S. M. Cahn (New York: Routledge, 2002), 103–112, 109. To avoid misunderstanding: "Another doctor" refers to a doctor with "a black skin."

[49] Lippert-Rasmussen, *Making Sense*, 242; but see Judith Jarvis Thomson, "Preferential Hiring," *Philosophy & Public Affairs* 2, no. 4 (1973): 364–84.

[50] This resembles Lippert-Rasmussen's, *Making Sense*, 139, distinction between an *individualistic* and a *holistic* notion of talents. See also Thomson, "Preferential," 366.

will be working in the team. Whether you are the most qualified, collectively speaking, is dependent on who else will be working in the team. If the others on the team are men, the team might benefit from the diversity of you being a woman, such that you are the most qualified in the collective sense (but not necessarily in the individual sense). Indirect affirmative action may lead to hiring the most qualified, collectively speaking. And there is no reason to believe that the individual understanding of merit is the most appropriate in all situations. If so, the merit objection fails to show that indirect affirmative action is necessarily unjust.

The publicity objection. A common charge against affirmative action is its lack of publicity.[51] The charge is that it violates what Lippert-Rasmussen refers to as *the liberal publicity constraint*: "the principle that public policies, rules, etc. must be stated openly in such a way that they are accessible to the public."[52] This makes affirmative action unjust. Two implicit premises are assumed here: that anything that violates the publicity constraint is unjust, and that affirmative action violates the publicity constraint. I address these premises in turn.

Clearly, there must be exceptions to the liberal publicity constraint. Few would say that the work of intelligence agencies is unjust because it is not accessible to the public.[53] What explains this exception? Presumably that it would undermine the work of intelligence agencies if their work was accessible to the public. And since the work is important, that would be undesirable. But one might then point out that the "work" of some indirect affirmative action policies is important as well, especially when there is much injustice in society. And it might also be that the work of some of these policies would be undermined if it was accessible to the public. So why couldn't indirect affirmative action also sometimes be an exception to the liberal publicity constraint?

And even if indirect affirmative action must satisfy the liberal publicity constraint to not be unjust, there is nothing in indirect affirmative action as such that precludes stating openly why the policy is pursued, e.g., to secure equality of opportunity between members of disadvantaged and advantaged groups. While it may be true that some affirmative action policies that have been pursued have failed to satisfy the liberal publicity constraint, that cannot be an objection to indirect affirmative action as such.

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[51] Beauchamp, "In Favor," 219.

[52] Lippert-Rasmussen, *Making Sense*, 211. On publicity, see, e.g., Cohen, *Rescuing*; Brian Kogelmann, *Secret Government: The Pathologies of Publicity* (Cambridge: Cambridge University Press, 2021); Kasper Lippert-Rasmussen, "Publicity and Egalitarian Justice," *Journal of Moral Philosophy* 5, no. 1 (2008), https://doi.org/10.1163/174552408x306717; John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971); Bernard Williams, *Ethics and the Limits of Philosophy* (London: Fontana Press, 1985).

[53] Lippert-Rasmussen, *Making Sense*, 211n5.

Those who pursue the policies could state the aim to the public, in which case they would not be unjust *for publicity reasons*. Perhaps the worry is that affirmative action will not work as well if stated publicly as when done in secret.[54,55] But this does not show that indirect affirmative action is unjust. It cannot be an objection to a just policy that an unjust policy would be more effective. And if indirect affirmative action must satisfy the liberal publicity constraint to be just, the objection would have precisely this form: it would object to the public indirect affirmative action policy (the just one) that the secret indirect affirmative action policy (the unjust one) would be more effective. But that is neither here nor there if we do not want to pursue unjust policies. Thus, the publicity objection fails to show that indirect affirmative action is necessarily unjust.

The mismatch objection. Let us consider a final objection. According to this objection, affirmative action is unjust because it is *underinclusive* and *overinclusive* in relation to beneficiaries. When it comes to beneficiaries, affirmative action is underinclusive because it does not benefit some who should be benefited (disadvantaged minority individuals who will not be positioned to take advantage of the opportunities provided

[54] Sabbagh, "The Rise," 496.

[55] Indeed, an anonymous reader worries that this response—that indirect affirmative action may satisfy the publicity constraint—might undermine parts of my response to the stigma and balkanization objections. In relation to stigma, one might worry that if indirect affirmative action satisfies the publicity constraint, the stigmatizer will know where to direct their stigma (undermining the epistemic response to the stigma objection). In relation to balkanization, if majority individuals become aware of the indirect affirmative action policy, they may respond in antagonistic ways against the recipient group (undermining that part of my response to the balkanization objection). But I think this apparent tension can be resolved quite neatly. (Also, note that my first response—that indirect affirmative action may not always have to satisfy publicity—is not vulnerable to the concern discussed in this footnote.) Notice that these responses from the majority—stigmatization and balkanization—are unjust responses to at least some indirect affirmative action policies, as I argued above, and that it may therefore be the response to the policy, and not the policy itself, that is unjust. This suggests that we may distinguish two readings of the publicity constraint. We may understand the publicity constraint in a moralized way, such that we assume that people will not respond unjustly to the policy being public, or we understand the publicity constraint in a non-moralized way, such that people may respond unjustly to the policy being public. It is true that if we assume the non-moralized publicity constraint, it might be that satisfying this constraint would give majority individuals the opportunity to respond in unjust stigmatizing and balkanizing ways. But in that case, it seems that the problem is the non-moralized publicity constraint, and not the indirect affirmative action policy. If, instead, we assume the moralized publicity constraint, then indirect affirmative action can satisfy this publicity constraint in a way that does not undermine the particular responses to the stigma and balkanization objections in a relevant way. The publicity objection runs into a dilemma if it is to show that indirect affirmative action is necessarily unjust: either the publicity constraint is moralized, but indirect affirmative action doesn't necessarily violate this constraint, or the publicity constraint is non-moralized, such that it doesn't exclude unjust responses from majority individuals (such as stigmatization and balkanization), but then it is not clear why the indirect affirmative action policy must satisfy this constraint. Compare Cohen, *Rescuing*, 363–64; Lippert-Rasmussen, *Making Sense*, 215–16. I return to the issue of publicity in Section III.C.

by affirmative action, and majority individuals who will have faced relevantly similar injustices as minority individuals), and it is overinclusive because it benefits some who should not be benefited (advantaged minority individuals who will be positioned to take advantage of the opportunities).[56]

While it may be a good objection to some affirmative action schemes, the mismatch objection cannot establish that indirect affirmative action is necessarily unjust. First, a mismatch must be relative to a particular aim. There is no fact of the matter about the mismatch involved in a policy unless we know what the policy's aim is. And we can imagine many different aims that could be pursued in indirect affirmative action policies. If our aim is to mitigate patterned inequality, then overinclusiveness may not be a worry, as Eidelson illustrates in the context of anti-discrimination norms:

> If we understand anti-discrimination norms as interventions to reduce patterned inequality, then particular individuals are granted rights under those norms for the simple reason that their fates are bound up with the larger social problem under attack. In other words, it happens that getting them into more favorable positions would be an improvement in the pattern. There are undoubtedly some other individuals who are just as badly off and yet receive no similar aid, and there are surely others who are morally wronged by the decisions made about them, in the same domains of decision-making, and yet are given no legal recourse. Excluding those others from the protection of anti-discrimination laws is justified, from this point of view, not because they are less deserving of help or have not suffered as serious a wrong, but simply because helping them would not have the social benefit of undermining patterned inequality.[57]

Second, most, if not all, policies in societies as we know them will involve mismatches. The penal system also involves a mismatch—some guilty people go free, and some non-guilty people do not—but that would not necessarily lead us to the conclusion that the penal system is unjustified.[58] This shows that the relevant concern is not whether a policy involves a mismatch, but whether it involves less or more of a mismatch than relevant alternatives.[59] If there is a relevant alternative to indirect affirmative action which involves less of a mismatch, then we may conclude that the affirmative action policy is unjust, all

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[56] Khaitan, *A Theory*, 224; Charles Lawrence and Mari J. Matsuda, *We Won't Go Back: Making the Case for Affirmative Action* (Boston: Houghton Mifflin, 1997), 190–91; Lippert-Rasmussen, *Making Sense*, 190–91.

[57] Benjamin Eidelson, "Patterned Inequality, Compounding Injustice, and Algorithmic Prediction," *American Journal of Law and Equality* 1, no. 1 (2021): 262, https://doi.org/10.1162/ajle_a_00017.

[58] Kwame Anthony Appiah, "Group Rights and Racial Affirmative Action," *The Journal of Ethics* 15, no. 3 (2011): 265–280, 275, https://doi.org/10.1007/s10892-011-9103–5; Lippert-Rasmussen, *Making Sense*, 200–202.

[59] Lippert-Rasmussen, *Making Sense*, 203.

else equal. But it is highly unlikely that indirect affirmative action will *always* be worse than a relevant alternative policy in terms of mismatch, especially once we remember that "when faced with a mismatch involving an affirmative action program, it is always possible that it could be revised in such a way that the relevant mismatch is reduced."[60,61] And, finally, sometimes the mismatch in a given indirect affirmative action policy may simply be a result of society being extremely unjust—the mismatch is a result of where the injustice has "placed" people in society—in which case what we should object to may be the prior injustice, and not the indirect affirmative action policy.

III.B. Reasons To Pursue Indirect Affirmative Action

We have seen that five prominent objections to affirmative action fail to establish that indirect affirmative action is necessarily unjust. Obviously, there could be other objections, as I said, but my responses to the objections discussed above may be useful in answering these objections as well. In any case, awaiting and setting aside such possible objections, we can (tentatively) conclude that indirect affirmative action is not necessarily unjust. This does not yet give us a positive reason to pursue indirect affirmative action—it simply establishes the negative point that it would not necessarily be unjust. So, in this section, I will point to some positive reasons to pursue indirect affirmative action. I will not spend too much time on this, partly because I will rely on arguments put forward in favor of (standard, direct) affirmative action, partly because I am more interested in exploring the question I will take up in the next section, to wit, the relationship between direct and indirect affirmative action. But first it is important to establish that there is sometimes good reason to pursue indirect affirmative action.

What I will do is to show that what I consider to be two of the strongest arguments in favor of affirmative action—the *equality of opportunity argument* and the *integration argument*—also give us reason to pursue indirect affirmative action. I do not have the space to give a full defense of these arguments, so I will rely on the assumption that it is important to secure equality of opportunity and integration and that these values give us reason to pursue direct affirmative action.[62]

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[60] Lippert-Rasmussen, *Making Sense*, 209.

[61] Is this possibility of revision true of indirect affirmative action? Or might it be (more) true of direct affirmative action? If it is (more) true of direct affirmative action, is that a problem? It might not be possible in all cases, but I also don't need that. It suffices that there are cases where, once revised, indirect affirmative action involves less, or not more, of a mismatch than direct affirmative action. And although I don't have the space to substantiate this point, I can't see why that shouldn't be true. This, at least, seems to shift the burden of proof. I thank an anonymous reviewer for raising this issue.

[62] For arguments in favor thereof, see, e.g., Anderson, *Imperative*, chap. 7; Lippert-Rasmussen, *Making Sense*, chap. 4.

First the equality of opportunity argument. This argument says that we have reason to pursue affirmative action because this brings us closer to a level playing field—a playing field in which minority and majority individuals have equal opportunities (or at least less unequal opportunities). Sher sums up this argument,

> the key to an adequate justification of reverse discrimination [affirmative action] [is] to see that practice, not as the redressing of past privations, but rather as a way of neutralizing the present competitive disadvantage caused by those past privations and thus as a way of restoring equal access to those goods which society distributes competitively.[63]

Now, we must distinguish between *formal* and *substantive* equality of opportunity. In Rawls's words, the latter requires that "those with similar abilities and skills should have similar life chances," and the former requires that "careers [be] open to talents."[64] Proponents of the equality of opportunity argument usually have substantive equality of opportunity in mind; I follow suit.

Just as direct affirmative action may lead to less inequality of opportunity, indirect affirmative action may do so as well. Consider, again, the indirect affirmative action policy of providing a benefit in university admissions to applicants whose parents did not go to university, knowing that members of a particular disadvantaged group are significantly more likely to have parents who never went to university. Since we know that (lack of) cultural capital travels from parents to children, those whose parents did not attend university can be expected to have worse opportunities to being admitted to university than those whose parents did attend university.[65] And when we add that members of a disadvantaged group are significantly more likely to have parents who did not attend university, pursuing this indirect affirmative action policy can be expected to improve the opportunities of members of this disadvantaged group vis-á-vis members of advantaged groups. I do not mean to suggest that indirect affirmative action will always promote substantive equality of opportunity. But because of how disadvantage tends to cluster,[66] there is good reason to believe that indirect affirmative action will sometimes (indeed often) promote substantive equality of opportunity. This suffices for my purposes.

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[63] George Sher, "Justifying Reverse Discrimination in Employment," in *Affirmative Action Debate*, ed. S. M. Cahn (New York: Routledge, 2002): 58–67, 61. See also Beauchamp, "In Favor," 214; Cohen and Sterba, *Affirmative Action*, 231; Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291, 337–392 (2014) (Sotomayor, J. dissenting).

[64] John Rawls, *A Theory of Justice: rev. ed.* (Cambridge: Harvard University Press, 1999), 63.

[65] Compare Lippert-Rasmussen, *Making Sense*, 88.

[66] Jonathan Wolff and Avner de-Shalit, *Disadvantage* (Oxford; New York: Oxford University Press, 2007).

The second argument I will consider is the integration argument—an argument put forward by Anderson. As she points out, "Americans live in a profoundly racially segregated society. De facto racial segregation unjustly impedes socioeconomic opportunities for disadvantaged racial groups, causes racial stigmatization and discrimination, and is inconsistent with a fully democratic society."[67] Affirmative action is justified as a way of securing integration—non-segregation and non-stigmatization—in society.

Indirect affirmative action may, like direct affirmative action, promote integration or mitigate the disadvantages of segregation. To illustrate, let's focus on the case of providing a benefit to applicants to medical school whose parents did not go to university, knowing that Black people are significantly more likely to have parents who never went to university. This indirect affirmative action policy may promote integration and mitigate the disadvantages of segregation. As Anderson says, "For professional schools, affirmative action helps remedy the severe deficit residents of segregated neighborhoods suffer in access to professional services. Black physicians are far more likely than white physicians to locate in underserved minority neighborhoods and serve far more black, Latino, and Medicaid patients, even after controlling for their location."[68] If Anderson is right, indirect affirmative action could promote non-segregation—in better integrating Black people in the medical profession and the higher echelons of society more generally—and mitigate the disadvantages of segregation—the lack of adequate access to medical services for Black people. Of course, much more could be said here. But if Anderson is correct that direct affirmative action promotes integration, we should also expect this to be true of indirect affirmative action. So there is, it seems, reasons from equality of opportunity and integration to sometimes pursue indirect affirmative action.[69]

III.C. The Strategic Usefulness Of Indirect Affirmative Action

We have seen that there is sometimes good reason to pursue indirect affirmative action. But these reasons likely also give us reason to pursue direct affirmative action.

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[67] Anderson, *Imperative*, 148.

[68] Anderson, *Imperative*, 149.

[69] There are also more radical goals than equality of opportunity and integration. Indeed, Fredman argues that equality of opportunity is not enough: "for fundamental change to occur, the structural and institutional causes of exclusion need to be changed." Sandra Fredman, "Reimagining Power Relations: Hierarchies of Disadvantage and Affirmative Action," *Acta Juridica* 1 (2017): 124–145, 140. We need transformative equality: social practices and norms must be transformed to secure inclusion of those who are excluded, such as trans people and people with disabilities. Although I don't have the space to make this argument here, I believe that indirect affirmative action can be a part of, but not the whole of, such a transformation, e.g., by providing valuable resources to those who are currently excluded. In this sense, indirect affirmative action can also serve more radical goals than equality of opportunity and integration. I thank an anonymous reader for help here.

What should we think of the relationship between direct and indirect affirmative action? In this section, I argue that, in an inegalitarian political climate like the current one in the US, indirect affirmative action is, for the egalitarian, particularly strategically useful vis-á-vis direct affirmative action when it comes to achieving egalitarian effects,[70] and that, in such circumstances, it is at least sometimes permissible for the egalitarian to pursue indirect affirmative action as a form of *egalitarian gamesmanship*.

To see what I am after, it will be useful to start by turning our attention to a discussion by Eidelson of what he calls *second-order discrimination*. Second-order discrimination is, as it were, the opposite of paradigmatic indirect affirmative action: "a person commits second-order discrimination on the basis of P when she discriminates on the basis of P in adopting a rule or decision to discriminate on the basis of Q in some other dimension of treatment."[71] For instance, the racist second-order discriminator does not discriminate directly on the basis of race, because that is prohibited (as a form of direct discrimination); instead, they discriminate on the basis of some other trait which is correlated with race to get much of the effect they would get from discriminating directly on the basis of race. The following example of second-order discrimination is instructive:

> In the late nineteenth century, Anatole French satirized French pride in the "majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread … It is true that the law against sleeping under a bridge does not discriminate on the basis of wealth, since it applies to "rich and poor alike." But the glaringly disproportionate burden that this law places on the poor is powerful evidence regarding how the law came about. It suggests discrimination on the basis of wealth in the dimension of how different people's interests are *valued* in making the laws … France's commentary alleges discrimination on the basis of wealth in the law's genesis … when the state applies the formally wealth-neutral law, it does not discriminate against the poor on the basis of wealth; it discriminates only on the basis of where one sleeps. Nonetheless, the state may be guilty of second-order discrimination on the basis of wealth.[72]

[70] Two anonymous readers note that some universities already pursue indirect affirmative action in this way (but without calling it indirect affirmative action). That might be true. I think this simply adds to the relevance of my argument. Indeed, if it is practised, it is surprising that it hasn't been considered in the scholarly literature on affirmative action. Moreover, the theoretical framework I provide might help them in their endeavours (and it might show others that it is a useful possibility). And, importantly, I provide an argument for why they might be *justified* in doing so.

[71] Eidelson, *Discrimination*, 41.

[72] Eidelson, *Discrimination*, 42.

In this case, let us suppose,[73] the French government did not want homeless people to sleep under bridges. But it was not allowed to discriminate directly based on wealth. So it adopted a rule—forbidding everyone, irrespective of wealth, from sleeping under bridges—which would primarily negatively affect homeless people. Well-off people would not need to sleep under bridges to begin with. It adopted a facially neutral rule to disproportionately disadvantage homeless people. As Eidelson points out, second-order discrimination "often involve[s] some form of subterfuge or gamesmanship on the part of the discriminator."[74] The second-order discriminator games the system to achieve the effect—in the above case, that homeless people do not sleep under bridges—that they cannot achieve by discriminating directly on the basis of wealth (because such actions are prohibited).

What makes such second-order discrimination useful is its facial neutrality when it comes to protected characteristics. In a politically egalitarian climate, it can be (more) effective for the racist to second-order discriminate rather than "first-order" discriminate. It would be unjust to do so, of course—racism, also when hidden, is unjust—but the racist effects that the racist is after will often be better realized second-orderly than first-orderly in such an egalitarian political climate.

And now we return to the current political climate in the US which is not egalitarian but highly inegalitarian. Not only is direct affirmative action prohibited, as per *SFFA*; even if we set that aside, in this political climate—which includes President Trump's executive orders regarding DEI policies—it will be strategically unwise for the egalitarian to adopt direct affirmative action policies. As an egalitarian, you do not, for fear of repercussions, want to be branded as someone engaged in affirmative action. It is in such political circumstances, I think, that indirect affirmative action has a strategic advantage vis-á-vis direct affirmative action. And the reason for this is precisely that indirect affirmative action is facially neutral; it does not single out a protected trait. Indeed, in such inegalitarian political circumstances, indirect affirmative action can be used as a form of *egalitarian gamesmanship*. By this, I mean that the egalitarian—wanting to secure justice for minorities—can game the inegalitarian political system by adopting rules which are facially neutral but which disproportionately advantage minority individuals. In this way, the egalitarian can secure some of the egalitarian effects justice requires without being branded as someone engaged in (direct)

[73] Eidelson uses the case to show that 'gamesmanship' is not a necessary condition for second-order discrimination. I agree (and note that the same is true of indirect affirmative action), but add the assumption of gamesmanship here so that it, in this respect, resembles my case of egalitarian gamesmanship (to which I turn shortly). This is not a problem, since the case is used for illustrative purposes.

[74] Eidelson, *Discrimination*, 41.

affirmative action. For instance, by intentionally selecting an admissions rule which is facially neutral but disproportionately advantages members of a racialized minority group. In this way, indirect affirmative action may be strategically useful for the egalitarian in a way that direct affirmative action is not in a political climate like the current one in the US, and this precisely because of its facial neutrality.

I recognize that this talk of egalitarian gamesmanship may sound controversial to some. So let me clarify what I am and will be arguing. Two points. First, I'm exploring the relationship between direct and indirect affirmative action. Particularly, I'm arguing that, in an inegalitarian political climate like the current one in the US, the facial neutrality of indirect affirmative action is precisely what makes it strategically useful vis-á-vis direct affirmative action when it comes to achieving egalitarian effects. Second, I want to make a preliminary case for the permissibility of pursuing indirect affirmative action as a form of egalitarian gamesmanship in such a politically inegalitarian climate. And while the two are closely related, one may agree with the first point—that, for the egalitarian, indirect affirmative action has a strategic advantage vis-á-vis direct affirmative action in a politically inegalitarian climate because of its facial neutrality—while disagreeing with the second point, e.g., because one might think that the secrecy or deceit involved in using indirect affirmative action as a form of egalitarian gamesmanship makes it impermissible. Even if I only get you on board with the first point, that is still significant: we now know more about the relationship between direct and indirect affirmative action—something we did not know much about to begin with. Having focused primarily on the first point above, then, let me now focus on the second point. This should also help to make clearer how indirect affirmative action can be used strategically by the egalitarian, thereby further substantiating the first point.

As I do not have the space to make a full defense—what I say is meant as a springboard for further discussion of the usefulness of indirect affirmative action—I think it will be useful to make my preliminary case by responding to three negative reactions that I expect some might have: (1) pursuing indirect affirmative action as a form of egalitarian gamesmanship is deceptive and therefore impermissible; (2) even if we assume it doesn't violate the law, it at least violates the spirit of the law and is therefore impermissible; (3) if second-order racist discrimination is impermissible, why isn't indirect affirmative action, egalitarian gamesmanship-style, impermissible as well?

Let me start with (1). Pursuing indirect affirmative action as a form of egalitarian gamesmanship requires some lack of transparency: to effectively game the system in a politically inegalitarian climate like the current one in the US, the egalitarian wants to

hide the real intention behind their policy.[75] For instance, they want the admission rule to look like need in a protected-characteristic-neutral way (e.g., a benefit in admission to those whose parents never went to university), although the rule is adopted to disproportionately advantage minority applicants. This lack of transparency about why one is adopting a given rule might remind some of Williams's criticism of government house utilitarianism, where policy makers use utilitarianism as their guide for making policy, while keeping this secret to the public to maximize total happiness (given the assumption that total happiness might be reduced if citizens knew that their policy makers were utilitarian).[76] They hide the real reasons for their policy choice, as it were. And this takes us back to the liberal publicity constraint discussed earlier, according to which "public policies, rules, etc. must be stated openly in such a way that they are accessible to the public."[77] The egalitarian pursuing indirect affirmative action as a form of egalitarian gamesmanship hides their real reason for adopting a given rule, thereby deceiving people and violating the publicity constraint. This makes it impermissible, the objection goes.

A few responses on behalf of the egalitarian. First, we should ask: why is publicity important? A common answer is that justice is a cooperative enterprise, and that cooperators must know that others are cooperating—to know that they are not being unfairly exploited—and this requires publicity.[78] But in our case—the inegalitarian political climate—the egalitarian already knows that the inegalitarian others are *not* cooperating—indeed, that is why they have to pursue indirect affirmative action as a form of egalitarian gamesmanship. The inegalitarian others do not abide by justice. So this does not seem to provide a reason for why the egalitarian should satisfy publicity. Another common answer to "why publicity?" is autonomy, where this involves "a willing identification with the social constraints to which one is subject."[79] But minority individuals may not have much autonomy in this sense to begin with in the inegalitarian political situation. Indeed, protecting their autonomy, including in the long term, would seem to sometimes speak in favor of non-publicity. And we can use a similar response to a third common answer to "why publicity?", that publicity is valuable because it secures a valuable form of community between citizens, which involves a common

[75] As we saw earlier, when I responded to the publicity objection, indirect affirmative action does not have to be non-public. But when pursued in an inegalitarian political climate egalitarian gamesmanship-style, which is what I consider here, it involves non-publicity.

[76] Williams, *Ethics*, 108–109. See also Cohen, *Rescuing*, 346; Kogelmann, *Secret*, 116.

[77] Lippert-Rasmussen, *Making Sense*, 211.

[78] Cohen, *Rescuing*, 347; see also Andrew Williams, "Incentives, Inequality, and Publicity," *Philosophy & Public Affairs* 27, no. 3 (1998): 225–47, https://doi.org/10.1111/j.1088–4963.1998.tb00069.x.

[79] Williams, "Incentives," 244.

pursuit of shared ends:[80] presumably, there isn't such a community to begin with in the circumstances we consider. These responses suggest a more general reply. While liberal publicity might be a reasonable constraint in ideal justice—conditions with full compliance (or at least where individuals have a sense of justice and a willingness to abide by just rules as long as they are assured that others are likewise inclined and act accordingly)—it does not follow that it is a reasonable constraint when some are unwilling to comply with the demands of justice.[81]

Second, a comment specifically on government house utilitarianism. This criticism is, indeed, common, but I wonder how much of its intuitive appeal is due to it being government house *utilitarianism* which is debated. Consider an instance of government house *egalitarianism*, where citizens, including racist citizens which compose a large majority, are being told and believe that government is based on inegalitarian, racist principles when, in fact, the policies are based on egalitarian principles. This strikes me as much less intuitively objectionable—indeed, this seems to me to be a reasonable way of achieving justice under non-ideal conditions. Third, even if we set these points aside, publicity is, in any case, just *one* consideration. As Enoch says, "perhaps transparency matters, even intrinsically. It is just that even if it does, in politics it is likely to be outweighed by suffering almost every single time."[82] We can do with something less strong in our case (it doesn't have to be true that suffering *almost every single time* outweighs publicity). Even if publicity is one consideration for the egalitarian, mitigating the injustice from which minority individuals suffer is another consideration—indeed, a lot of suffering might be at stake for minority individuals—and it seems unbelievably strong to say that the former always outweighs the latter.[83]

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[80] Ibid.

[81] Compare David Enoch, "Against Utopianism: Noncompliance and Multiple Agents," *Philosophers' Imprint* 18, no. 6 (2018): 6, http://hdl.handle.net/2027/spo.3521354.0018.016.

[82] David Enoch, "Politics and Suffering," *Analytic Philosophy* 66, no. 1 (2025): 18, https://doi.org/10.1111/phib.12318.

[83] This should also help with the following worry. The reasons for publicity might apply in relation to majority individuals who *are* reasonable. But these individuals will also be deceived by the egalitarian. Doesn't that make the egalitarian gamesmanship impermissible? I agree that there is a publicity consideration vis-á-vis these individuals, which means that there is a cost to this form of egalitarian gamesmanship. But we must not forget that there are strong reasons—such as the suffering of minority individuals—on the other side of the equation, which must be balanced against this cost. Also, it is relevant in this respect that there are non-affirmative action-related reasons for the indirect affirmative action policies under consideration, e.g., benefiting majority individuals who are disadvantaged because their parents never went to university. Cf. Peter de Marneffe, "Avoiding Paternalism," *Philosophy & Public Affairs* 34, no. 1 (2006): 68–94, https://doi.org/10.1111/j.1088–4963.2006.00053.x on paternalistic and nonpaternalistic justifying reasons for a policy. So majority individuals could agree that there is sufficient justifying reason for the policy, even if they disagree with the particular motive and justifying reason of the egalitarian. Thus, while lack of publicity in relation to reasonable majority individuals is a cost of pursuing

If so, publicity considerations will likely not always make it impermissible for the egalitarian to pursue indirect affirmative action, egalitarian gamesmanship-style.[84]

Let's turn to the second worry: even if pursuing indirect affirmative action in this way does not violate the law, it at least seems to violate the spirit of the law, and this makes it impermissible for the egalitarian to do so. In short: the prohibition on direct affirmative action also extends, at least in spirit, to indirect affirmative action. A few reactions to this concern. First, remember that there is a relevant difference between direct and indirect affirmative action: the former is not facially neutral—it picks out minority groups for special treatment—but the latter is. If (part of) what makes direct affirmative action prohibition-worthy is its facial non-neutrality, then it does not seem to extend (straightforwardly) to indirect affirmative action.[85] Of course, it might be that there is a reason for the prohibition that could extend, somewhat naturally, to indirect affirmative action, but the point is that this reasoning would then have to be further developed.

Second, in any case and since I'm not a legal scholar, let's simply suppose that the reasoning could be developed such that it would hit the egalitarian pursuing indirect affirmative action, egalitarian gamesmanship-style: the egalitarian would act against (the spirit of) the law. Would that make it impermissible for the egalitarian to do so? Not necessarily, I think. Of course, this question deserves a paper-length treatment, or much more, on its own—as the debate on (un)civil disobedience shows[86]—but here are a few remarks to mitigate this illegality worry. This is basically a question of whether it is always morally required to obey (the spirit of) the laws. In this context,

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indirect affirmative action, egalitarian gamesmanship-style, we should not expect this cost to always outweigh the reasons in favor of doing it.

[84] Especially not once we consider that publicity might not be a requirement of justice, but a desideratum of rules of social regulation. E.g., Cohen, *Rescuing*, 325–27.

[85] Compare Laborde's argument that indirect discrimination law should only protect dominated groups. Cécile Laborde, "Structural Inequality and the Protectorate of Discrimination Law," *Politics, Philosophy & Economics* 1, no.1 (2024): 1–24, https://doi.org/10.1177/1470594x241283034. But see Sophia Moreau, "What Is Discrimination?," *Philosophy & Public Affairs* 38, no. 2 (2010): 143–79, https://doi.org/10.1111/j.1088–4963.2010.01181.x.

[86] For some contributions to this debate, see Kimberley Brownlee, *Conscience and Conviction: The Case for Civil Disobedience* (Oxford: Oxford University Press, 2012); Candice Delmas, *A Duty to Resist: When Disobedience Should be Uncivil* (Oxford: Oxford University Press, 2018); Candice Delmas and Kimberley Brownlee, "Civil Disobedience," in *The Stanford Encyclopedia of Philosophy*, eds. E. N. Zalta and U. Nodelman (2024), https://plato.stanford.edu/archives/fall2024/entries/civil-disobedience/; Ten-Herng Lai, "Justifying Uncivil Disobedience," in *Oxford Studies in Political Philosophy*, eds. D. Sobel, P. Vallentyne, and S. Wall (Oxford: Oxford University Press, 2019): 90–114; Chong-Ming Lim, "Vandalizing Tainted Commemorations," *Philosophy & Public Affairs* 48, no. 2 (2020): 185–216, https://doi.org/10.1111/papa.12162; Avia Pasternak, "Political Rioting: A Moral Assessment," *Philosophy & Public Affairs* 46, no. 4 (2018): 384–418, https://doi.org/10.1111/papa.12132.

Wellman usefully reminds us, it is important to distinguish between *political legitimacy* and *obligation*. Political legitimacy concerns the state's moral right to coerce or create legally binding rules, and citizens' correlative lack of a right not to be coerced. Political obligation concerns citizens' moral obligation to obey the laws. Whereas the latter is about what a citizen is obligated to do, the former is about what the state is permitted to do.[87] Following this, it might be that a state is legitimate—in the sense that it may coerce citizens—but that citizens, or some of them, do not have a duty to obey the laws, for instance, because there is widespread injustice. The situation the egalitarian we consider is in might be such a situation: even if the injustice against minority individuals does not make the state illegitimate, it is not obvious that the egalitarian has a duty to obey these laws. If so, violating the (spirit of) the laws to mitigate some of the unjust harms from which minorities suffer might not always be impermissible.[88] Indeed, as has been argued in the literature on (un)civil disobedience, it might even be that there is sometimes a duty to break the law as a way of resisting injustice.[89] Again, this deserves more attention, but it should at least address the immediate worry that simply because it goes against (the spirit of) the laws, it would be impermissible for the egalitarian to pursue indirect affirmative action in this way.

And now the third concern. Above, we considered the racist second-order discriminator who tries to game the system to secure racist effects by adopting a rule which does not single out a protected characteristic. If, as seems obvious, such racist second-order discrimination is impermissible, why isn't egalitarian gamesmanship-style indirect affirmative action—which tries to game the system to secure egalitarian effects by adopting a facially neutral rule—impermissible as well?[90] The short answer: because the former is racist, and the latter is not. That they are relevantly different can be seen by deploying the following test; we may call it the "*what if?*" test.[91] It is a counterfactual test which is meant to capture which role race plays in your action. Using it, you ask: if society had not been unjust—if we were under conditions of full compliance—would your view still provide a reason for treating some differently from others based on race? The strategic egalitarian can answer no to this question.

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[87] Christopher H. Wellman, "Liberalism, Samaritanism, and Political Legitimacy," *Philosophy & Public Affairs* 25, no. 3 (1996): 211–12, https://doi.org/10.1111/j.1088–4963.1996.tb00040.x.

[88] Wellman makes a similar point in relation to Martin Luther King, Jr.: "On my view, King was morally at liberty to break the particular laws he disobeyed simply because they were unjust." Christopher H. Wellman, "Samaritanism and the Duty to Obey the Law," in *Is There a Duty to Obey the Law?*, eds. C. Wellman and J. Simmons (Cambridge: Cambridge University Press, 2005): 86.

[89] Delmas, *Duty*; Lim, "Vandalizing."

[90] Compare the *reverse discrimination objection* to affirmative action, according to which affirmative action amounts to discrimination against majority individuals. E.g., Cohen and Sterba, *Affirmative Action*, 25.

[91] Compare Enoch's "appropriate question test." Enoch, "Against Utopianism," 6.

If minority individuals did not suffer from injustices, there would not be a reason to pursue indirect affirmative action in favor of them, egalitarian gamesmanship-style.[92] The racist second-order discriminator cannot answer no to this question. Their view is that Black people are morally inferior to White people: that the former's interests intrinsically count for less than the latter's interests. Their view would speak in favor of treating White people better than Black people because of their race, also, or perhaps especially, under conditions of full compliance. That they respond differently to the "what if?" test shows that there is a relevant difference between the strategic egalitarian and the racist in the way that race figures in their reasoning, and that, intuitively, what the latter does is objectionable in a way that what the former does is not precisely because of this. Indeed, the strategic egalitarian does not subscribe to a view on which one race is inferior to another. I do not mean to claim any novelty here: it is often argued, in the affirmative action literature, that affirmative action does not amount to reverse discrimination or racism.[93] Indeed, as Laborde points out: "Race- and sex-conscious policies of preferential treatment for members of dominated groups are not presumptively wrongful. They can contribute to reducing structural inequality, and they are not grounded in biased mental states and attitudes. Affirmative action in favor of African-Americans in the US, for example, is not an expression of anti-white racism."[94] In other words: it is possible to maintain that racist second-order discrimination is impermissible, while maintaining that it may sometimes be permissible for the strategic egalitarian to pursue indirect affirmative action, egalitarian gamesmanship-style.

Of course, much more could be said here, both about the specific concerns I have addressed, and more generally about the permissibility of strategically pursuing indirect affirmative action. But as I said, my aim here was—in addition to showing that indirect affirmative action, because of its facial neutrality, is particularly strategically useful vis-á-vis direct affirmative action in a politically inegalitarian climate—to provide a preliminary case for the permissibility of sometimes pursuing indirect affirmative action as a form of egalitarian gamesmanship. These arguments, then, are meant as a starting point for further engagement with the distinction between direct and indirect affirmative action. Engagement which, despite the distinction's significance, is presently largely lacking.

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[92] Cf. Lippert-Rasmussen, *Making Sense*, 165–66.

[93] E.g., Cohen and Sterba, *Affirmative Action*, 224; Lippert-Rasmussen, *Making Sense*, chap. 8.

[94] Laborde, "Structural," 9.

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