

# [Good and bad objections to positive discrimination](#) [1]

Type: [Think Pieces](#)<sup>[2]</sup> Written by **Ben Southwood** | Thursday 27 June 2013



*The US Supreme Court has just left one Texan affirmative action scheme in place, but it has recently busted schemes elsewhere. I discuss what libertarians should think about positive discrimination and affirmative action.*

Many of the arguments libertarians make against affirmative action/positive discrimination do not hold. For example, it neither needs to interfere with equality before the law, nor does it need to be imposed by state coercion. And in its favour, affirmative action may be one way to overcome some of the unjust forms of inequality in our society. On the other hand, it is clearly not even close to the best way of dealing with unjust inequality. And some evidence suggests that these schemes actually hurt those they are designed to help. But without sufficient evidence perhaps the best short-term approach is to allow universities to experiment with their admissions process, so they can among them discover the best approach.

The supreme court on 24th June effectively [decided to leave a Texan affirmative action programme in place](#)<sup>[3]</sup>. The programme had two main provisions: (1) guaranteeing any pupil finishing in the top 10% of their year group a place at a publicly-funded university in the Lone Star state; and (2) allowing university administrators to consider race and diversity as part of their admissions criteria.

Both elements work as positive discrimination tools. Guaranteeing places to relatively high-achieving pupils should mean that at least some of the effects of school quality are subtracted out. And allowing authorities to take into account race means that deprivation or oppression experienced mainly or exclusively by non-whites may also be factored out. How do we judge whether this is bad or good?

Many libertarians would object that a system of affirmative action either because it violates equality before the law or because it interfered with people's free interactions, and could only come from state involvement. But neither of these claims necessarily hold.

Though it may not necessarily be true in the specifics of this US case, in general we'd generally expect and require that equal application of law took circumstances into account. For example, years of domestic abuse would rightly be considered an extenuating circumstance in a case where a partner accidentally went too far in self defence. Similarly equality before the law in schooling may require taking into account the statistically likely backgrounds of applicants.

The alternative seems less equal, since getting top A-levels at a tough inner-city comprehensive is surely more difficult than at a highly selective school, even given similar parental support. And in [still-discriminatory societies](#)

[4] people of colour usually have more difficult lives, even past their general social deprivation, and thus we might expect lower grades, even for an equally talented or conscientious student.

The other libertarian objection may have slightly more force. It would be rational for universities that either sought to maximise wealth (through boosting bequests) or academic prestige (through the best students or best research) to neuter out factors that affected school-level performance but would not affect university or later career performance. The factors listed seem like obvious examples of these. But affirmative action may have to go further, not simply aiming for top potential, but also for those who due to their unfairly poor circumstances have lower potential. It would seem to have to go this far if it wanted to attain the goal of fully accounting for circumstances, as some circumstances may reduce potential as well as reducing results in lower tiers of education. In effect, with affirmative action we want to act as if people had never been hampered with worse starts, even if at the university level we want to "leave in" differences in natural talents.

Thus it might be that state pressure would be necessary to get universities to consider more than just student potential. But this is far from certain; the University of Michigan's scheme, which gave 20 automatic points (out of an 100 needed for guaranteed admission) to underrepresented ethnic minorities. [It was ruled unconstitutional](#) [5] but while it was in place it was chosen freely by the university. If chosen upon freely then surely libertarians should laud the schemes as admirable voluntary attempts at distributive equality through free association.

But there's a more telling objection to affirmative action: it causes more harm than it does good. In [his barnstorming dissent to the judgement](#) [6], (black) conservative justice Clarence Thomas points out many of the bad effects of the scheme. [In his 2007 memoir he said](#) [7] "As much as it stung to be told that I'd done well in the seminary DESPITE my race, it was far worse to feel that I was now at Yale BECAUSE of it." And in his very readable judgement, along with pointing out the similarity?despite their apparently inverse goals?between segregationist and pro-slavery arguments and pro-affirmative action cases, he listed the negative impacts positive discrimination can have on those it's supposed to help.

Thomas cites [a 2003 book](#) [8] which claims that "it is a fact that in virtually all selective schools?where racial preferences in admission is practiced, the majority of [black] students end up in the lower quarter of their class." And, according to Thomas, this upward shifting does not result in higher proportions of black or Hispanic students in higher education on average. Instead, minority students go to more selective schools than they would have otherwise attended, which he believes explains their relatively poor performances. This, in turn, pushes them into less challenging schools within those universities, he says, citing figures showing disproportionately high numbers of blacks and Hispanics study social work or education.

Worst of all for Thomas is that?in our flawed society (which won't be changed by this policy alone)?positive discrimination "stamps blacks and Hispanics with a badge of inferiority". One feature of race is that it's often outwardly identifiable, meaning any black or Hispanic student could be seen by others as owing their place to affirmative action, even though most of them in the particular case in question did not gain their place due to the system. He quotes a black student: "I was never able to be as proud of getting into Stanford as my classmates could be?how much of an achievement can I truly say it was to have been a good enough black person to be admitted, while my colleagues had been considered good enough people to be admitted?" This ties into the ideas Elizabeth Anderson explores in her [classic essay "What is the Point of Equality?"](#) [9]. She imagines a government grant to the less attractive?would they be grateful for the money or would they be deeply hurt by the elevation of subjective preferences to official dictum?

Such concerns, especially packaged with the litany of practical issues and inconsistencies highlighted by Thomas and [Prof. Mark J Perry](#) [10] make the issue more difficult, and give us reason to question whether

the system is the best means of achieving our [genuine concerns about equality](#) [11]. If we can achieve more desirable policies to improve [distributive justice](#) [12] like a [universal basic income](#) [13] and a [negative income tax](#) [14], then we should definitely not try and engineer equality at the level of the university. In a system with overall distributive justice, differences in education are down to different choices and shouldn't trouble us.

In sum, we can conclude that though neither of the main libertarian arguments against affirmative action hold, it may nevertheless be an undesirable scheme because it actually hurts those it intends to help. But a diverse system is surely preferable to a one-size-fits-all set of admissions policy, and that suggests we'd want to leave universities to decide whether or not they implement positive discrimination for themselves.

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[4] <http://slatestarcodex.com/2013/04/20/social-justice-for-the-highly-demanding-of-rigor/>

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