



## Affirmative Action and the 14th Amendment – Part 1

Thursday, October 28, 2022

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**[00:00:00] Jeffrey Rosen:** Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to *We the People*, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. On October 31st, the Supreme Court will hear oral arguments in *Students for Fair Admissions vs. Harvard College and University of North Carolina*. In this pair of cases, the court will assess whether the schools are violating the Equal Protection Clause by using race as a factor in admissions. This is a two-part series. Today we'll focus on the text, history, and original understand of the 14th Amendment and how it relates to Affirmative Action, and next week we'll recap the oral arguments. Joining me to explore these urgently important constitutional issues are two of America's leading constitutional scholars.

**[00:01:00]** David Bernstein is Executive Director of the Liberty and Law Center at the Antonin Scalia Law School at George Mason University. He submitted an amicus brief on behalf of the petitioners, Students for Fair Admissions, and he is the author of the new book, *Classified: The Untold Story of Racial Classifications in America*. David, it's wonderful to welcome you to *We the People*.

**[00:01:20] David Bernstein:** Thanks, Jeff. Great to be here.

**[00:01:21] Jeffrey Rosen:** And Ted Shaw is the Julius L. Chambers Distinguished Professor of Law and Director of the UNC Center for Civil Rights. He previously taught at the University of Michigan Law School, where he played a key role in initiating the review of its admissions policy that was later upheld in *Grutter vs. Bollinger* in 2003. Ted, it is always an honor to have you on *We the People*.

**[00:01:42] Ted Shaw:** Always good to be with you.

**[00:01:43] Jeffrey Rosen:** Let's jump right into the central constitutional question that I really wanna explore in depth. Did the 14th Amendment, as originally understood, prohibit all racial classifications or not? David, there are several briefs in the case arguing that there is an anti-classification rule in the 14th Amendment. The brief filed by Edwin Meese and other

constitutional scholars argues that the 14th Amendment required color blindness and race neutrality as demonstrated by the text and the debates surrounding the text, as well as the debates about contemporary civil rights legislation like the Civil Rights Act of 1866. Tell us about the argument that the 14th Amendment, as originally understood, required color blindness and race neutrality.

**[00:02:29] David Bernstein:** Sure, well, we have to remember that the 14th Amendment, that's the Equal Protection Clause, which is at issue in this case, was aimed at the States, and of course, we have just had a very big civil war, the worst war in American history to stop the Southern states from seceding and ultimately to end slavery at all. The argument basically is that we were changing the scope of federal-state relations. Before states could do whatever they wanted, including having slavery, but now that the Civil War is over, we don't trust the states to adjudicate fairly between different groups, especially ex-slaves and their descendants, so we're going to put the Equal Protection Clause in there, which will prohibit the states from engaging in arbitrary classifications. Now, the word "arbitrary" isn't in there, but very quickly, that's how the, Equal Protection Clause was interpreted, and then the argument in the briefs is that racial classification was seen at the time as being, at least, formally, presumptively arbitrary, and it should be seen so as well today, so if the 14th Amendment was meant to prohibit the state governments from engaging in arbitrary classifications, that would include, with potentially extremely limited exceptions, racial classifications for Affirmative Action or any other purpose.

**[00:03:46] Jeffrey Rosen:** Thanks very much for that. Ted, there are several important briefs filed by progressives arguing that the original purpose and understanding about 14th Amendment was to prohibit subordination based on race or caste and to help African Americans, and those briefs give examples of race-conscious legislation that Congress enacted even though it understood the federal government to be bound by the principles of the 14th Amendment. Tell us about the argument that the 14th Amendment wasn't supposed to be color-blind but was meant to prohibit subordination based on race.

**[00:04:15] Ted Shaw:** Well, thank you. First, there's no reference to the term "color-blindness" in the 14th Amendment. The purpose of the 14th Amendment as initially enacted was, in fact, to protect people from racial discrimination and other forms of discrimination. The word "arbitrary" doesn't appear in that clause either, but there's no question that the 39th Congress, which is the Congress that adopted the 14th Amendment, intended it to help those emerging from slavery, those who were African American, at that point, although it applies universally, but particularly African Americans, to gain a foothold on equality in this country, and that same Congress that adopted the 14th Amendment, the 39th Congress, adopted a range of measures, including the Freedmen's Bureau and created hospitals for African Americans and other institutions that were explicitly meant for African Americans. The question is begged, therefore, how could the same Congress that adopted the 14th Amendment and adopted all of these explicitly designed efforts to assist African American, they were race-conscious, have intended total color-blindness. I think the answer is they didn't. And the Supreme Court, up until now, notwithstanding the powerful, dissent by Justice Harlan in Plessy vs. Ferguson, has never adopted an absolutist, color-blind theory, but they're being asked to, at this point, in these cases before the Supreme Court.

**[00:06:09] Jeffrey Rosen:** Thanks very much for that. David, Ted mentioned laws that the Reconstruction Congress enacted, which were not color-blind, the Meese brief runs through them, including a law that donated federally owned lands and the District of Columbia for the sole use of schools of colored children and several other examples and says none of these enactments, when considered in context, suggest Congress believed racial classifications were constitutionally acceptable and it tries to distinguish them. Do you agree with that distinction, and how much weight do you put on the fact that these were laws that were passed by Congress and not the states?

**[00:06:45] David Bernstein:** So it's a very interesting question. One argument that's been made with regard to Ted's point is that, yeah, the Reconstruction Congress did have some race-based legislation, including creating segregated schools, and if we're gonna use what they did as evidence in favor of allowing some sorts of racial classification by the government, it sort of undermines, to some extent, the argument in *Brown vs. Board of Education* that the 14th Amendment doesn't allow for that notwithstanding what Congress did. Now that's sort of like a rhetorical point more than, necessarily a historical point. I mean, historical point, the argument that the Meese brief tries to make, and let me point out that I didn't sign on to the Meese brief, so I'm not necessarily endorsing anything that they say, but explaining it, the Meese brief says, well, first of all, the laws that were aimed at freedmen, the word "freed slaves," where with very few exceptions, never said the word "race." They said people who are in former conditions of slavery or they said, "refugees and freed men," which also would apply to some White refugees. So to some extent, Congress was, in fact, careful to not phrase it in race-specific terms.

**[00:07:54]** The other thing was that some of the laws that were specifically race-based were thought, argued by the Meese brief to be remedial. Like, it wasn't that Congress wanted segregated schools or thought that was a good idea, but just there were no schools for African Americans in D.C. at the time and to quickly allow some form of education without getting bogged down at the base about segregation. They just quickly allowed for that, for example, there are some laws that gave pension money and back pay to former Union soldiers who had been discriminated against, and the money was set aside specifically for Black soldiers, but the argument there was that this wasn't race-conscious legislation so much as making up for the fact that these soldiers had been discriminated against in their pay and pensions, during the Civil War.

**[00:08:38] Jeffrey Rosen:** Ted, a lot hangs on this history, and how persuaded are you by the response that David just, you know, accurately offered that these laws were careful not to be in race-specific terms or others were remedial. The progressive notes that no one made the claim when Congress was passing these laws, that Congress was forbidden from engaging in all racial classifications. The Civil Rights Act of 1866 anticipated that there might be different punishments for Blacks and Whites and said there'd be a penalty as a result. So the progressives argue that the claim that the Constitution prohibits racial consciousness in all circumstances was never actually raised at the time of the framing of the 14th Amendment because it didn't occur to anyone. What do you think of that response?

**[00:09:22] Ted Shaw:** Well, I may be missing something, but the fact that, for example, the term or the phrase "race" is not used doesn't mean that Congress or that 39th Congress didn't intend to explicitly enact legislation or, for that matter, that the Constitution, as modified by the 14th Amendment, didn't explicitly intend to aim at assisting African Americans. That was the purpose the 1866 Act, and it was the purpose of the 14th Amendment. The fact that Congress created schools for African Americans and created the Freedmen's Bureau, I don't see how the arguments that we've heard take away from the fact that that was a race-conscious action, and it seems plain that the 39th Congress did not equate race consciousness with racism or race discrimination. That's the argument, though, that's being made, effectively by the plaintiffs, in the two cases that are before the Supreme Court for argument on Monday.

**[00:10:36] Jeffrey Rosen:** David, when was the first time that anyone claimed that the Constitution forbade all racial classifications? We mentioned Justice Harlan's dissent in *Plessy vs. Ferguson*, but Justice Harlan quoted the *Strauder* case when he said that the point of the 14th Amendment was the right to exemption from unfriendly legislation against them distinctively as colored, exemptions from legal discrimination, implying inferiority in civil society. So the *Strauder* citation was not a provision on all classifications, and then this famous statement about color blindness, Justice Harlan said, "With respect to civil rights, all citizens are equal before the law," suggesting that political and social rights did not require color blindness. So when was the first time that someone claimed that the Constitution forbade all racial classifications?

**[00:11:22] David Bernstein:** I don't actually know when the first time a Supreme Court justice articulated that in a broad sense and opinion, but before we turn back to Ted, I just wanted to point out that there was one issue that is really very interesting that came up in this progressive brief you were mentioning, and I think we need to put out there, which is that they sort of associate the phrase, "race consciousness" with all forms of considering race in any way in legislation, whereas it's possible to potentially distinguish between that and classifications. So for example, you mentioned the 1866 Civil Rights Act. The 1866 Civil Rights Act also says all persons shall have the same right to make an enforced contract into a whole bunch of other things as White persons have. So the progressive brief refers to that as race-conscious, and that would make all civil rights laws race-conscious, right?

**[00:12:17]** We understand that there are certain people who are facing discrimination. We want to prohibit discrimination in a race-neutral way, but it will primarily benefit those who are members of minority groups who have been discriminated against. That's race consciousness. I don't think there are that many people on any side who are arguing that that sort of race consciousness is unconstitutional. What they're arguing is that in terms of being race-conscious and being aware that there's racism and so forth, that the remedy cannot include classifying people by race and then giving them special harms or special benefits in that basis, and the reason I'm mentioning this is it's one way of going back and squaring the circle with Justice Harlan's opinion. And he would say, of course, part of the 14th Amendment is anti-subordination. We wanna make sure that groups were getting the full rights of citizenship and are able to participate fully in society, but we have a really heightened level of scrutiny, if not a complete ban on actually classifying people by their race and then taking away or potentially giving privileges to them on that basis.

**[00:13:18] Jeffrey Rosen:** Ted, David interestingly notes that Justice Harlan is embracing two principles. I'll read the famous passage. "In view of the Constitution and eye of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our Constitution is color-blind and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." David's suggesting there are two ideas, an anti-caste principle and an anti-class legislation principle, and that that second principle should prohibit classifications on the basis of race. Do you find that persuasive as a matter of the original understanding of the 14th Amendment or not?

**[00:13:57] Ted Shaw:** First, let me mention that I think that we have to wait until the late 1930s and into the 1940s until we really had the creation and constitutional law of an understanding of classifications. We're thinking about, the case that, ironically involved, as you know milk's filler, but really for the first time spoke to this notion that there are different classifications, and race is one of them, that the Constitution would look at. That was not in place in Plessy when Harlan dissented, with all due respect, and interestingly enough, in the next breath, Harlan made clear that he did not believe, and I say this with all respect for Harlan's dissent. He didn't believe in social equality. He believed White people were superior culturally and otherwise, and so while he articulated the color blindness principle that later became so popular on the part of conservatives, that was something that was never actually adopted into law by the Supreme Court.

**[00:15:11]** We had finally, after many years, a notion that the court would look at racial classifications in various classifications differently. That's true, but that didn't mean absolutely color blindness. We still haven't gotten to a Supreme Court decision, which has mandated absolute color blindness even though that's what conservatives want not because they wanna end all discrimination as it stood over the years as much as they want to take conscious efforts, to affirmatively address racial discrimination and inequality. Those are two very different things.

**[00:15:53] Jeffrey Rosen:** David, it's a crucial point that Ted makes that Harlan clearly said that he only thought, to the degree there was a color blindness requirement, it might have applied to civil rights, but not political or social rights, so whatever his classification principle was it didn't prohibit all government classification of race, but only those with regard to civil rights, and then, of course, there was a very big question about whether or not the right to have admission to schools was a civil right or not, which is why the question of whether or not Brown is consistent with original understanding is so hotly contested. Am I missing something here? But isn't the historical evidence quite uncertain about whether the framers thought that the right to go to schools was a civil right, and if something wasn't a civil right, isn't it pretty clear from Harlan that you didn't have to be color-blind?

**[00:16:40] David Bernstein:** Yeah, so I would add that, I'm surprised neither of you mentioned it, right after all that language, Harlan also then talks about, "By the way, there's another group in this country, the Chinese, who are so far different from White people, that we're never gonna give them rights," or, you know, the language to that effect. So, clearly, Harlan was not entirely, race or ethnicity-blind in his [laughs] own thought. So, that's clear as far as the original meaning goes, this is where we get into the weeds of originalism, and I'm, admittedly not a... I don't call

myself an originalist, and I'm not the biggest expert in originalism, but we've largely been talking about original intent at this point, and originalists would come back and say, "Well, another issue is we don't really care exactly what the reconstruction in Congress did or certainly what Justice Harlan did 30 years later."

**[00:17:32]** We're more concerned with the principle that we put into the Equal Protection Clause, and they put that principle in that classifications could only be justified in, a racial basis in very narrow, if any, circumstances, the fact that they didn't think that education was particularly important or they didn't think that certain rights were important, that that classification, then those realms may have been nonarbitrary in those days by 1954, as the court suggested in *Brown* itself, we had realized that, education was actually very important and, in fact, we also realized that, whatever the intent was in 1866, having segregated schools in 1954 could no longer be deemed, to be consistent with equal protection.

**[00:18:21]** And, you know, get further into the weeds, we then have Clarence Thomas, who believes, has articulated in Affirmative Action cases in particular, the view that to the extent there is the ambiguity you talked about in the Equal Protection Clause, that we have to read that in light of the Declaration of Independence and the [inaudible 00:18:40] principle of "All, men..." nowadays would be "All persons are created equal," and that, therefore, it's sort of repugnant to a free society, a natural rights-based society to have the government be classifying people. Now we're getting just a little bit of weeds... you know, more complex arguments about originalism which is maybe beyond what your... [laughs] audience wants to hear, but it's also, these arguments are, indeed, floating around in the ether of this case.

**[00:19:07] Jeffrey Rosen:** No, I'm glad we're getting into these weeds 'cause this is the question that we're focusing on. We've agreed at this point in the debate, despite the ambiguities and historical record, there's no evidence that people at the time of the framing expected or claimed that racial classifications would be forbidden in all circumstances, and the claim that they are forbidden in most or all circumstances is a 20th century claim based on the *Brown* decision and on the text to the amendment, read in light of the Declaration of Independence. Ted, have we missed something here? And when was the first time that you began hearing the 14th Amendment invoked to prohibit all racial classifications, including those that helped Black people?

**[00:19:47] Ted Shaw:** Well, to the extent that Justice Harlan's dissent in *Plessy* can be read as referring to a classification. Actually, what Justice Harlan said was we have no caste system in this country. I was indicating before, it's not until 1938 with the footnote 4 on *Carolene Products* that the Supreme Court began to think so much in terms of tiered classifications, and the application of strict scrutiny. It wasn't until that footnote that classifications became a more clear part of the Supreme Court jurisprudence, notwithstanding *Korematsu* and, you know, a couple of cases a few years earlier than that. What the court was doing with footnote 4 was firing a warning shot coincidentally or not coincidentally at the same time that World War II was breaking out in Europe, about its, turning to race and finally beginning to interpret the 14th Amendment in a way that would protect African Americans, when it hadn't done so, for so long,

ever since, really, the adoption of the amendment except for a few years in the Reconstruction era.

**[00:21:11]** But clearly, the court has been conscious of the need to use the 14th Amendment specifically, and it was the original intent to address the conditions of African Americans. Anybody who interprets the 14th Amendment in a way that requires color blindness which would not allow the Supreme Court to employ remedies for racial discrimination against African Americans and their peculiar condition, historically and otherwise, I think is not engaging in a true originalism.

**[00:21:49] Jeffrey Rosen:** Thanks so much for that and for noticing that it wasn't until the '30s and the *Carolene Products* footnote, as you say, that classifications that were designed to harm minorities were considered especially constitutionally suspect, and the claim that classifications that were meant to help minorities are constitutionally suspect, you say is not an originalist claim. David, you are an expert on the *Lochner* era. You've written an important book about the *Lochner* case. When was the first time that people began claiming that arbitrary classifications violated the 14th Amendment, and did we hear that come up in the *Lochner* era, before the 1930s?

**[00:22:25] David Bernstein:** That happened very quickly, if I'm remembering correctly. It's been a while since I wrote about this. As early as the late 1870s, the court sort of announced the principle, although it took them quite a bit longer before they took it seriously enough to start occasionally validating legislation. Interestingly enough, when they first start doing it, it wasn't even really clear whether it was an equal protection principle or a due process principle, or some combination, or it really just didn't matter because they were just applying general constitutional principles under the 14th Amendment. We're very text-based nowadays, and originalism and textualism have helped us become that, but the court was less strictly tied to the text, at the time. And I did want to add one thing, then just throw in one more thing here, maybe two more things. One thing is that there's a case to be made that while the framers of the 14th Amendment were stricter about what the states can do, they both were given more latitude to Congress because they trust the Congress more, but, yeah, they also thought 14th Amendment principles applied to Congress, but the additional thing is that Congress specifically had the power under Section 5 of the 14th Amendment to enforce the provisions of that amendment. So you could argue that Congress gets special leeway that the states wouldn't, and one argument here might be that Congress should amend title six of the Civil Rights Act to specifically invoke that power.

**[00:23:49]** The last thing I wanted to mention, just to respond to what Ted said previously, was that if we do accept the notion, and I think it's a reasonable case, right, I'm not judging the case ultimately. A reasonable case that Congress thought a remedial action for African Americans would be permitted at least by Congress and maybe by the states, after the Civil War, there's a question of whether that would apply specifically to African Americans or Congress could just choose whichever racial or ethnic groups it wants, to put into the law and classify them and give them either special favors or not, if that's what you wanna call it, or remedial actions or not, which is more pressing issue today than it was, say, 50 years ago because we're a much more ethnically and racially diverse country than we were at the time.

**[00:24:34] Jeffrey Rosen:** Ted, what are your thoughts on David's point about Congress getting more latitude than the states? If the right to go to schools is a privilege or immunity, my understanding is that Congress and the states have to respect it equally, and both are bound in the same way. Does it make sense as a matter of original understanding to say that Congress can be more race-conscious than the states or not?

**[00:24:54] Ted Shaw:** I actually was going to mention the privileges and immunities clause because in some ways, in the early days after the passage or the enactment or the ratification of the 14th Amendment, the privileges and immunities clause was the workhorse of anti-discrimination law for quite some time during those years. I know Justice Thomas thinks a lot or has thought a lot about privileges or immunities. But with respect to the question of Section 5, yes, I think it's right that Section 5 gives authority to Congress to enact legislation to carry out purposes of the 14th Amendment. Those purposes are aimed at the states in particular. That was the original intent of the 14th Amendment, was to bind the states in ways that were particularly protective of the rights of African Americans and others in those states, so I think that you're on point when you mention that intent.

**[00:25:59]** But I also wanna mention that slavery wasn't cold in its grave when the Supreme Court in the civil rights cases mentioned that African Americans, the idea that African Americans were seeking to be "the special favorites of the laws," which was extraordinary, but was the forerunner to the anti-Affirmative Action arguments that we see today. , so my point is that this has been a long-running struggle with respect to the interpretation and application of the 14th Amendment, and the ideas that we now frame as so-called "reverse discrimination" and our ideas that the Supreme Court struggle with or articulate as early as the civil rights cases.

**[00:26:53] Jeffrey Rosen:** David, you mentioned Justice Thomas. Just one more beat here, 'cause it's so important. If the right to go to schools is a privilege or immunity, as arguably was post-*Brown*, is it clear that admissions have to be color-blind, that you can't be race-conscious? You can't deny admission on the basis of race, but what would Justice Thomas' argument be about why you can't even know race when it comes to college admissions if it were a privilege or immunity?

**[00:27:17] David Bernstein:** Yeah, there's, a case, the, *Seattle School District vs. Parents Involved*... Right, I'm getting the parties backwards, but, involving, race-conscious admissions in busing in a couple of school districts, one Kentucky, one in Washington state, and in that case, the court said that you can't classify students by race and decide what school they go to, and the dissent said you can, and Justice Kennedy wrote a very interesting concurring opinion, because he said that you're not allowed to classify people by race, but you can be race-conscious. In other words, let's say the city council's decided where to site the new high school, and if they put it in one part of town, it's gonna be 100% or very close to 100% segregated one way or the other, but if they put it in a different part of town, it'll be integrated. And they don't have to ignore that it's better to have an integrated school than a segregated school. So that's race consciousness without classification.



[00:28:13] And the reason I'm bringing this up is because a subsidiary issue that the court will have to grapple with since people sort of mostly expect them to rule in favor of the plaintiffs here, is if you're not allowed to have racial classification and then give that a bonus or whatever for admissions, are you allowed to have race-conscious but not classificatory policies that are aimed to achieve diversity? So are you allowed to have 10% plans where 10% of the top students at each school get to the state university, or are you allowed to have, what would then prefer people from high poverty zip codes and knowing that one reason that you're doing it is because it will increase diversity but without classification.

[00:28:55] **Jeffrey Rosen:** Ted, when did you first see in litigation the claim that the 14th Amendment prohibits all racial classification? Was it post-*Brown*? Was it after that? What's the history of this claim?

[00:29:05] **Ted Shaw:** That issue arose in, I mean, well before, *Brown vs. Board of Education*. Certainly in the cases that led up to *Brown*, but they were, certainly, I think, on the court's mind in, footnote 4, *Carolene Products*, when it was thinking about tiered scrutiny. But certainly by the time we began to see the cases, the pre-*Brown* cases, the higher education cases, those issues were upfront. They were present. So I don't think it waited until *Brown*. I think it was before *Brown*, but there's one other thing I wanna mention. I wanna underscore that the cases that are before the Supreme Court now, interestingly enough, people are talking about Affirmative Action again. And yet for years, for decades ever since, the *Bakke* decision and certainly on up through, the Michigan cases and *Fisher*, twice to the Supreme Court, the discourse was one about diversity as a First Amendment interest in colleges and universities. Somehow or another, that seems to be dropping out the discourse as worth considering or running up to these cases, and I'm not sure why that's so, because the Supreme Court all but killed remedial justifications for race consciousness in higher education in the *Bakke* case.

[00:30:39] So why are we talking about Affirmative Action again as opposed to diversity? The thing about diversity, and a First Amendment interest is that the First Amendment interest doesn't expire merely because of time, that's a remedial concept. Remedial justification. Remedies have to expire after they've achieved their purpose. Diversity, if that was a justification that the court latched on to in *Bakke* and afterwards, diversity doesn't end, that is a First Amendment interest that continues. The only question is whether, the courts have to do something or institutions, rather, have to do something to achieve that interest.

[00:31:26] **Jeffrey Rosen:** Thanks so much for that and, and thanks for putting the diversity interest on the table. That, of course, was recognized in the *Grutter* case, which upheld the portion of Justice Powell's opinion in *Bakke* that recognized diversity as a compelling interest. David, in this case, what are the arguments for why diversity should not be considered a compelling interest, which the court may well accept, and do you find it persuasive or not?

[00:31:50] **David Bernstein:** I think there are two basic arguments here. First is the argument that even if the court reaffirms that diversity is a compelling interest, that at least since *Grutter* and also in *Fisher* that came with conditions that Harvard hasn't met, and among those conditions, which is emphasized in the *Fisher v. University of Texas* case a few years ago, is that

the court explicitly said that universities are required, very often to look at its policies, to figure out if they meet constitutional standards, if they're actually fulfilling the goals of diversity, and so forth and so on, and Harvard didn't do any of those things. So I think the first argument the plaintiffs were making is that even if the court doesn't overrule *Grutter*, Harvard never reviewed its Affirmative Action policies or diversity policies until they were sued, which means that they were ignoring constitutional precedent.

**[00:32:40]** The argument that diversity itself is not a compelling interest is basically that this was a mistake, that was made, initially by Justice Powell, in *Bakke* that diversity per se is sort of an incoherent, inchoate, interest. There is at least a rhetorical point to be made that Justice Powell basically got his idea from Harvard's brief in the case, and Harvard was trumpeting how it does its admissions policies, and Harvard did not admit it at the time, but now acknowledges [laughs] in its briefs that these policies were intended when they were instituted, to keep down the percentage of Jews who would be attending Harvard by getting away from test scores and so forth into broader, criteria, and that now the same sorts of discriminatory, inchoate criteria being applied to Asian Americans and that this shows the danger of allowing universities to run with a diversity rationale, and that essentially, that the court has allowed the diversity rationale, the way that the court was intending it to potentially be considered in terms of using it the way they use other sorts of preferences, but only as a last resort, is not really what universities have been doing.

**[00:34:02]** And they actually make the argument explicitly that the reason they haven't been doing it that way, and this goes back to Ted's point and why we were talking about this, the plaintiffs are arguing that while Harvard and other universities are required to put their racial preference policies in terms of diversity, and they don't really believe in them. They really are engaging in something akin to soft quotas for racial balancing purposes, for remedial purposes, and they're just not admitting it.

**[00:34:31] Jeffrey Rosen:** Ted, what are the counter arguments for why the court should continue to recognize as it has since *Bakke* that diversity is a compelling governmental interest, and what's the response to the claim that it's inchoate, that it's not applied rigorously and that it's been used to keep down the numbers of Jews and Asians?

**[00:34:46] Ted Shaw:** First, let me point out that there's a plethora of briefs that have been filed, amicus briefs, on both sides in this case. When I think about *Grutter*, the Michigan case, when I think about Harvard and UNC cases, I think about the briefs that have been filed on behalf of the military, on behalf of colleges and universities, on behalf of corporations. I mean, from every corner of American life, diversity has been adopted as an important value, and the Supreme Court now has clearly affirmed on multiple occasions that diversity is a compelling state interest, so whatever the origin of diversity was, and I've said, I think that when Justice Powell wrote his opinion in *Bakke*, that bridge that [inaudible 00:35:42] court, he came up with a rationale that had not been articulated before but that did rely on case law that existed about the First Amendment interests of colleges and universities, to decide who was admitted, who taught, what was taught, *etc.* That's a part of American life across the board now, and all one has to do is look

at the briefs, including numerous briefs by groups of Asian and Asian American students and other individuals in support of diversity in these cases.

**[00:36:16]** And so I think it's important to acknowledge that diversity is not only a fact of life, but a reality, not only here in the United States, but really, internationally now. To do away with diversity would be an extraordinary measure if the court were to go in that direction. I'm not gonna say what the court's going to do, but diversity is very well established, and even more to the point, as some of the briefs that, have been filed clearly articulate, to say that everything about students, can be taken into account in holistic review except the experiences of being an African American because that's race-conscious. That's a form of discrimination in and of itself if the court were to adopt those arguments and that point of view.

**[00:37:08] Jeffrey Rosen:** David, just as a matter of constitutional law 101, what's the argument against recognizing diversity as a compelling interest? Is it, is it that you can't have any classification except in extraordinary circumstances, period, or something else?

**[00:37:22] David Bernstein:** Yeah, so I think one issue with the diversity rationale is that it does rely on classifications, and these classifications are seen as inherently arbitrary. There is, I think, everyone acknowledges a certain amount of arbitrariness to it that's unavoidable. Exactly where that gets you legally is under dispute, exactly how arbitrary they are, but there is a certain level of arbitrariness whenever you decide, well, what's the cutoff if someone has one ancestor who's African American and claims to be such, but, they otherwise look Caucasian, aren't part of the African American community? My understanding from looking at the record in this case is that Harvard, number one, never actually checks anyone's self-identified race on their form, and number two, they don't actually require you to talk about race having any impact on your life, that sort of you get put into the pool of Black, Hispanic, Asian American, or White, just solely based on the box you check.

**[00:38:20]** Now it doesn't have to be that way, but in practice, I believe almost all universities do it that way. And the argument there for the unconstitutionality is that this, then, treats race as itself being a meaningful, allowable criteria for admissions process, not your experiences as a member of a particular group or the fact that you've thought deeply about the role of race in society or commitment to diversity or other things that may often be proxies, for people's identity, or go beyond that, but we're actually just using the mere fact that someone checks the box as affecting their chances of getting into a university and that is both itself offensive to a norm of equal protection of the Constitution that protects people rather than groups, but also, again, the classifications themselves are sufficiently arbitrary, and it's not, by the way, I don't think Harvard or really anyone else has articulated why, other than the fact that these happen to be the classifications the Department of Education Office of Civil Rights requires them to keep track of for monitoring discrimination, why they actually use the classification of Hispanic, Asian, White, and African American as the diversity classifications, as opposed to subgroups or additional groups, that aren't included.

**[00:39:41] Jeffrey Rosen:** And, Ted, what's the counter argument for why diversity is a compelling governmental interest? I remember years ago finding just one article about what

counts as a compelling interest. It was 1988, Stephen Gottlieb, compelling governmental interest in essential but unanalyzed Herman constitutional adjudication. Gottlieb said if there's an enumerated right like the First Amendment, then there's a compelling interest in achieving its values, which is why diversity counts. Would you offer a different argument for why diversity is a compelling governmental interest?

**[00:40:11] Ted Shaw:** Once the Supreme Court recognized the First Amendment interest that belonged to colleges and universities, I think that opened the door to the court finding that diversity was a compelling state interest, and diversity writ large. As I think I indicated before, whether somebody was from the city, whether somebody was from the suburbs, whether somebody was from the South, whether somebody played the oboe as a, I think, was articulated in, by Justice Powell in, in *Bakke*, and on and on. All the things that made people different and that they brought to who and what they were into the institution when they enrolled, constituted diversity, diversity writ large, so to speak. As I indicated, it wasn't like Black folks or Brown folks invented the concept of race. [laughs] But once that concept was invented and it became such a part of, determining who got what in this country, but also had an impact on the lives of individuals and continue to have an impact on the lives of individuals, whether we're talking about intergenerational wealth, whether we're talking about housing segregation, other affects of race, these are realities in this country.

**[00:41:38]** We just went through a period of consciousness, or revival, I think, of consciousness by necessity, about these issues. So to say that people can't talk about it, when they apply to college, which would, in effect, what the court would be saying if it said these institutions can consider everything else but can't consider that, as I indicated, would be a form of discrimination. If we believe in diversity as a country, which is what the court said, not only in '78 or at least Justice Powell said but the court has, reaffirmed over and over again, then I think diversity has been found repeatedly to be a compelling state interest, and we can equate diversity with, racism.

**[00:42:31] Jeffrey Rosen:** Well, David, I'd now love for you to get on the table of the argument in your brief and in your new book, *Classified: The Untold Story of Racial Classification in America*. In the brief, you argue that Harvard and UNC's racial categories are arbitrary and irrational and that an admission system that relies on self-identified race is inherently flawed and unreliable. And you draw on arguments in your new book, *Classified*, which note that the current classifications stemmed from an Executive Order that President Nixon ordered in 1971, meant to assess minority-owned business enterprises, but which identify the groups that counted as minorities and what you argue is an arbitrary way, so I know there's a lot in there, but put on the table your argument and your brief in your book.

**[00:43:13] David Bernstein:** Sure, so, I mean, I have some sympathy with many of the arguments that Ted has made, throughout the hour, some more than others. But I would know that he typically comes back to the experience of African Americans, which has been, in fact a driving force behind all of the controversy. But we do have to keep in mind that as of 2022, 20% of the population of 18-year-olds is Hispanic, and only 15% is African Americans, and Hispanics typically get preferences as well, sometimes not as strong as preference as African Americans,

but Harvard certainly is. So then we can look at the Hispanic classification and say, well, we're talking about racial diversity, but first of all, Hispanic isn't actually a race. It's not considered race under federal law. It's considered an ethnicity. You can be of any race and be Hispanic. You could be anything from 100% European in origin to 100% African in ultimate origin to 100% indigenous or even Asian. You could be any combination of those, and the federal definition of Hispanic, and it's right on the Common Application when you apply for college, also includes people from Spain. So, even people who we know, basically, are unlikely to be racially at all and are 100% European, get a preference.

**[00:44:30]** So we have this odd situation somewhere like Harvard where you're giving someone who checks off the Hispanic box, then checks off the white box as the second choice you have, is 100% European origin and happens to have ancestry from Spain instead of Italy or Greece or Armenia or Afghanistan or Yemen or Morocco, all of whom are considered just to be generically White, that they get a preference for adding to diversity even if there are already many other people just like them in the class, but if you're the first person from Turkmenistan to ever apply to Harvard, and you're dark and you're Muslim, and you're also of other things of diversity, you don't get anything. So, there's that level of arbitrary, and that's when I would...

**[00:45:10]** You know, I don't wanna go on too long about this, but I want to add that the Asian classification includes everyone from the western border of Pakistan to the Philippines, people who have nothing in common with each other at all. They don't look alike. They don't have the same religion. They don't have the same culture. They're often historic enemies in their ancestral countries, with each other, and, you know, to say that, well, we have a lot of the Indians and Chinese and, Koreans, at Harvard, therefore if someone who is from Minnesota applies, we don't really care about the diversity they add because they're just another Asian strikes me as offensive, racist, and oddly enough, it's completely recreating unintentionally, admittedly, but recreating the racist categories the Supreme Court invented in the 1920s to enforce the Asian Exclusion Act.

**[00:45:54] Jeffrey Rosen:** Ted, you're hearing it on this podcast, but David has argued, as you just heard, that the categories the universities are applying are arbitrary, that they come from federal law that involves some logrolling and political compromises, and that in particular the category of Hispanic Americans and Asian Americans is arbitrary and incoherent, that Affirmative Action is best focused on African Americans. What do you make of his argument?

**[00:46:17] Ted Shaw:** I am unabashedly talking about African Americans first and maybe last, but not only, because of the history we have of African American treatment in this country, from slavery to Jim Crow, which only began to be addressed, 40, 50 years ago, and we still see the legacy of that inequality manifested in so many ways. I reject the term "preference," when it's applied to consideration of diversity and particularly of African Americans because I reject the notion that Black applicants are being preferred to White or other applicants, given the inequality that still exists in terms of the experiences and where those Black students come from. Who gets access to Advanced Placement courses in high school, the quality of that education, etc.

**[00:47:16]** But let me turn to this question that you are raising, which I think is one that richly deserves a lot of discourse, the classifications themselves, whether we're talking about the term "Hispanic" or "Latino." You correctly point to something that deserves some attention, but my first answer to that and first response is that it assumes that the person from Spain or, the other groups you mentioned from Europe, that they are not part of, diversity. White people are part of diversity. I reject the notion, as I often hear, that when we refer to an individual as "diverse," that that's a legitimate description. They're part of diversity, and White people also bring something to diversity, and, yes, the classifications are complex, and we can criticize some of them, but the fact is that somebody from Spain may bring something to diversity at an institution, and the same thing is true of European Americans, et cetera, and so I think we need to think about diversity writ large differently as we do, because often the term "diverse" is only used as a proxy for Black and Brown people. It includes them. It is important when it talks about them and their inclusion. Diversity is not only Black and Brown people.

**[00:48:53] Jeffrey Rosen:** As we wrap up this wonderful discussion, David, I'll ask you, what's the legal test that you would apply for evaluating these categories? As you, as you note in your book, the court in the *Fullilove* case upheld the Small Business Investment Act, which recognized these categories over Justice John Paul Stevens' dissent where he said that the categories were arbitrary. Would you have the court say that universities can't classify arbitrarily, and that current categories are arbitrary, or what would your legal test be?

**[00:49:21] David Bernstein:** So I fill out, at the end of my book, the possibility of trying to use what I call political classifications rather than racial classifications which avoids a lot of these issues. I'm relying on a case which may or may not still be upheld by the Supreme Court next time they rule on it, but there's a case from 1974 called *Morgan vs. Mancari* where the Supreme Court held that it's okay to have a preference for hiring American Indians at the Bureau of Indian Affairs because it was based primarily on a tribal membership, and tribal membership is a political rather than a racial classification. Not everyone with racial Indian heritage is a member of a tribe, nor is everyone who's a member of a tribe necessarily have Indian racial heritage. Similarly, we can think of political classifications that would encompass most African Americans like there's a, a new acronym that some may not have heard of yet, ADOS, American Descendants of Slaves. We could have people who live on American Indian reservations.

**[00:50:18]** And I do have more sympathy, even though the current standard is diversity, I do have more sympathy with the remedial rationale to say that we're going to take a special look at people who we know have, ancestrally suffered from generations of Jim Crow, and slavery and violence and segregation and so forth, it's quite different than to say we're gonna give you some sort of bonus or special look just because you happen to be Black, just because you're the ambassador from Nigeria's son. You came here for high school, decided to stay and become a citizen. That's a different story. There might be some value there, too, but that's a different sort of value than the value of looking at, these historically marginalized groups that we wanna bring in.

**[00:50:58]** So I always start with that, and I'd also start with saying that, you know, Harvard and UNC both rejected first looking at race-neutral options. There's a dispute in the briefs as to exactly how useful these would be, but if you believe the plaintiff's briefs, they could basically

achieve a similar amount of diversity on the criteria they're currently using, but their GPA and SAT scores would go down ever so slightly. Like, from 99th percentile to 98th percentile make them slightly less elite in their student selection. I would at least say that under strict scrutiny, which I guess I would still keep applying, to racial classification, you should at least experiment with such a criteria as at least try to reduce the use of race before you decide, that you're using it at Harvard and UNC, especially Harvard really having done so.

**[00:51:52] Jeffrey Rosen:** Ted, the last word in this excellent discussion is to you. What do you think of David's suggestion that the American Descendants of Slaves should be given special constitutional consideration given the history of the 14th Amendment, or that under strict scrutiny, experiments with race-neutral alternatives should be tried first?

**[00:52:10] Ted Shaw:** David, I thank you for that. I have engaged in debate and discourse with conservatives, and every once in a while, somebody makes the point that you just made. Look, I've always thought that the primary and original justification for allowing race-conscious measures in admissions and in higher education in particular at selective institutions was remedial. But as I said before, there was so much opposition to that, that the Supreme Court all but killed that in *Bakke*, there's been so much resistance to that. I believe, I know that there are two legs on which race-conscious measures could stand on in higher education. The first one is remedial, and we're not done with that task yet. I think if we do the math, about eight out of every 10 days of this country since, its creation and maybe even since, the colonial era, Black folks have been spent in legalized segregation and subordination and slavery. We certainly have not remedied the impact of that. Look at all the inequality we see, and it can't be separated out from that history.

**[00:53:29]** So I appreciate that. I think that's right. But the example you gave of the Nigerian prince, for example, is an interesting example, because the other leg is the diversity leg. And that Nigerian prince may bring something to Harvard or some other institution in terms of diversity, if that's a justification writ large, that is not only with respect to race and Black folks, but rather diversity writ large in which they're part of that, but not only that, if that makes sense. So I welcome the discourse that you are inviting with respect to the, remedial justification. At the same time, I fought to uphold diversity since that's what the court left us with, frankly, when it comes to, keeping the doors of opportunities open in significant ways to Black and Brown people.

**[00:54:31] Jeffrey Rosen:** Thank you so much, David Bernstein and Ted Shaw, for a rich, illuminating, and absolutely superb discussion of this crucially important case. As I mentioned, this is the first of a two-part series, but, David and Ted, I didn't mention that I'm gonna try to persuade both of you to join us again next week to recap the oral argument, and, *We the People* listeners, you'll find out next week if I've succeeded. But until then, on behalf of all of *We the People* listeners, David and Ted, thank you so much for joining them.

**[00:54:58] Ted Shaw:** Thanks. Good being with both of you.

**[00:55:00] David Bernstein:** Likewise.

**[00:55:03] Jeffrey Rosen:** Today's show was produced by Melody Rowell and engineered by Greg Sheckler. Research was provided by Sam Desai, Sophia Gardell, Kelsang Dolma, Liam Kerr, Emily [inaudible 00:55:13], and Lana Ulrich. Homework of the week. Dear friends, please listen to the *Students for Fair Admission v. Harvard* oral argument on October 31st or read the transcript, after it's posted, and join us next week as David Bernstein and Ted Shaw reconvene to discuss the oral argument. Please rate, review, and subscribe to *We the People* on Apple and recommend the show to friends, colleagues, or anyone anywhere who is eager for a weekly dose of constitutional illumination and debate. And always remember that the National Constitution Center is a private nonprofit. We rely on the generosity, the passion, the engagement, the devotion to lifelong learning of people from across the country like you, who are inspired by our nonpartisan mission of constitutional education and debate. You can support the mission by becoming a member at [constitutioncenter.org/membership](https://constitutioncenter.org/membership) or give a donation of any amount to support this work, including the podcast at [constitutioncenter.org/donate](https://constitutioncenter.org/donate). On behalf of the National Constitution Center, I'm Jeffrey Rosen.