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**Intelligence Squared U.S.**

**The Equal Protection Clause forbids racial preferences in state university admissions**

For the Motion: Roger Clegg, Stuart Taylor, Jr.

Against the Motion: Deborah Archer, Erwin Chemerinsky

Moderator: John Donovan

<b>AUDIENCE RESULTS</b>	
<b>Before the debate:</b>	<b>After the debate:</b>
<b>27% FOR</b>	<b>32% FOR</b>
<b>30% AGAINST</b>	<b>62% AGAINST</b>
<b>43% UNDECIDED</b>	<b>6% UNDECIDED</b>

Start Time: (18:48:37)

John Donovan:

So let's bring to the stage now Nicholas Quinn Rosenkranz and Jeffrey Rosen.

[applause]

So the backdrop behind us is not our usual backdrop. You can see that it's the U.S. Constitution. And I first want to ask Jeffrey Rosen, who is the president and CEO of the National Constitution Center, our partners in this debate, what that backdrop is about and what this partnership is about tonight.

Jeffrey Rosen:

Well, that backdrop is the symbol of the National Constitution Center in Philadelphia on Independence Mall, the most historic place in America. And the National Constitution Center is an inspiring place with a very ambitious mission, to transform civil dialogue in America. And we are the only -- you can applaud that because it's worth it. This is the --

[applause]

Let's -- give it up for the U.S. Constitution.

18:49:35

Ladies and gentlemen, this is important. We are the only place in these incredibly polarized times that bring together people of different perspectives, liberals, conservatives, and everyone in between, to learn about debate and celebrate this one text, this vision of human freedom that binds us, and we do that by creating the best interactive Constitution, which you can check out on the web, that brings together liberals and conservatives to debate what they agree and disagree about every clause of the Constitution. And we do it with this incredible debate series that -- like the Lincoln Douglas Debate with our great partners at Intelligence Squared -- is traveling around the country, premised on the idea that citizens can educate themselves about the difference between constitutional and political arguments and then make up your own minds. And my friend, Nick, who started this great series with me two years ago, is going to tell you about that distinction.

[applause]

John Donovan:

And Nick -- Nicholas Quinn Rosenkranz is a professor of law at Georgetown University and also a director of the Rosenkranz Foundation. And you are responsible for bringing this partnership together. So tell us why -- what is the idea behind framing these debates in a constitutional framework?

18:50:40

Nicholas Rosenkranz:

So most of our debates are public policy debates. In fact, we had a public policy debate on this very topic, on affirmative action, and the gist of that debate was, "What do you think of affirmative action? Is it good or bad? Does it do more harm than good?" And you probably all have very strong feelings, very strong instincts about that question, but tonight, and in this series, we're debating a different question, which is, "Is it constitutional? Is it consistent with U.S. constitutional texts?" I think we'll have the Equal Protection Clause for you on the screen. But for -- to begin, just consider it's entirely coherent for you to believe, for example, that affirmative action is a terrible idea and yet constitutional, or a fantastic idea, and yet unconstitutional. These are different questions. So for the constitutional debate, you'll hear our debaters talk about constitutional text, constitutional history, constitutional structure, Supreme Court cases, things like this. We're asking the constitutional question, not the policy question tonight.

18:51:47

John Donovan:

And we have four spectacular debaters who are going to do that. So let's welcome them all to the stage with one of these

[applause]

So when it comes to the question -- so when it comes to the question of, "Who gets into college?" how do we determine what is fair? And this is a question that does keep coming back to the Supreme Court, where the issue is, "What role should race play?"

18:52:27

Does "fair" mean that race should play no part, whatsoever, in the equation, leave it up -- just up to grades and test scores, where history shows that, on the whole, Asians and Whites do score better than blacks and Latinos, or does fair mean let's find a way to crack the door open a little wider for blacks and Latinos in recognition of their historical challenges that are relevant in these cases, and also to bring them in in the name of diversity for the good of the whole university, and this is all in the spirit of what is known as affirmative action. And when it comes to fair, what does the Constitution have to say about these questions? Well, that sounds like the makings for a debate. So let's have it. Yes or no to this question: The Equal Protection Clause Forbids Racial Preferences in State University Admissions. A debate from Intelligence Squared U.S. in partnership with the National Constitution Center. We are at the Kaufman Music Center in New York City with four superbly qualified debaters who will argue for and against the motion The Equal Protection Clause Forbids Racial Preferences in State University Admissions.

18:53:34

As always, our debate goes in three rounds and, as always, the audience votes to choose the winner and only one side wins. Let's register your first vote. We will ask you by the time the evening has ended to vote two times, once before the debate and once again afterwards, and the team whose numbers have changed the most in percentage point terms between the first and second votes will be declared our winner. The first vote to take place now. Go to those keypads at your seats. Take a look at the motion language again: The Equal Protection Clause Forbids Racial Preferences in State University Admissions. If you agree with the motion push number one, and if you disagree push number two, and if you're undecided push number three. You just hold that key down until you see the number that you've selected show up in the window and that means you are locked in.

18:54:37

We're good. Okay. We're locked out. And now it's time to meet our debaters. Again, our motion is: The Equal Protection Clause Forbids Racial Preferences in State University Admissions. Let's meet the team arguing for the motion. First, ladies and gentlemen, Roger Clegg.

[applause]

Welcome, Roger. You are president general counsel of the Center for Equal Opportunity. You served in the Reagan and Bush administrations and you have argued in the past that affirmative action is actually at odds with the Civil Rights Movement. I want to ask you is that always the case? Or what if we went back 50 or 60 years, what would you have said?

Roger Clegg:

Well, I think that the original meaning of affirmative action, which was taking positive steps to get rid of discrimination, was a good idea back then and it's still a good idea. But racial preferences, which is the specific kind of affirmative action that we're talking about tonight, was a bad idea and it's certainly a bad idea now.

18:55:39

John Donovan:

And the point you'll be arguing tonight. And tell us who your partner is in that argument.

Roger Clegg:

It's the lovely and talented Stuart Taylor who is with the Brookings Institution and the author of the book "Mismatch."

John Donovan:

All right. Then I'm going to say the rest of it, but first I'm going to say let's welcome Stuart Taylor.

[applause]

All right, Stuart. We just heard the name of your book. The interesting thing about you is that you started out as a reporter in Baltimore in the '70s and then you became a lawyer. You went to Harvard and got a law degree and you practiced law for a few years. Then you went back to being a journalist again. So, why cover the law as opposed to practicing it?

Stuart Taylor:

Well, it's confusing, but the first duty of a good lawyer is to serve clients' interests. The first duty of a good journalist is to tell the truth. I prefer that.

John Donovan:

All right.

[laughter]

[applause]

Ladies and gentlemen, the team arguing for the motion and that motion is: The Equal Protection Clause Forbids Racial Preferences in State University Admissions. We have two debaters arguing against it. Please first let's welcome Deborah Archer.

18:56:41

[applause]

Deborah, welcome. You're a professor at New York Law School where you serve as co-director of the Impact Center for Public Interest Law. You're Dean of Diversity and Inclusion. You've also served as assistant counsel at the NAACP Legal Defense and Educational Fund. We're wondering because you have so much contact with students, I mean, you're in that world, among your law students, does the majority come down on either side of the constitutionality question of affirmative action?

Deborah Archer:

I would say the majority support affirmative action programs. I think as students they're in a unique position to really see the way that diversity is benefiting their education.

John Donovan:

And again, you'll be arguing that point tonight. Thank you very much, Deborah Archer, and your partner is?

Deborah Archer:

My partner is leading constitutional law scholar, Dean Erwin Chemerinsky.

John Donovan:

Ladies and gentlemen, Erwin Chemerinsky.

[applause]

18:57:37

John Donovan:

Okay. So your partner said the word "Dean." You are the founding Dean, Erwin Chemerinsky, of the Law School at the University of California Irvine. You were also named the most influential law professor in America by National Jurist in 2014. Sorry about this year.

[laughter]

And you saw in California, a state that passed Proposition 209 back in 1996, which -- in which voters banned affirmative action in university admissions. So, as you've seen it in the system there, what's been the result?

Erwin Chemerinsky:

Proposition 209 has substantially reduced diversity in the University of California -- especially Berkeley and UCLA. There's still fewer African American students at UCLA today than there were prior to 1996, when Proposition 209 was adopted.

John Donovan:

Okay. Again, all grist for the mill for the debate we're going to have tonight. The team arguing against the motion. Ladies and gentlemen.

[applause]

18:58:37

So, remember. You have now voted. We are going to ask you to vote again after the debate. And we want to emphasize that the team who wins under our rules is the team whose numbers have changed the most in percentage point terms between the first and the second votes. Let's move on to Round 1. Round 1 are opening statements by each debater in turn. Those statements will be seven minutes each. Our first debater will be arguing for the motion -- The Equal Protection Clause Forbids Racial Preferences in State University Admissions. Up first is Stuart Taylor. You can make your way to the lectern, Stuart. Stuart is non -- Stuart Taylor is a non-resident fellow at the Brookings Institution and co-author of the book "Mismatch: How Affirmative Action Hurts Students Its Intended to Help and Why Universities Won't Admit it." Ladies and gentlemen, Stuart Taylor.

[applause]

Stuart Taylor:

Thank you and good evening. Roger and I thank Intelligence Squared for the opportunity to debate this violent -- this -- I'm sorry, not violent -- this vital issue.

[laughter]

18:59:39

We thank Professor Archer and Dean Chemerinsky for -- in advance, for a respectful exchange. Now, in candor, we're not counting on persuading the two of you. But we are counting on persuading everyone else in the room. Roger, batting cleanup, will focus on how racial preferences violate the clear text and bedrock principles of the 14th Amendment, and how they have costs to constitutional values that far exceed any

benefits. I focus on facts showing how the large racial preferences -- very large -- used by almost all selective universities in the country violate each of several equal protection rules laid down by the Supreme Court in its four racial preference and admissions precedents. The first of those rules -- I'll read it -- "A race-conscious admissions program may not unduly harm members of any racial group."

19:00:38

Our contention is that large racial preferences -- and I emphasize large, because we're not talking about tiebreakers or balance-tippers. We're talking about enormous differences in the average credentials of students of different racial groups entering universities and the costs those have. The first racial preference harm is obvious. Whites and Asians, who are excluded, are overlooked to admit less qualified members of racially-preferred groups. They're harmed, clearly. And not enough so far to get the Supreme Court to say, "You can't do this anymore." But they're harmed. Asian Americans in particular are the victims of systematic racial discrimination by just about all of the top universities in America. I think that's become fairly clear, although it's still disputed.

19:01:34

And -- but the most grievously harmed victims, we think, are the Hispanic and African American -- especially, because they receive the largest racial preferences -- supposed beneficiaries of racial preferences, who are misled by universities into thinking that they're going to do well academically when the universities know that on average, they're not going to do well because of their entering credentials. In fact, between 25 percent and 50 percent of African American students at our universities rank in the bottom 10th of their classes academically. This comes as a rude surprise to a lot of them, because that's not what they were led to expect. But the reason is obvious. The reason -- use of very large racial preferences to bring into the universities the same racial gaps in academic accomplishment and preparation that people have when they exit high school is the reason for this. The average black 12th grader is about four years behind the average white 12th grader.

19:02:39

Now, that's not true of everybody going to college, but it's some indication of how big the gaps are. Now, this sets black students in particular without warning to struggle and in many cases to fail, no matter how hard they work. There are, of course, excellent black students that do terrifically, but recipients of large racial preferences with some exceptions by and large have a very hard time no matter how hard they work. Most lose self-confidence, become demoralized, avoid or drop out of the toughest courses, science, math, engineering, pre-med, courses that lead to some of the most desirable careers. And, therefore, as a result of racial preferences, I contend, and we contend in

our book, "Mismatch," my coauthor, Rick Sander, and I, we have fewer black and Hispanic lawyers, doctors, engineers, and scientists than we would if all universities had race-neutral admissions programs, because the people who are doing badly at universities where they are not well qualified would be doing well in universities where they're competitive.

19:03:52

This pattern is called "mismatch." Black law graduates fail the bar exam, for example, at four times the white rate. This is an enormous waste of their time, their money, and their ambitions. And if they were going to less prestigious law schools, they would be more likely to pass the bar exam. In fact, most recipients of racial preferences we contend would be better off, certainly academically, if they attended colleges for which they're well qualified. And, in fact, we think there's some evidence -- this is pretty well disputed -- that they might do better in their careers and they might have happier lives in that case. I'll try and give an example of that later.

19:04:40

The universities' pervasive dishonesty about the size of racial preferences and about their academic effects on the supposed beneficiaries denies these people the opportunity to make informed decisions about where they want to go to college. At a minimum, there ought to be full disclosure of the size of racial preferences, which are a deeply dark secret among the universities. Second Supreme Court rule, I'll read this one, "Universities must demonstrate, before they turn to racial preferences that race neutral alternatives do not suffice to provide adequate diversity." The Supreme Court has said that more or less verbatim. No university of which I know has ever made the slightest effort to explore race-neutral alternatives to racial preferences to promote diversity. Now, there's a very, very obvious race neutral alternative, which is class-based recruitment and preferences for working class and poor students of all races.

19:05:41

And there's a large supply of pretty strong academic students in that -- in that category. Such class based preferences would add more diversity of background and of viewpoint than racial preferences do. But instead of trying class-based preferences, universities systematically prefer well off black and Hispanic students over less well-off white and Asian students who are better qualified academically. Think about that. The third Supreme Court equal protection rule holds that outright racial balancing is patently unconstitutional. And the facts on that are pretty brief. The information all over the country screams the conclusion that virtually all these universities are using outright racial balancing in the face of rough targets for how many students in each racial group, which they strive to meet.

19:06:37

John Donovan:  
Stuart Taylor, I'm sorry, your time is up.

Stuart Taylor:  
Thank you.

John Donovan:  
Thank you very much.

[applause]

Our motion is: "The Equal Protection Clause Forbids Racial Preferences in State University Admissions." And here to make his opening statement against the motion, Erwin Chemerinsky. You can make your way to the lectern.

[applause]

Founding Dean and distinguished professor of law at the University of California Irvine School of Law.

[applause]

Erwin Chemerinsky:  
Good evening. It's such a pleasure to be with you. Every Supreme Court case to consider the issue has held that affirmative action by college universities is constitutional. The Supreme Court for decades has said that colleges and universities have a compelling interest in a diverse student body. The colleges and universities may use race as one factor among many to enhance diversity and benefit minorities. This has had a tremendous beneficial effect. It's reduced the unfortunate legacy of racial discrimination in this country. It's enhanced the education of countless students.

19:07:38

Tonight Professor Archer and I are arguing we should not abandon this policy that largely has worked so well. I am going to argue why affirmative action is consistent with the Equal Protection Clause. Professor Archer, in her time, will respond to the arguments that are made against affirmative action by Mr. Taylor and Mr. Clegg. I am going to make three points. First, affirmative action is consistent with the text and the history of the Equal Protection Clause. Second, affirmative action serves compelling purposes, especially diversity in college universities. And, third, there's no other way to achieve these goals, especially diversity, except through affirmative action. As to the

first point, the Constitution says, "No state shall deny any person equal protection of laws." Notice it doesn't say that everyone has to be treated the same.

19:08:35

Long ago, Aristotle said, "Equality means treating likes alike and unalikes unlike." To the extent that students are different, based on their history, based on what they bring to the campus, they must be treated differently. Notice it also doesn't say that the government must be colorblind. The 14th Amendment could've been written that way, but it wasn't. It is absurd to think of the government as always colorblind. If the police want to infiltrate a gang that's defined by race, surely they should be able to take that into account. Throughout American history, the Supreme Court has recognized that equal protection allows the government to take race into account. That's consistent with the history of the 14th Amendment. The very Congress that ratified the 14th Amendment adopted color-based programs, things we call, "affirmative action," today, like the Freedmen's Bureau. It's why the Supreme Court repeatedly has said, "Colleges, universities can engage in affirmative action."

19:09:38

My second point is that affirmative action serves compelling purposes, especially diversity. We cannot discuss affirmative action outside of the context of American history. Throughout American history, there have been separate and unequal schools based on race, and that's not a thing from long ago. Just a couple of decades ago, Harvard Professor Christopher Jencks found that an average 20 percent less is spent on an African-American child's elementary and secondary school compared to a white child's elementary and secondary school. Today, about 90 percent of the students in private schools are white. The reality is that race matters enormously in how all of us experience society. College universities have long realized diversity matters. It's long been easy to get into Harvard or Yale if you're from Montana or North Dakota compared to if you're Boston or New York based.

19:10:33

College universities have long accepted people who had relatives who went to that college or university. Legacies, I don't hear Mr. Taylor talking about the problem in mismatch for legacies. The reality is diversity matters, and racial diversity matters. Racial diversity helps to bring cross-racial understanding. It breaks down stereotypes. It prepares students for the multicultural world in which they'll exist. That's why every Supreme Court case has found diversity to be a compelling interest. And my third point is there is no other way to achieve diversity except through affirmative action, no other way to achieve the goals that I've talked about except through this. This has been the experience in states that have tried to eliminate affirmative action. As I mentioned earlier, in California, after Proposition 209, there was

a dramatic decrease in the presence of African-American and Latino students, especially at UCLA Berkeley. There are still fewer African-American students today at UCLA than there were prior to 1996.

19:11:38

There are dramatically fewer African-American and Latino students at Berkeley and UCLA law schools compared to Stanford and USC. But affirmative action programs work. Take the University of Texas program that's now before the Supreme Court. They look at race as one of many factors in admissions. In addition to grades and test scores and two letters of recommendation, race is just one of six factors, and yet doing that, together with taking the top 10 percent of high schools across the state, meant there was a 20 percent increase in African-American students, a 15 percent increase in Latino students. Professor Archer will respond in detail to Mr. Taylor, but I want to disagree with a couple of things that he says. One thing that he says is they are against large racial preferences. I think all of us would be against large racial preferences, but that's not what you're asked to vote on tonight. In order to vote for the affirmative, you have to vote against all racial preferences, large or small, that's how the topic is written.

19:12:39

He spent most of his time talking about his mismatch hypothesis. There's one problem with the mismatch theory. It's flat out wrong. The evidence doesn't support it. In fact, I'll quote to you from a brief that was recently filed in the Supreme Court by Richard Lempert a social scientist and professor at Michigan. He said, "The overwhelming weight of the evidence suggests that affirmative action as currently practiced, does not harm minorities for academic mismatch, and may benefit students." If there's any mismatch problem it is that minorities are more likely to be in situations of under-match. To vote for the affirmative tonight you must find one of two things. Either they must convince you that diversity is unimportant, disagreeing with the Supreme Court and almost every university in the country, or they must convince you that there is some other way to achieve diversity besides what we're discussing. No college or university has found it yet.

19:13:34

Focusing on class doesn't do that because, although more percentage wise African American and Latinos are coming from disadvantaged classes, the sheer number of white students who are disadvantaged greater. Focusing on class doesn't yield racial diversity. Nothing does. That's why you should continue the status quo and vote against the proposition.

[applause]

John Donovan:

Thank you, Erwin Chemerinsky. And a reminder of what's going on, we are halfway through the opening round of this Intelligence Squared U.S. debate. I'm John Donovan. We have four debaters, two against two, arguing for and against this motion: The Equal Protection Clause Forbids Racial Preferences in State University Admissions. You have heard from the first two debaters and now onto the third. Debating for the motion here is Roger Clegg president and general counsel of the Center for Equal Opportunity.

[applause]

19:14:31

Roger Clegg:

Thank you very much and thank you to Intelligence Squared for putting on this event. Let's begin by reading the Equal Protection Clause of the 14th Amendment. "No state shall deny to any person within its jurisdiction the equal protection of the laws." Note that it doesn't say anything about protecting some races differently from other races. It applies to all races. And, of course, any other interpretation would be inconsistent with equal protection of the laws, wouldn't it? It is also inconsistent with the necessary structure of a Constitution for "We the People," the people that is increasingly multi-racial and multi-ethnic. Now Erwin talked about how some kinds of discrimination are certainly okay. Colleges discriminate all the time on the basis of things like SAT scores and grades and so forth.

19:15:39

But some kinds of discrimination are not okay under the Equal Protection Clause when you look at its historical context And the principle kind of discrimination that is not okay under the Equal Protection Clause is discrimination on the basis of race. It's true that the people who drafted the Equal Protection Clause had in the forefront of their minds protecting the rights of African Americans who had just been freed from slavery, but they deliberately chose words that were broader in protection than that. Words that protected whites, as well as blacks, from racial discrimination. And it would today protect Asian Americans from being treated less favorably because of their race than white Hispanics. And it's good that they did. It is after all the Constitution we are expounding, and it would be untenable to have a legal regime in 2015 that allowed the government to sort people according to skin color and what country their ancestors came from in our increasingly multi-ethnic and multi-racial society.

19:16:49

Bear in mind that our opponents interpret the Equal Protection Clause to permit racial discrimination against a racial minority, Asian Americans, in favor of white Hispanics. Now, it's sometimes said that the Constitution means what the Supreme Court says it

means, and I don't buy that completely. But it's worth pointing out here that the basic approach the court has taken is the correct one, that all Americans are protected from racial discrimination and that exceptions to this rule will be allowed only in extraordinary circumstances when the government has a really, really, really, really good reason to discriminate, and no other way to accomplish this compelling end except through racial discrimination.

19:17:39

If our opponents don't establish all four of those reallys, then they lose. It's as simple as that. So, do we have that in the case of racial preferences in state university admissions? We do not. And this is where the Supreme Court has gotten wrong -- where I hope it will correct itself in the year ahead. What the Court has said and what our opponents are arguing tonight is that what some students say in random conversations in and outside campus classrooms might be so insightful, and so unlikely and difficult to be learned in any other way besides these random conversations, that it is worth denying admission to some white and Asian American students because of their race so that other white and Asian American students might hear these random observations. That's it.

19:18:41

That is what universities are arguing. I don't think that that is compelling at all. But there's something else that you need to keep in mind tonight. Even if you think that there is something to that argument, you have to weigh against that purported benefit the costs of racial discrimination. Now, my partner -- Stuart Taylor tonight, has already described one of the heaviest of those heaviest costs, namely the mismatch of students in universities. But there are a lot of other costs too. And in my remaining time, I'm going to run through them. Here they are. It's personally unfair, passes over better-qualified students, and sets a disturbing legal, political, and moral precedent in allowing racial discrimination. It creates resentment.

19:19:36

It stigmatizes the so-called beneficiaries in the eyes of their classmates, teachers, and themselves as well as future employers, clients, and patients. It fosters a victim mindset, removes the incentive for academic excellence. It encourages separatism. It compromises the academic mission of the university and lowers the overall academic quality of the student body. It creates pressure to discriminate in grading and graduation. It breeds hypocrisy within the school. It encourages a scofflaw attitude among college officials. It papers over the real social problem of why so many African Americans and Latinos are academically uncompetitive. As Stuart said, they typically emerge from K through 12 schools four years behind their white and Asian peers

academically. That's a problem that should be addressed, but we are not -- there's not the urgency to address it because of the existence of racial preferences.

19:20:40

Another cost -- perhaps most fundamental of all -- it gets states, state governments, and their schools involved in unsavory activities like deciding which racial and ethnic minorities will be favored and which ones not -- and how much blood is required to establish group membership? An untenable legal regime in America that is becoming increasingly multiracial and multiethnic. And where individual Americans are more and more likely themselves to be multiracial and multiethnic, starting with our president. I think that it is very hard to say that all of those costs are outweighed by anything that might be learned in a random campus conversation. Please vote against a pro-preference interpretation of the Constitution and in favor of the motion tonight. Thank you.

John Donovan:  
Thank you Roger Clegg.

[applause]

19:21:38

And the motion is: The Equal Protection Clause Forbids Racial Preferences in State University Admissions. And here to make her opening statement against this motion, Deborah Archer. She is professor of law and Director of the Racial Justice Project at New York Law School. Ladies and gentlemen, Deborah Archer.

[applause]

Deborah Archer:  
Good evening, everyone. My partner has explained the legal analysis that firmly establishes the constitutionality of affirmative action programs. Although there is a push to interpret the Equal Protection Clause in a way that ignores race and racial context, the very purpose of the 14th Amendment is to counter the oppression of historically subjugated racial minorities. You've also heard a laundry list of the alleged harm that affirmative action causes to black and Latino students. Those harms are not real. Affirmative action has offered a pathway to opportunity for generations of students of color. It has taken steps to diversify our campuses and has made for a more just America.

19:22:40

The weight of the evidence demonstrates that affirmative action is good policy. But whatever you think of affirmative action as a matter of policy, that's not the question you're asked to address today. The question is whether or not affirmative action violates the Equal Protection Clause, and I urge you to vote against that motion. It bears repeating that the United States Supreme Court has repeatedly held that race-conscious admissions programs in public colleges and universities are constitutional with substantial, not trivial, substantial benefits that flow to the educational institution, the larger society, and individual students, both students of color and white students. Pursuing the educational value of a racially diverse student body is a compelling state interest. Arguing -- arguments about whether extra points set aside substantial preferences, whether or not those are constitutional are all -- they're all red herrings.

19:23:37

The court has already held that universities cannot have specific racial targets, universities cannot set aside spots for students of certain racial backgrounds, and universities can't consider race in an inflexible manner. The Equal Protection Clause does allow universities to use race as one consideration when choosing among a group of qualified students, not all with identical qualifications, but all qualified. Numbers are not the only thing that matter, and higher SAT scores does not make you more qualified or more deserving of admission.

[applause]

Universities are trying to admit people, not SAT scores. And universities don't exist to credential the best test takers. I'm not saying that race is a qualification, not at all, but race is a part of who we are. The Equal Protection Clause permits colleges and universities to consider many characteristics, including sexual orientation, political persuasion, gender, whether or not you're from Ohio.

19:24:41

We can't exclude race and only race from that list of considerations. We couldn't possibly offer each student individualized holistic review without giving some consideration to race, especially when an applicant has indicated that race is important to their own sense of self identity, their own sense of who they are. For that student who says their race is important, it's critical to understanding their achievements, their accomplishments, and their perspectives. Now, the statistics that have been cited by the proponents of this resolution about disparities and outcomes for students of color are indeed troubling. But every assertion that they make is contested, and none can be the basis of a constitutional rule. The methods and conclusions they've reached have been criticized and rejected by almost every social scientist who has examined the

data. There have been many studies that have found no evidence, whatsoever, of mismatch.

19:25:38

There are numerous studies that say affirmative action programs have unequivocally benefitted minority students and society. There are studies that say minority students fair far better, the higher ranked school that they attend, and, very importantly, there are studies that say the problem of under matching, where students with strong academic credentials attend lower ranked schools even though they could get accepted to higher ranked schools, is far more a problem for minority students than mismatches. Even if you were to accept the proponents' assertions as true, they do not undermine the conclusion that achieving racial diversity is a compelling government interest. Those statistics they cite are just a snapshot of a much larger story. They ignore the fact that race continues to structure the opportunities and outlook for all Americans.

19:26:29

To assess the impact of race conscious admissions programs, we must first acknowledge the critical factors that contribute to any alleged black or Latino underperformance in the classroom. And those include racial discrimination. They include discrimination by professors. They include inadequate K-12 education systems. They include stereotype threat. The gap between the performance of some minority students and some white students is quite troubling, but race conscious admissions programs are not the cause of those troubles. Finally, the argument that race conscious admissions programs should be outlawed because minority students end up attending schools that are academically too challenging for them quite frankly is condescending. It inappropriately seeks to displace the independent, informed judgment of minority students about the potential costs and benefits of attending flagship universities and colleges. We should want all of our students to aim high and challenge our -- themselves. We shouldn't be settling for less for minority students.

[applause]

The individual harm -- the individual harms that affirmative action's opponents claim will befall minority students have not come to pass.

19:27:37

For example, you heard about minority students who will experience stigma, both internal and external, doubting their own qualifications and sense of belonging and having their classmates, and their faculty members doubt their abilities. There is no causal connection between race conscious admissions programs and racial stigma. It's

never been established. The fact remains the root causes of racial stigma reach back much further than race conscious admissions programs. We all know that minority students faced stigma before affirmative action programs and they would continue to face stigma without affirmative action programs. In fact, those who argue that race conscious admissions programs should be banned because they stigmatize minority students are part of the problem. Stamping all minority students with badges of inferiority by assuming they lack qualifications is racial discrimination. The fact that there were will be racists who assume that every black person or Latino person that he or she sees is unqualified cannot dictate the reach or meaning of the Constitution.

19:28:40

[applause]

The motion asks you to assess the constitutionality of race conscious admissions programs, not whether affirmative action is good policy. But on either question, the proponents of this motion are wrong, and I urge you to vote against the motion.

[applause]

John Donovan:

Thank you, Deborah Archer. And the motion is, "The Equal Protection Clause Forbids Racial Preferences in State University Admissions," and that concludes Round 1 of this Intelligence Squared U.S. Debate. Now we move on to Round 2. And Round 2 is where the debaters address one another directly and they take questions from me and from you and our live audience here in New York. The motion is, "The Equal Protection Clause Forbids Racial Preferences in State University Admissions." We've heard two debaters arguing for the motion, Stuart Taylor and Roger Clegg. They say, "Look at the text of the -- of the 14th Amendment, 'No state shall deny to any person in its jurisdiction the equal protection of -- under the laws.'"

19:29:37

And they're saying the text is already violated by affirmative action because affirmative action is in itself a form of discrimination. They're arguing that it brings harm to all races, including the races that it is intended to benefit. The team arguing against the motion, Deborah Archer and Erwin Chemerinsky, are saying -- they look at the text, and they're saying nowhere does it say that the Equal Protection Clause says that the government is required to be colorblind, that the amendment was adopted by a Congress that absolutely had historically affirmative action in mind, that the harms that their opponents have spelled out as "mismatch" are not real, and that the Supreme Court has repeatedly upheld affirmative action's goal of diversity as a compelling interest.

19:30:23

So I want to -- I want to start slicing up some of the arguments that have been made already, but I want to say that I already see the challenge that we're going to have in that a lot of what we heard were arguments about whether affirmative action is good or not -- good policy or not -- and less on the question of whether it is constitutional or not, whether racial preferences in state university admissions are constitutional or not, which is what you're going to be asked to vote on. I heard more of that argument from the opposing side than from the for side. So I want to take something that the opposing side said and bring it to the for side, when they said that the text of the amendment does not say anything about the government's obligation to be colorblind. So they are -- they are challenging in a very fundamental way your interpretation of what we mean by equal protection under the laws. So they say, "Nowhere does it say, 'You can't -- you can't make these kinds of arguments.'" Roger Clegg, can you respond?

Roger Clegg:

Well, you know, the -- it's a Constitution -- there is limited space. You don't have to use every synonym in the -- in the dictionary when you describe what can't be done.

19:31:33

What it says is that you can't deny equal protection of the laws. It doesn't say that you have to be colorblind, but in context, what it's saying is that you can't deny equal protection to people because of their skin color. That's basically the same thing as saying that you have to be colorblind unless you have a really, really good reason. I mean, I really don't see any distinction between a -- you know, a writing that says, "You have to be colorblind," and saying that, "No American can be denied the equal protection of the laws," given the historical context.

John Donovan:

Let's take it to your opponents. Erwin Chemerinsky.

Erwin Chemerinsky:

Imagine that a college or university has been proven to discriminate based on race. Can a court order that -- it remedy that and then admit students who have previously been excluded based on race? Of course it can. In other words, it's not totally --

John Donovan:

That would be a really, really good reason.

Erwin Chemerinsky:

-- in other words, it's not colorblind. No Supreme Court case in history has ever equated equal protection with colorblindness.

19:32:32

That's because that's not what "equal" means. "Equal" means you treat people who are alike, alike and those who are different, different. People are different based on race, based on the experiences they've had in society. That's why racial diversity matters so much in colleges and universities.

Roger Clegg:

You know, this business that --

John Donovan:

Roger Clegg.

Roger Clegg:

-- people are different because of their race sounds like something I would've heard maybe a hundred years ago in favor of Jim Crow.

[applause]

John Donovan:

Deborah Archer.

Deborah Archer:

I don't think that we're saying that people are different because of their race or that people think one way or another that a black or Latino student is going to hold a certain position because they are black or Latino, but I think what we are saying in the context of affirmative action programs is that race influences the way we view the world. It influences how we perceive the things that go on day to day.

19:33:27

So although we wouldn't expect a black or Latino student to hold a certain position, we would anticipate that a black or Latino student's race would have influenced whatever position it is that they're holding. So we're not making assumptions about --

Male Speaker:

Sure you are.

Deborah Archer:

-- people based on race. We are looking at reality and knowing that race impacts how we think and how we perceive the world, because it's impossible that it -- for it not to.

John Donovan:

Stuart Taylor.

Stuart Taylor:

I'd like to interject a minor point on the descendants of slaves issue. You might think that all recipients of racial preferences are descendants of slaves. I'd imagine it's a minority of racial preferences because many of the black beneficiaries of racial preferences, so called, are foreign born, immigrants from Africa and many are Hispanics and there was no slavery of Hispanics in this country. As for the Freedmen's Bureau, which Professor Chemerinsky brought up as an example of the original intent of the framers, that was a reparations program for freed slaves. It wasn't an in perpetuity preference program for all descendants of freed slaves and all other people who look like them.

19:34:37

[applause]

Roger Clegg:

And I think it's fine for --

John Donovan:

Okay. Roger you go.

Roger Clegg:

I think it's fine for schools to try to bring in students who have a diversity of backgrounds and perspectives. The problem is when you use skin color or what country your ancestors came from as a proxy for those backgrounds and experiences. You can't look at somebody and say, "Oh, you're black. You must have this background and this perspective." You've got to look at the individual.

Deborah Archer:

That's actually ignoring exactly what I said. It's not that someone is saying, "You're black, you hold this perspective." We're saying that, "You're black. I'm sure that the fact that you are black in an America where race very much matters where we're still fighting and battling against racial discrimination impacts the way that you see the world, whatever that perspective is, it's important to bring that to the table," and you get at that by looking at the whole student. No one's looking at just the race box. We're actually looking at the entire application and getting a sense of who that student is as a person and making sure that classrooms offer diverse perspectives.

19:35:40

In fact, it would be wonderful to have blacks and Latino students who are both liberal and both -- who are conservative, who are Republicans, and who are

Democrats. They're not asking for a black person who holds a particular view, but looking to see and assess the whole person knowing that race will impact and influence their views.

[applause]

John Donovan:

I would like to – Erwin we'll go to you.

Erwin Chemerinsky:

I've been a law professor now for 36 years. I've taught subjects like criminal procedure and Constitutional law in classes that are almost all white and in classes with a substantial number of minority students. When you talk about things like racial profiling of the police, the discussion is vastly different with a significant number of students of color who've experienced it compared to an all-white class. When you talk about affirmative action the conversation is different. That's why diversity matters, because it benefits all students and the education of all studies and prepares students for the multi-cultural society we live.

19:36:38

It's not that a particular student comes with a specific viewpoint, but it does mean that race matters in how we experience the world, how we're treated, and we need to have all those experiences in the classroom.

John Donovan:

Stuart Taylor, how -- in responding to that, how does the –

[applause]

-- how does the issue of the goal of diversity work into the constitutionality argument here?

Stuart Taylor:

I'm sorry. The goal of the university?

John Donovan:

How does the goal of diversity in the university setting work into the constitutional argument?

Stuart Taylor:

Well, the Supreme Court has made diversity, which originally meant diversity of thought, but has migrated towards racial diversity, the touchstone for whether a racial preference program is legal or not. Now they've hedged it around. You have to have

very, very, very strong proof that you get just the right kind of racial diversity and as much of it as you need, before you can use racial preferences, and my position is that they have not satisfied that. But that comes from the Supreme Court. Now a lot of scholars –

19:37:36

John Donovan:

Just for -- I'll let you continue. I don't mean to interrupt. I just wanted some clarity. So, but does your position require you to basically say that the court's been wrong? The court's decisions on diversity have taken us in the wrong direction?

Stuart Taylor:

No. It doesn't. Well, it obviously -- we're taking a more absolutist position than the court has ever taken.

John Donovan:

[affirmative]

Stuart Taylor:

We'll see what they do in the future. But I think the court has laid down principles under which most racial preference programs in the country would be struck down if the court enforced them as written. There have been a lot of 5-4 cases where the principles -- and I mentioned a couple of them, as in "no harm to any racial -- members of any racial group," as in "not in perpetuity" -- I don't think I got to that one. Yeah. They laid down principles that would be very hard to meet. They have upheld some programs that, in my opinion, did not conform to their own principles.

John Donovan:

All right. So, one of the points that you made there, and also in your opening statement, is that you're saying the Equal Protection Clause is violated by virtue of the fact that there are -- you made the case for "mismatch" that minorities who are meant to benefit from the affirmative action program are harmed.

19:38:39

But you also made the far more intuitive point that Asians are harmed as a result. And so, I want to take that to your opponents. They're basically saying that it's not equal protection when Asians are believed to be harmed, perceived to be harmed by affirmative action programs. And I want to ask either of you to take that on.

Deborah Archer:

Okay.

John Donovan:  
Deborah Archer.

Deborah Archer:  
So I think we have to first start by distinguishing affirmative action from negative action. And negative action is where a university will take steps to artificially keep low the numbers of a certain group. And so, it seems like there are allegations -- that universities are engaged in negative action against Asian and Asian American students. If that's true, then we absolutely should do something about that. Universities should explain what they're doing. But we shouldn't confuse negative action with affirmative action.

[applause]

John Donovan:  
And Deborah, you said in your opening statement universities do not exist -- they're not there for the best test-takers.

Deborah Archer:  
That's right.

John Donovan:  
So, but the -- I think part of the argument that your opponents are making is that, in fact, test scores -- that they should be a level or they -- at a minimum, they should be an indicator of raw talent. And you're saying that that's not relevant?

19:39:45

Deborah Archer:  
No. I'm not saying it's not relevant. I'm saying it's not the --

John Donovan:  
I didn't mean to put it --

John Donovan:  
But you're saying that that doesn't count enough?

Deborah Archer:  
I'm saying it's not the final decision. Certainly, numbers -- SAT scores, LSAT scores, are good indication to judge a wide range of students that can be successful at your university. But it shouldn't be the end. And if I can make one more point about --

John Donovan:

Sure.

Deborah Archer:

-- Asian and Asian American students -- Asian and Asian American students benefit from affirmative action the same way that everyone else does. Whenever you allow a university to engage in a holistic review of that student, the student's going to benefit. And for Asian and Asian American communities in particular, it's important. Not all Asian and Asian American students have access to a high quality education. They aren't all as successful educationally. In particular, Cambodian students, Laotian students do not fare as well academically as Korean students or Japanese students, or Chinese students.

19:40:38

Laotian and Cambodian students have lower graduation rates than black students. And so, to say that "Asian" students don't benefit from affirmative action is just simply --

John Donovan:

Okay. Let me --

Deborah Archer:

-- wrong. And it's a wedge issue.

John Donovan:

-- I want to --

Deborah Archer:

It's to put a wedge -- put a wedge between the people of color.

John Donovan:

Let me bring Roger Clegg in, because we haven't heard from you in a few minutes. So, your opponents are saying, on the issue of harm done to Asians, that if affirmative action were harming Asians --

Roger Clegg:

Let me interrupt you--

Roger Clegg:

right there. You keep using the phrase "affirmative action."

John Donovan:

All right.

Roger Clegg:  
Racial preference.

John Donovan:  
-- your opponents

Roger Clegg:  
-- racial preference. That's what we're talking about here, okay?

John Donovan:  
So your opponents are saying that if -- yes, you're absolutely right to make that point. Your opponents are saying that if racial preferences were harmful to a class of Asian students, that that would be a problem that they would agree should be remedied. However, they're just saying, it is not a problem.

Roger Clegg:  
Well, yeah. I mean, this gets worse and worse. It's like, well, some Asian Americans are getting discriminated against. But --

John Donovan:  
What's --

Roger Clegg:  
-- let --

John Donovan:  
-- what do you mean by -- describe in what way.

19:41:39

Roger Clegg:  
Well, they admit -- I think what they just admitted was that Chinese American students, and Japanese American students, and Korean American students are being discriminated against by the use of racial preferences. But that's okay. Because, in their view, there's the possibility that Laotian American students and Filipino American students may get preferential treatment. And somehow or other, that makes it okay.

Deborah Archer:  
That's actually not at all what I said.

Roger Clegg:  
Well, I think that is what you said.

[applause]

John Donovan:  
Let's let Erwin respond.

Erwin Chemerinsky:  
-- Mr. Clegg – that's mischaracterization. We are not saying to discriminate against anybody based on race is okay. I want to go to your question, no college

Roger Clegg:  
So you're saying no –

Erwin Chemerinsky:  
-- please, please –

Stuart Taylor :  
What's a racial preference?

Roger Clegg:  
What's racial preference if it's not discrimination based on race?

[applause]

19:42:37

John Donovan:  
Erwin, are you going to answer that very well-phrased question?

Erwin Chemerinsky:  
Yes.

John Donovan:  
Directly?

Erwin Chemerinsky:  
Directly.

John Donovan:  
All right.

Erwin Chemerinsky:  
No college or university ever has accepted students based on just grades and test scores. Colleges and universities always look to a wide range of factors, in terms of what the student can add to the student body and the diversity of the school. I mentioned, "geography." I mentioned, "legacies." I taught for a long time at U.S.C., I'd

venture to say the football players there had lower grades and test scores than other students, or I taught at Duke, the basketball players probably had lower grades and test scores. That's because they brought some other talent to the forefront. There are a much larger pool of students who are qualified to do the work than the number who will be accepted. And so in deciding among them, many factors go into consideration. It is not discrimination to say that one of the things that's considered in addition to athletic talent or legacy is also, "What does a student add based on his or her race to the diversity of the school?" It's wrong to equate preference with discrimination.

19:43:40

[applause]

John Donovan:  
Stuart Taylor.

Stuart Taylor:  
I think the case that's made publicly, there is no doubt that the grades and tests] -- that many Asians with grades and test scores far higher than anybody else's are being rejected by colleges because they're Asians. There's no doubt about that at all.

John Donovan:  
Do you doubt -- do you doubt that?

Deborah Archer:  
Yes, because --

Deborah Archer:  
-- they're Asians, absolutely.

Stuart Taylor:  
I think because they're Asians, but the rationale not used here tonight but often used for this is, "Well, the people we're accepting are better in other ways. They have better leadership qualities. They're contributing more to diversity," whatever. This is a slur on Asian-Americans, the idea that --

[applause]

-- "Well, if they have higher test scores and grades, they've got other qualities that aren't as good."

Roger Clegg:

And a quick point on test scores and grades, Erwin I think said all of us would be against large racial preferences. Well, I think we just won the debate. If all you have to establish is that the racial preferences are large, that's undisputed.

19:44:37

There are 300 to 400 SAT point average differences in a lot of the colleges. There are corresponding GPA differences. There are huge achievement differences within the college. And that's pretty large.

Deborah Archer:

I think –

[applause]

Erwin Chemerinsky:

No, but we're not debating -- we're not arguing here about, "What's the best form of affirmative action." The resolution you're asked to vote on is, "Does equal protection forbid racial preferences?" In order to vote affirmative, you have to conclude that all racial preferences, however small, are unconstitutional. No court cases ever said that.

Deborah Archer:

I also want to just make a quick point. You said that, that there are large racial preferences is undisputed. That's not true. There are many people -- many prominent social scientists who dispute everything that you've said before. Erwin mentioned Richard Lempert, Ian Ayres, Richard Brooks, Derek Bok They've all disputed the points that you're making.

19:45:33

And I think we need to take a step back because everyone else is using the term, "preference," I'm not, because I don't think it's a preference. What universities are doing -- hundreds of universities around the country -- what they're doing is looking at the whole application. It's not a preference. If it was a preference, we'd have far more than 20 percent black and Latino students at most colleges and universities.

[applause]

I also want to dispute the use of the word, "discrimination." Erwin mentioned this. There is no symmetry between race conscious measures that seek to include traditionally excluded groups and invidious discrimination that seeks to include people because of a sense of superiority or hatred.

John Donvan:

All right.

Deborah Archer:  
Those are not the same thing.

[applause]

John Donovan:  
Deborah, I need you to break for Roger.

[applause]

Roger Clegg:  
I don't think that you can draw a meaningful distinction between floors and ceilings that way. I mean, if you are setting ceilings for some -- or if you're having a floor for some, you're setting a ceiling for others. And there's no question that what's going on here is not -- just is an effort, yes, to increase the number of students who are of particular races and ethnicities.

19:46:43

But the means for doing that is by discriminating against people of other races and ethnicities because there's too many of them. If you have underrepresented groups, then you must have overrepresented groups. That's just logic.

John Donovan:  
I want to let Stuart join this as well, but after Stuart speaks, I want to come to you for questions in the audience. And, again, we're struggling a bit to keep this on the topic that we want to keep it on.

[laughter]

You know what? But that's fair. The law does not exist in a vacuum. All of this does relate to real-life stuff. So there is going to be a lot of crossover. But in the end, you're going to have to vote on the constitutionality question. They're going to have to persuade you on that, and that's why I'm trying to keep the issue on this question of fairness and on the text as much as possible. If you can help out in your questions, that would be great, too. But, Stuart, go ahead with your thought.

19:47:32

Stuart Taylor:

One thing we're hoping not to help you struggle on is redefining the terms of the debate by saying, "I'm not going to talk about racial preferences." That seems to me like changing the rules in the middle of the game.

John Donovan:

Well, that -- that's a risk Deborah took, so --

Stuart Taylor:

[laughs] But I want to address the statements by both of our adversaries that all the mismatch argument I was making is nonsense and there are all sorts of scholars who have attacked it. Yes, there are all sorts of scholars who attacked it. I also just sat down yesterday and wrote a list of more than 20 distinguished scholars who have supported our mismatch arguments in various important ways. Now, we're not going to resolve the scholarly debate here. I can say the difference between our scholars and their scholars is that theirs have been discredited completely and nobody has even challenged most of the points made by our scholars. Nobody's challenged, and I didn't hear them challenge, the fact that there are huge racial gaps in grades and test scores within every university.

19:48:32

Nobody's challenged that African-American students who want to do science have to drop out of it in disproportionate numbers because they can't hack the competition. And all of us would agree against large racial preferences. We've talked about that already.

John Donovan:

Okay, let's go to some questions.

[applause]

Right down in front here, sir. Oh, wait -- sir, if you can wait for the mic and then tell us your name as well and then --

Male Speaker:

My name is Russ Neely [spelled phonetically]. And I'd like to ask a question to Erwin and Deborah. Part of the difficulty of separating the constitutional question from the policy question is that the justices who support racial preferences will often say it's a compelling state interest because it has such favorable policy outcomes. So it's not so easy to make this distinction here that the -- that our moderator has made. But I want to ask Erwin and Deborah if there could be such a things as bad diversities, diversities that have harmful effects on the way people of different races perceive each other.

19:49:34

In particular, I want to take up what Erwin said about racial diversities breaking down stereotypes. The critics of our racial preference policy [inaudible] --

John Donovan:

Sir, I'm going to -- I'm going to stop you there because you actually asked a really good question and I need to give everybody a chance. So why don't you go with the question? Thank you.

Erwin Chemerinsky:

Okay.

Erwin Chemerinsky:

Sure. I actually think he raised two questions, first, about the --

John Donovan:

Well, he tried to raise about four, but --

[laughter]

-- he tried to get in four, but -- just take one of them, okay?

Erwin Chemerinsky:

-- the first is the relationship --

Roger Clegg:

If you gave him a couple more minutes, he'd have gotten to 10.

[laughter]

Erwin Chemerinsky:

-- the first is the relationship between the Constitution and policy. This is important. The Constitution does not prohibit all use of race. It doesn't prohibit all use of sex. It says that the government can discriminate even on the basis of race if it's necessary to achieve a compelling purpose. What we're arguing is, "What's the compelling purpose and is it necessary?" So you can't completely separate the policy and the Constitution. And, second, in terms of diversity, what study after study has found is that interracial association does break down stereotypes, that interracial association in college and law school and medical school better prepares those who are graduating to deal with a multicultural workforce.

19:50:47

And commonsense bears that. If we deal with those who are different from us, we're then better prepared to deal with those like them in the future.

John Donovan:  
Roger Clegg.

Deborah Archer:  
Just -- can I add something?

John Donovan:  
I want to hear from the other said, and then I'll come back if it keeps moving. Roger Clegg?

Roger Clegg:  
Well, this is astonishing to me that I actually agree with Erwin on something, and it was actually a point that --

Erwin Chemerinsky:  
We can stop here.

[laughter]

Roger Clegg:  
-- and not only that, but it's something that will make John I think feel better, too, and that is a way to sort of explain why this constitutional argument immediately becomes so laden with policy considerations.

John Donovan:  
Roger, can you turn to your mic? That's great.

Roger Clegg:  
Sure.

Roger Clegg:  
And that is because what the Equal Protection Clause means, and what the Supreme Court, believe it or not, has said that it means, it's got this right, is that racial discrimination is forbidden by the 14th Amendment unless, as I said, the government has a really, really, really, really good reason.

19:51:42

And so that's why what we're talking about tonight immediately becomes, "Well, okay, is there a really, really, really good reason for the discrimination that state universities

are engaging in?" That's why, you know, this debate about the Constitution has become so much a policy debate. And that --

John Donovan:

And you think the diversity goal is not a really, really good reason?

Roger Clegg:

It is -- that's right. And I think that in order to answer that, we talk, first of all, about whether there is anything good that comes from these random interracial conversations, which is what the diversity argument boils down to. And I think that those -- that premise is weak. I think it's even weaker when you consider that a lot of these lessons could be achieved through means that don't involve racial discrimination.

19:52:41

You know, you don't have to have -- rely on these -- the happenstance of these conversations in order to teach students that not all black people think the same way. If you're in law school, you can assign the opinions of Justice Clarence Thomas and the opinions of Justice Thurgood Marshall and figure it out that way, but even after you've done that if you think that there is still something --

John Donovan:

All right.

Roger Clegg:

-- to the -- there are these possible benefits, you then have to weigh against all of these costs.

John Donovan:

All right, Roger. Thanks for your patience and you can -- you wanted to make a point, but you can also respond to Roger. Either way you want to go.

Deborah Archer:

I actually just don't even know where to begin.

[laughter]

Let's start with the lessons can be achieved in other ways. One of the lessons or benefits of affirmative action programs is that they equip us with the skills that we are going to need to engage in an increasingly global economy.

19:53:37

That's happening for the first time for many students in college and it's an important skill to learn. You can look at the protests that are going on, on university campuses around the country and see that having real, substantive discussions about race are difficult. It's the first time that many people are having those conversations because we are incredibly segregated in K through 12 education and we are getting more segregated and the Supreme Court has tied our hands there. We are segregated in our communities and our housing. We -- the Supreme Court just recently recognized last term that it's growing with racial isolation in our communities. Where we can start to bring people together to have these important discussions to gain these skills of cross-racial conversations is in colleges and universities.

John Donovan:  
Stuart Taylor.

[applause]

Stuart Taylor:  
Yeah. A couple of related points that relate to diversity and also to stigma. I think it's important to understand that probably 95 percent of American colleges and universities would have just as many minority students if there were no racial preferences as they do now.

19:54:41

[applause]

The few -- there are some at the top, the very most selective, that would have fewer for a while, and I'm not sure how long awhile it would be, but it wouldn't be a catastrophic drop. They would still have a significant number. They wouldn't have as many as they do now. They don't now have as many as to be proportionate to the population.

Roger Clegg:  
And more that would graduate.

Stuart Taylor:  
So, you know, diversity -- it's not diversity is dead if racial preferences don't continue.

John Donovan:  
Could I just stop you for a second? For a 10-second check in with Erwin, because I thought you had told us in your opening -- our opening chit chat that you saw tremendous drop off in California.

Erwin Chemerinsky:  
There was.

John Donovan:

Okay. Let's hear 10 seconds.

Erwin Chemerinsky:

I can present you the statistics. It's just not true that 95 percent of colleges and universities would have the same diversity. It's just the opposite.

John Donovan:

Okay that was your 10 seconds. I wanted that as a little bit of a fact-check on Stuart.—  
Stuart, go ahead.

Stuart Taylor:

Berkeley and UCLA, two of the eight or so campuses of the University of California had a dive in minorities after racial preferences were banned.

19:55:40

They've crept back up. There are now more Hispanic and black graduates than there were before Prop 209. That's been true for a long time and the other universities, the people who didn't get into Berkeley or UCLA, they weren't just disappearing or going, you know, out to do hard labor, they were going to other UC campuses and they were doing better. They were having better graduation rates. They were having better science retention rates, and in general they were doing better. The racial stigma, which I quickly wanted to say, they say there aren't any studies on racial stigma. I'm not an expert on racial stigma studies. There are some things you don't need a study to understand. If you have an enormous gap between two racial groups in academic achievement at most colleges in the country, that creates stigma all by itself.

[applause]

Deborah Archer:

Can I just very quickly? Sorry.

John Donovan:

Your question really moved this thing along.

19:56:33

Deborah Archer:

Can I very quickly just address --

John Donovan:

Yes, Deborah, please do.

Deborah Archer:

-- a point that Stuart made. They've been discussing back and forth the harm this gives to Asian students and they mentioned UC Berkeley and UCLA. Actually, when race conscious admissions programs were banned in California, Asian students experienced a drop in UCLA and UC Berkeley and just a fluctuation of one percent back and forth over the years and it has been white students who have benefited. So I just want to make that point, because you're -- you keep saying that --

Roger Clegg:

I think that's wrong.

Deborah Archer:

-- the race conscious -- I don't think it's wrong.

Stuart Taylor:

That's not what I've read.

Deborah Archer:

Second, you've been talking about the harm then you said that you don't need studies. There's one point that you made earlier on that is particularly difficult for me to swallow, and that is that somehow race conscious admissions programs lower the academic standards and the drive for high achievement for students of color. I don't think there's evidence that there are students of color sitting around saying "I don't need to work hard because affirmative action is going to get me into college," but there is evidence of students of color --

Roger Clegg:

John McWhorter

Deborah Archer:

-- fighting --

[applause]

-- fighting for a quality education.

19:57:40

There is evidence of students of color trying to get equal access to resources. There is evidence of parents of students of color doing everything humanly possible to get their children a quality education.

John Donovan:

I want to move on to another question, please. Ma'am, right in the center there. The mic is coming from your right hand side.

[applause]

Female Speaker:

Hi. My name is Rachel Jackson. Setting aside the current formulation of affirmative action programs, are you willing to stipulate -- this is for the side arguing for the motion -- that there is evidence of unconscious bias against racial minorities in admissions decisions, in job decisions, things like that? And if so, is there a compelling state interest to correct that bias?

John Donovan:

How does -- how would you relate that to this motion?

Female Speaker:

I would say that, setting aside the current way that people do this, if there's a compelling state interest to correct for unconscious bias? Admissions officers probably have that bias as well.

John Donovan:

Okay. I'm going to pass on the question because I don't think it moves us along quite well. Sir, down front -- but thank you for it.

19:58:39

If you can stand, and let us know your name. Thanks.

Male Speaker:

Yes. My name is Jerry Gilbert. I'd like to ask the affirmative team, how can the state guarantee equal justice if they don't address unequal opportunity to that justice?

[applause]

Stuart Taylor:

Well, there is nothing wrong with the state being aggressive in fighting discrimination.

[applause]

I'm in all favor of that. And in fact, it's because I'm so passionate about fighting racial discrimination that I'm on this side of the debate. I'm also all in favor of affording equal opportunity to people who are disadvantaged or who come from poverty, or who face any kind -- any number of hardships.

19:59:32

But I say all that without using skin color as a proxy for who's disadvantaged, and who's in poverty, and who's facing hardships. You know, there are poor people of every color. And there are also rich and middle class people of every color. And in fact, the way that racial preference systems in select college admissions work is that 86 percent of the African Americans who are admitted to more selective schools come from middle class and upper class backgrounds. Only 14 percent come from lower SES (social economic status) backgrounds. So, this is not a very good way to achieve equal opportunity.

John Donovan:

Sir, down in the front, did you change your mind? I'm going to go to the younger guy in the back. Sorry.

[laughter]

He -- because he was paying attention and you weren't.

[laughter]

Stuart Taylor:

You look pretty young to me.

[laughter]

20:00:34

Male Speaker:

Hi. My name is Eli. I just wanted to ask a question, because you were talking about sort of the different values diversity -- and what it brings. And you made a great point about different perspectives in the classroom. What I wanted to ask is, how can you have a good discussion about something like abortion if you're the only conservative in the room? So how can you --

John Donovan:

Okay. Again, I'm going to pass. This is not helping us understand whether the Equal Protection Clause allows for racial -- and I'm not mocking the question. That's what I'm saying in the beginning -- we're all smart people and we're -- this is a very big subject. So, my passing of the question is no disgrace. Right down in the front here, please.

Female Speaker:

Hi. My name is Jane. If it is a compelling state interest to promote diversity --

John Donovan:

And therefore, passes under the Equal Protection Clause –

Female Speaker:

-- exactly -- is it a denial of equal protection if our legislatures are not diverse?

John Donovan:

Again, I'm going to pass on that.

[laughter]

It's not a dumb question, but it's just not on point. It's not going to help you vote. Right down that -- yeah. Young lady, yes. And there's a mic coming from your right.

20:01:39

Female Speaker:

Hi. My name is Charlotte.

John Donovan:

You're going to be the good one, right?

[laughter]

Female Speaker:

I'm curious as what you -- what action do you think the state and federal government should be taking to, -- to lessen the need for affirmative action --

John Donovan:

Okay. Again, I'm going to pass –

Female Speaker:

-- in state universities?

John Donovan:

-- because we're not doing a policy debate again. Back row, against the wall there.

Female Speaker:

Hi. Hallie Potter [spelled phonetically] from the Century Foundation. One of the legal tests for affirmative action that has been held up by the court most recently, in the *Fisher* decision, was that you have to show that race-neutral alternatives are not sufficient to create racial diversity. Both sides have talked about this, but not a lot about the evidence behind that. Do we actually have examples of universities that have seriously tried both racial affirmative action and socioeconomic affirmative action --

John Donovan:  
Let me take it –

Female Speaker:  
-- so that we can answer that question?

20:02:37

John Donovan:  
-- to the for side first. Which of you –

[applause]

-- Stuart Taylor? And then -- yeah.

Stuart Taylor:  
There may be an example here or there. I see Dean Chemerinsky waving his arm, so I don't want to say anything too absolute. But by and large, the vast majority of selective American schools have been shamefully neglectful of any responsibility they might have to socioeconomically disadvantaged people. They want to fill their racial numbers. They're happy to fill them with immigrants, they're happy to fill them with children of millionaires. They don't care by and large about people who drive trucks or taxicabs and their kids.

[applause]

John Donovan:  
Erwin.

Erwin Chemerinsky:  
That's just wrong.

[laughter]

I've been on admissions committees at three different law schools. We certainly do look to students who are the first in their family to go to college, as I was. Now, let me answer your question directly. There have been many attempts to try to create race neutral ways of achieving diversity.

20:03:35

The University of Texas showed that everything else that it tried failed, which is why the United States Court of Appeals for the Fifth Circuit, with a conservative Judge Patrick Higginbotham writing that Texas is proving no alternative. We'll take UCLA as an

example. They've tried all sorts of alternatives, and they still have fewer African-Americans today than before in 1996. The reason just looking at just socioeconomic status doesn't work is as I said briefly earlier, the percentage of African-Americans and Latinos that are disadvantaged is higher than the percentage of whites, but the sheer number of whites who are disadvantaged is greater. So focus on that socioeconomic, which is important, won't yield racial diversity.

John Donovan:

And, Roger Clegg, your opponents have been saying throughout the debate that there -- that there is no other way. If diversity is a compelling state interest and the Supreme Court has ruled thus, there is no better way than including racial preferences. It can't be done.

Roger Clegg:

Well, certainly, you know, if what you're trying to do is meet a racial quota, there is no better way to meet that racial quota than by considering race.

John Donovan:

No, no, but, no -- but, Roger, seriously, the --

Roger Clegg:

No, I am serious.

John Donovan:

-- the goal -- the goal is not, "Let's include a racial quota." The Supreme Court's language is, "Diversity is a compelling interest." And so you're just -- you think it's a cynical argument?

20:04:44

Roger Clegg:

Yeah. Well, I think that if schools are saying that, "Well, in order to hit our racial numbers, we really have to take race into account," you know, I think that's plausible. But, first of all, I think that Erwin is wrong in saying that the University of Texas has not been extremely successful in using the top 10 percent plan. There is actually, you know, more diversity under the top 10 percent plan than there had been when the University of Texas was using quotas. Now they want to re-impose racial preferences on top of the top 10 percent plan because -- and they want to insure that the African-Americans who are admitted come from well-to-do families rather than those poor African-American students who are being admitted under the top 10 percent plan. That's part of the issue that's before the Supreme Court.

20:05:33

John Donovan:

Deborah, hang on. Deborah, hang on. Just one second. I just need to say one thing for the broadcast. I want to remind you that we are in the question and answer section of this Intelligence Squared U.S. Debate. I'm John Donovan, your moderator. We have four debaters, two teams of two arguing it out over this motion, "The Equal Protection Clause Forbids Racial Preferences in State University Admissions." Deborah Archer.

Deborah Archer:

Just a quick point about top 10 percent plans generally and the one in Texas. They work because there is racial segregation in our communities in our public schools. You're able to get diversity through top 10 percent plans because black people in Texas have -- attend predominantly black schools, and white people in Texas attend predominantly white schools. And so the top 10 percent of any class is going to demonstrate that kind of racial isolation. There's something really perverse about telling a university that in order to achieve the benefits of a racially diverse class, you have to rely on racial segregation in K-12 education.

20:06:30

Also Texas -- the top 10 percent plan -- and other top 10 percent plans, don't allow you to achieve the full diversity. They're asking us not to rely just on race, but that's what those plans do. They're saying, "You got enough black people by going -- by getting the top 10 percent plan, and that's enough." What Texas wants to do is take it a step further and say, "We want a lot of diversity. We don't just want black or Latino students who attended racially segregated schools. We want a variety of black and Latino students." And I think that that's a -- that, that means that, that race neutral alternative is not a workable race neutral alternative or even race neutral.

John Donovan:

Very quickly because I want to get some more questions.

Roger Clegg:

I don't think there's anything perverse about the Texas 10 percent plan. They not only get racial diversity, they get class diversity. Getting class diversity is good. And so now the idea is that they need overt racial preferences so they can get some wealthy black kids in there because they've got plenty of relatively poor black kids and Hispanic kids.

Deborah Archer:

But that's a bad thing.

Roger Clegg:

That begins to sound a little strange --

Deborah Archer:

You don't want to have all of your class –

Roger Clegg:

-- but –

Deborah Archer:

-- diversity be the same as your racial diversity so that all you have are poor black students and all you have are poor Latino students. That only reinforces stereotypes. It doesn't help to break down stereotypes.

20:07:43

[applause]

John Donovan:

On the stairs there

Male Speaker:

My name is Herbert. This is for the team for. You have been emphasizing the problem about mismatching. But wouldn't you say that struggling opens up new gates to the human mind?

[applause]

John Donovan:

Stuart Taylor.

Stuart Taylor:

That's a very good question, and it gets me back to the difference between small racial preferences and large racial preferences. It may not be dispositive on the constitutional issue, but your question raises it. We wrote in our "Mismatch" book that bringing in people who are a little bit less well-prepared academically, a balance tipping thing, than their classmates, may actually be good for everyone because they can catch up. They can work a little harder. It's not that big a gap.

20:08:34

But the gaps as I've been emphasizing in colleges today, the racial preference gaps between black students especially and Asian and white students, are so enormous that no matter how hard the black and Hispanic students work, most of them, they can't compete. They can't catch up. It's like taking me and putting in a -- putting me in a nuclear physics graduate course at MIT. I'd be lost on the first day. I'd get more lost every day from then on.

John Donovan:  
Okay. Down front.

Kelly Gerstenhaber:  
Kelly Gerstenhaber at Columbia University. So there's a -- there's a pretty well established racially prejudiced testing bias that we see from -- since kids are age four. Might it be a fair interpretation of equal protection that, you know, affirmative action offsets this racial bias?

John Donovan:  
Let's put the question first to --

Stuart Taylor:  
I think the complete rebuttal to that --

John Donovan:  
-- Stuart Taylor.

Stuart Taylor:  
-- and I respect the question -- is that the whole idea of the SAT and scores of the usual grading -- usual criteria for admissions is that they predict how well people will do.

20:09:47

So if there was a racial bias against blacks in SAT, they would do better in college, one would expect, than their SAT scores predict. In fact, they do worse in college than their SAT scores predict. They do worse in law school than LSAT scores predict, and I think that takes care of that particular point.

John Donovan:  
Erwin Chemerinsky.

Erwin Chemerinsky:  
What you say is right. Many studies have demonstrated that there is a cultural and racial bias to standardized tests. It's why you can't measure qualifications just based on standardized tests. And in terms of --

[applause]

-- again, having looked at the studies about the LSAT, there is only a very weak correlation between the LSAT in first-year law school grades, no correlation to LSAT in second and third-year grades, and no proven correlation to the LSAT on what somebody's going to be is a lawyer.

20:10:43

So let's not assume that these tests really measure qualifications.

[applause]

Deborah Archer:

I would also just want to add a response to what you said.

Stuart Taylor:

The entire educational system has voted against what you just said.

[applause]

Deborah Archer:

I just want to add something to respond to --

John Donovan:

Deborah Archer.

-- something you said about the SATs. A book called, "The Shape of the River," by William Bowen and Derek Bok, they studied 28 academically selective universities and looked at black students in a certain band of SAT scores. In the top tier schools, think Yale and Harvard, 87 percent of the black students in that band graduated. In tier two schools, 79 percent of the black students in that same band graduated. And in tier three, 72 percent of the black students in that same SAT band graduated.

20:11:34

So that actually proved the opposite, that the students with the same SAT score were more successful, the higher ranked school that they went to. So, again, I we can't resolve whether you're right and Derek Bowen, Ian Ayres, Richard Lempert are right, but it's important to note that what you say is not undisputed.

Stuart Taylor:

But I think it's also important to note that the schools you're talking about like Harvard graduate almost 100 percent of their students. And the ones --

Deborah Archer:

Yes, but you claim that when you admit black and Latino students --

Stuart Taylor:

-- farther down don't, and I think --

Deborah Archer:

-- it somehow undermines the --

Stuart Taylor:

-- that accounts for what Bowen and Bok found.

Deborah Archer:

-- academic qualities.

John Donovan:

All right, in the last few minutes we have, we're going to do what sometimes we do in these debates where we call it our "volley round." And what we want to do is we want to look in a very, very short period of time sort of cut to the chase on the issues that are before us. And the way this works is that each debater -- it'll take two minutes -- each debater gets 30 seconds to answer a question I'm going to put. They all answer the same question, and when their 30 seconds are up they have to stop talking -- [bell dings] -- because I will do that.

[laughter]

And my question is, "When we talk about 'equal protection under the laws,' what do we mean by 'equal' in the context of this debate we're having about racial preferences? What constitutes equal?" I'm going to start with this side. Which of you would like to go first?

20:12:47

Roger Clegg:

I'm happy to take it.

John Donovan:

Roger Clegg, your -- Roger Clegg, so your 30 seconds starts now.

Roger Clegg:

The answer is that we do not treat people differently because of the color of their skin or what country their ancestors came from.

[applause]

John Donovan:

You're done with your 30 seconds?

[applause]

On the opposing side, Deborah Archer.

Deborah Archer:

I think the history and the purpose of the Equal Protection Clause shows that equal doesn't mean colorblind.

John Donovan:

Stuart. Stuart Taylor.

Stuart Taylor:

I agree with Roger, and I would also add that once you start saying some people are more equal than others, to borrow from Orwell, with a multi-racial society like we have you get into an impossible racial spoil system where everybody's struggling for their little racial slice of the pie.

[applause]

John Donovan:

Erwin Chemerinsky.

20:13:36

Erwin Chemerinsky:

One thing we're doing is discussing this out of the context of American history. We're not talking about the long history of separate and unequal schools. We're not talking about the long history of discrimination against African Americans. The purpose of the Equal Protection Clause was especially to prohibit subordination of minorities, try to get a more equal society based on race. That's why the same Congress that ratified the 14th Amendment also adopted programs that today we call affirmative action.

John Donovan:

And that concludes –

[applause]

-- our volley round and round two of this Intelligence Squared U.S. debate where our motion is: The Equal Protection Clause Forbids Racial Preferences in State University Admissions. And that's the first time we've done that where I didn't have to ring the bell once.

[laughter]

And I so wanted to.

[laughter]

Roger Clegg:  
Try again.

John Donovan:

Now we move on to round three. Round three is our closing statements from each debater in turn. They will be two minutes each. These will be done seated. First speaking for the motion: The Equal Protection Clause Forbids Racial Preferences in State University Admissions, Stuart Taylor, journalist and co-author of the book "Mismatch."

20:14:40

Stuart Taylor:

To look at a little recent history, very recent, consider the anguish of Amani Marshall. She's a senior at pre-med student at Amherst, which is a private university, but the racial preference system works the same there as in the state universities. She started to cry at a recent gathering when another student said she went to sleep every night wishing she would not wake up. Now both of these students are African Americans and that was sort of the context. Ms. Marshall said she felt unprepared academically and socially for Amherst. Remember, she was identifying with a woman who was suicidal so she was pretty -- feeling pretty bad about this. She was reluctant, she said, to ask for help for fear of undermining the standing of herself and her race. She added, "I feel like an imposter. I feel like I need to prove myself to people to believe -- to prove that I belong here." Her anguish is understandable. It's touching, but she mentioned no experience of racism.

20:15:37

Instead she may be a victim of large racial preferences and her school's failure to warn her about their academic consequences. Of course, they also harm better-prepared Asians and whites who get turned away, as we've discussed. This destructive system violates the Equal Protection Clause. Also, let's recall the Supreme Court's statement in 2003 that equal protection forbids permanent racial preferences. That's not -- in other words, diversity doesn't mean anything goes. Forbids permanent racial preferences. A question I have for Professor Archer and Dean Chemerinsky, should racial preferences end by 2028 as the Supreme Court said in 2003? Or 2050? Or 2100? Or 2200? Or is this system of racial discrimination forever? Please listen for the answer and please vote for the proposition The Equal Protection Clause Forbids Racial Preferences in State University Admissions.

20:16:36

John Donovan:  
Thank you, Stuart Taylor.

[applause]

And that is our motion and here to make his closing statement against the motion Erwin Chemerinsky, dean of the University of California, Irvine School of Law.

Erwin Chemerinsky:

When I stood at the lectern, I issued a challenge to my opponents. I said you could only vote affirmative if you find one of two things. I don't have to convince you that diversity in the classroom is unimportant or they must convince you there's another way to achieve diversity. I think they failed at both of those questions. As to the former, diversity is compelling. The Supreme Court has said it time and again. It's like every college and university I know of engages in affirmative action. Some form of what we're, tonight, calling racial preference. Diversity matters in preparing all of our students for the society that they're going to deal with. The second question is, is there any other way to achieve diversity? The reason college universities engage in affirmative action is none has found an alternative. We talked in generalities, but I've got statistics. The University of California Davis Medical School found that without some form of affirmative action they would average less than one African American or Latino student a year in an entering class of a hundred.

20:17:42

When Proposition 209 was passed in California, five years after -- University of California Law School, a private school, 11.4 percent of the students are African American. At Stanford Law School 9.6 percent of the students were African American, but the University of California Berkeley only 3.2 percent of the students are African American, and UCLA Law School only 2.4 percent of the students were African American. Without affirmative action -- because our legacy discrimination and continuing discrimination -- we will not have diversity in higher education. How do you feel about the idea of elite college universities with almost no African American or Latino students? That's what the affirmative asking you to vote here. We are not here tonight to argue whether there should be large racial preferences. We're not here, Stuart, to argue there should be permanent racial preferences. No one favors that. To vote affirmative, you must conclude that no racial preferences ever are constitutional. You must overrule decades of Supreme Court jurisprudence. Don't do it. Vote negative.

20:18:41

[applause]

John Donovan:

Thank you, Erwin Chemerinsky. And the motion is: The Equal Protection Clause Forbids Racial Preferences in State University Admissions. And here summarizing his position in support of the motion, Roger Clegg, President and General Counsel of the Center for Equal Opportunity.

Roger Clegg:

Let me make one point at the outset. You've heard a lot about dispute social science evidence. And I would say that yes, this social science evidence is, to some extent, disputed. I think that we have the better argument. But if the evidence is disputed, then I think the other side loses, because there cannot be a compelling interest in something if it's not clear if that interest exists at all. Now, what you have to decide tonight is which of two very different visions of the role the Constitution allows race to play in state university admissions is.

20:19:37

Our opponents think that it is fine if state education officials, for the foreseeable future - and probably forever -- look at the skin color and national origin of the students who apply to help determine who gets in. I don't think that this is the vision of the people who wrote the words of the 14th Amendment or the people who ratified it right after the Civil War had been fought. I think that when they said that, "No state shall deny to any person the equal protection of the laws," they said "No" to that kind of discrimination. The institutionalization of racial discrimination that our opponents support will become harder and harder to dismantle with every tick of the clock. It is not consistent with the vision that we should have for our increasingly multiracial and multiethnic society.

20:20:35

In that society, by the way, blacks and whites are now the slowest growing groups. The fastest growing group is Asian Americans, and then Latinos, and then people who are themselves multiracial. For a society like that to work, there has to be mutual respect. And for mutual respect, we must all be judged by the same standards. And we must know that other people are being judged by the same standards too. Please vote for the motion.

[applause]

John Donvan:

Thank you, Roger Clegg.

[applause]

And that motion is: The Equal Protection Clause Forbids Racial Preferences in State University Admissions. And here making her closing statement against the motion, Deborah Archer, professor of law at New York Law School.

Deborah Archer:

I very quickly just want to respond to something that was said, that because there is some dispute -- very little dispute -- about whether or not mismatch exists, that it can't be the basis to say that diversity is a compelling interest. It's important to note the Supreme Court, in the first Fischer case, received all the information and data about mismatch and still ruled that diversity is a compelling state interest.

20:21:33

The 14th Amendment isn't about color-blindness. It is about equal citizenship. Indeed, the purpose of the 14th Amendment was to constitutionalize race-conscious admissions -- to constitutionalize race-conscious programs. The framers of the 14th Amendment understood that considering race is sometimes necessary to achieve equality. It is perverse to argue that the constitutional amendment created to help turn America away from its legacy of racial oppression requires us to limit the opportunities available to students of color. Racial diversity in education is important and it is compelling. It is not about discriminating against anyone. It's not about denying opportunities to anyone because of their race. Race is not the only factor and it's not the deciding factor. I am certainly personally been a beneficiary of affirmative action programs, but I didn't get into college or into law school because of my race. Did the law school consider the fact that I'm a black woman, the child of immigrants, or the first person in my family to graduate from college when they accepted me?

20:22:35

Did it consider the fact that I was raised in a racially-segregated neighborhood, then moved to a white suburb, where I experienced racial discrimination? I hope so, because without it, they have no idea who I really am. And they have no idea what it took for me to get to where I am. My SAT scores, my LSAT scores, my GPA certainly did not tell my whole story. The Constitution promises equality to all people regardless of race. Today, race matters. Not because it should, but because it does. And there's nothing in the Equal Protection Clause that says we have to ignore that reality. I urge you to vote against the motion. Thank you.

John Donvan:

Thank you, Deborah Archer.

[applause]

And that concludes closing statements for this Intelligence Squared U.S. Debate, where our motion is: "The Equal Protection Clause Forbids Racial Preferences in State University Admissions."

20:23:30

And that concludes our closing statements. And now it's time to learn which side you feel has argued the best here. We're going to ask you again to go to the keypads at your seats and vote, as you did at the beginning, but after having heard the arguments. Push number one if you agree with the motion: "The Equal Protection Clause Forbids Racial Preferences in State University Admissions." Push number two if you disagree. Push number three if you became or remain undecided. All right, while we're doing that, first of all, I may -- I may need to ask for a revote because I'm just hearing in this thing in my ear where -- everything that I say is exactly what I'm told to say by the real puppet master backstage --

[laughter]

-- so I've given away the secret -- we may have had a system crash on the vote -- on the second vote, and we may need to do it quickly. I'm going to wait for a second. So while that's happening, I'll say the things that I was going to say.

20:24:33

First of all, as we referenced at the beginning, this banner behind us explains what this purpose of this debate was. And working with the National Constitution Center on this and this whole series has been terrific for us. And it was a really interesting one to see the struggle to separate policy in the law. The point maybe is that you can't separate policy and law -- and policy in the Constitution. We're going to keep trying because we think there's value to it. And I think, despite some wandering around, that all four of the debaters did a terrific job of continuing to bring it back. So thank you for that.

[applause]

Thank you. So now that you've had a whole second chance to think about it, we're going to have you vote a second time -- a second, second time.

20:25:37

It's not working, you're saying? Okay. Show of hands. Show of hands. Count off, please. Okay, the other thing I want to say, and I usually say this afterwards, is that I bumped a lot of questions today and I don't like doing that because it -- I don't want anyone to feel that they were disrespected by that. I don't think it's so easy to come up with questions on this topic, that keep it on focus. In fact, we've done an affirmative

action debate which was very rich and textured, and I sort of wish some of your questions had come up in that debate because they were really, really excellent. So I just want to say to everybody who got up and asked a question, including the gentleman who was looking away when his turn came, I appreciate all of you having the guts to get up and do this. So my thanks to all of you, and a round of applause for all of you.

[applause]

Okay, we're going to do the second vote for a third time now.

[laughter]

20:26:38

You're all showing great fortitude. Is it looking alive?

Female Speaker:

Yes.

John Donvan:

Okay. I'm told it's alive. I'm sure this is introducing a note of indecision. All right, we're good? Okay. I'm told that the votes are still coming in. Okay. We're locking in the system now. It looks like everybody has voted. I wanted to also mention that this was -- that we're going to have the results in about a minute, so I just want to share our upcoming season. This was the last debate of the fall season for us. I think we are very proud to say that it is -- was number 116 of the debates that we've done, and we're --

[applause]

Yeah, pretty amazing.

20:27:39

So we're back on January 13th when we're going to go through the spring. So here's some of what we're doing on January 13th. The motion is going to be this, "The U.S. Should Let in 100,000 Syrian Refugees."

[applause]

Later in the season, we are going to be looking at "Offensive Speech on College Campuses;" we are going to be doing a debate on "Artificial Intelligence: Good or Bad;" we're going to be looking at "Corporate Subsidies: Good or Bad" whether hunters are good for wildlife, whether they're conservationists. And we're going to be looking at the issue -- sometimes we do a little sort of cultural quirkier topics that are nevertheless

fascinating and we're going to look at the -- sort of the politics and the ethics and the reality of radical life extension, of people planning to live as long as they can, you know, for like 125 years.

20:28:35

We are going to be partnering again in June with the National Constitution Center. That debate will be in Philadelphia. It's a very short train ride. We have had people from our New York audience make the trip down. And, again, these constitutional debates are their own special animal, and they're -- and they're fantastic. So we'd love to have you come along. If you want to know more about our upcoming debates, you can buy tickets on our website, iq2us.org. And if you can't get to the live audience, just as tonight's debate was livestreamed, you can watch it on the livestream. This debate will live on for a long, long time on our website and on our app, like it's going to live 125 years. And we have an app that's available through the Google Play Store and the Apple Store. And all of our debates are on there both as video and as audio as the podcast, with the results also, you can vote on the debates, and there is actually a comment section on it. It's really a gorgeous app. And you can -- wherever you are in the country, you can check with your local public radio station to see if they're carrying us.

20:29:38

And our website, finally, last of all, we are on Twitter and on Facebook, and I think we had a lot of tweets going on throughout this debate so we're delighted to have that. The last thing I want to say, we're nonprofit. Everything that I just talked about, all of that programming, we give it away for free. A lot of it now is in use in school curricula across the country, by the thousands, we understand. I'm hoping that's not an exaggeration. I'll just ratchet it back to the hundreds, but I'm told that it's a lot of places. And we depend on your support for that. We're a philanthropy. And the ticket prices don't come anywhere close to covering the costs of putting one of these things on. We have a lot of benefactors who are helping us out, but even the smallest contributions would be very, very much appreciated to keep us going and to get us to be doing more and more debates. So we would appreciate it. If you take a look at our website, it's very easy to make a contribution there. So that's it. I'm going to re-announce the results of the votes -- the results of the vote now. I'm going to only do the third vote. I'm not going to bother with the first two -- well, first and second false votes, so we can get to the conclusion.

20:30:41

So back to the radio show. So we have the results all in now. The motion is this, "The Equal Protection Clause Forbids Racial Preferences in State Universities." You have voted twice on this, before the debate and once again afterwards. The team whose numbers changed the most will be our winner. Let's look at the results of the first

vote. In the opening vote on this motion, 27 percent agreed, 30 percent disagreed, 43 percent were undecided. So that is the first vote. Let's look at the beginning of the second vote. Let's look at the team arguing for the motion, "The Equal Protection Clause Forbids Racial Preferences in State University Admissions." First vote, 27 percent, second vote, 32 percent, they picked up five percentage points. That is the number to beat, that five. Let's look at the team against. Their first vote was 30 percent. Their second vote was 62 percent.

[applause]

They pulled up 32 percentage points, making them our winner.

20:31:34

[applause]

The motion has been defeated, "The Equal Protection Clause Forbids Racial Preferences in State University Admissions," defeated. Thank you from me, John Donovan. Congratulations to that side. We'll see you next time.

20:31:45