

Affirmative Action and the 14th Amendment

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[00:00:00] **Tanaya Tauber:** Welcome to Live at the National Constitution Center. The podcast sharing live constitutional conversations and debates hosted by the center in person and online. I'm Tanaya Tauber, senior director of Town Hall programs. Last week, we hosted an informative discussion on a key affirmative action case before the US Supreme Court. Our guests were Jin Hee Lee, senior deputy director of Litigation and Director of Strategic Initiatives for the NAACP Legal Defense Fund, and Ilan Wurman, associate professor of Law at the Sandra Day O'Connor College of Law at Arizona State University.

[00:00:43] **Tanaya Tauber:** They discussed the history and meaning of the 14th amendment and how the amendment informs the debate about whether or not the Constitution is colorblind. The program was presented as the keynote panel of the Annual Law Symposium hosted by the University of Pennsylvania Journal of Constitutional Law. Jeffrey Rosen, president and CEO of the National Constitution Center moderated. The conversation was streamed live on January 27, 2023. Here's Jeff to get the conversation started.

[00:01:12] **Jeffrey Rosen:** Hello, friends. Welcome to the National Constitution Center and to today's convening of America's Town Hall. Before we begin, I want to thank the University of Pennsylvania Journal of Constitutional Law, including Richard Hughes, Simone Hunter-Hobson and Trevor Kirby for inviting the NCC to collaborate on this discussion. Thank you so much for joining, Jin Hee Lee and Ilan Wurman. It's wonderful to convene both of you. We're going to begin with a broad question. Do you think that the Harvard Affirmative Action Program is consistent with the 14th amendment or not?

[00:01:47] **Jeffrey Rosen:** And after opening statements, we'll dig into questions like: is it consistent with the original understanding of the 14th Amendment? Is it consistent with Brown versus Board of Education? And what about specific aspects of affirmative action as it's practiced? So with that introduction, Jin Hee Lee, it would be wonderful if you would lead us off. Welcome to the conversation. And please tell our audience why you believe that the Harvard Affirmative Action Program is consistent with the Constitution.

[00:02:14] **Jin Hee Lee:** Well, thank you so much, Jeff. And I want to thank the National Constitution Center, as well as University of Pennsylvania Law School for having me. This is really an important event and a really important conversation and so glad to be here. This question that you asked is important to me personally, but also professionally, because I am an attorney at the NAACP Legal Defense Fund, which is the late Thurgood Marshall's firm that he had founded. And he of course, was the first Black Supreme Court justice. And from the very beginning, when formative action has been litigated in the federal courts, we at LDF

have always maintained that affirmative action programs are very much consistent with the 14th Amendment.

[00:03:00] **Jin Hee Lee:** When we think about the equal protection clause of the 14th Amendment and, and the reasons that it was enacted, and I know we'll get into this more later in the program, but we have to remind ourselves of why that very important part of the constitutional amendment was enacted. And it was because we lived in a society that was grossly unequal. If a large part of our population was enslaved and not even considered to be full human beings, that is the society that we lived in when the 14th Amendment has been passed. And we have been in a generations-long effort to remedy that egregious sin, that original sin of the United States.

[00:03:45] **Jin Hee Lee:** And so now, we look at the affirmative action and affirmative action can occur and in different places, but focused on higher education. And it's so essential. And I think this has been said quite eloquently in the Supreme Court opinions that have really affirmed repeatedly, affirmative action in higher ed for over 40 years. So this has been a very stable kind of concept within the federal jurisprudence. But the notion that higher ed, in particular, is a gateway for developing the leaders of this country, that higher education is also a place where you're supposed to be encountering people of different backgrounds, different experiences and so forth.

[00:04:29] **Jin Hee Lee:** And especially in a place like higher education, it is so essential for all students, regardless of their race or their background, to have the opportunity to be a part of that educational setting, to contribute their experiences, and also benefit from the opportunities that educational experience would afford them. And unfortunately, we live in a society where our K-12 educational system is grossly inadequate and grossly unequal. That is undisputed. And it is unequal along racial lines. And so in order to achieve the goal of having the best education for our students so that they could truly learn from each other, it's essential to look at diversity of all kinds. And certainly, racial diversity should be one consideration among many.

[00:05:20] **Jin Hee Lee:** And I think that's really important for everyone to understand that when we're talking about affirmative action in higher education, we are not talking about quotas, we're not talking about people getting accepted to a particular school because of their race, solely because of their race. We're talking about the ability to consider a person's race in combination with the myriad characteristics that colleges and universities look at. And certainly, for many, many people of color, their race has really been a very formative part of their development.

[00:05:55] **Jin Hee Lee:** It may be a formative part of their education, the opportunities that they had received. It may be a very important aspect of their identity that they want to explain to the college and university as to why they in particular will contribute to the student body and be of benefit to the educational setting. So for all of these reasons, it's just really an actuality quite contrary to the 14th amendment to say that a college or university cannot consider race among many, many factors when thinking about trying to formulate that diverse student body that they think would create the best educational setting for them.

[00:06:38] **Jeffrey Rosen:** Thank you so much for that opening statement. Ilan, I'll ask you a version of the same question. Is the Harvard Affirmative Action Program consistent with the 14th Amendment or not?

[00:06:51] **Ilan Wurman:** And I'm going to decline to answer the question, for the reason that I was asked actually to write a brief, as you mentioned earlier, Jeff, I have a book on the original meaning of the 14th Amendment, and so I was asked to write a brief in the Harvard admission's case. And I declined to do so actually, because it strikes me that this question is very hard. I won't totally dodge, and I will say that my instinct, my inclination, is that it's not consistent with the Constitution, but it will be dependent on the particular program that we're talking about.

[00:07:24] **Ilan Wurman:** So having said that, why is this the view that I'm taking? Why is it probably inconsistent with the Constitution? Again, depending on the particular program, that's an issue. I'm going to sketch out a few things that I know, Jeff, you want to talk about a bit later. But to me, when you ask, is it consistent with the 14th Amendment and is it consistent with the original understanding? To me, that's the same question. As you know, I consider myself an originalist. We could get into that another time, perhaps. And so let's talk about the original meaning of the 14th amendment and just the framework that I would apply to analyzing these questions.

[00:07:57] **Ilan Wurman:** The first point I would make is that the equal protection clause is actually the wrong clause. And why is that? Because the protection of the laws was a narrow legal concept of judicial remedies against private interference with private rights. In addition to that, it was the government that had to actually physically protect you from private violence from like the Ku Klux Klan, right? So mob violence was the quintessential violation of the protection of the laws.

[00:08:22] **Ilan Wurman:** So what guarantees equal rights in the 14th Amendment? It's the privileges or immunities clause. The clause that says no state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States. What are the privileges and immunities of citizens of the United States? These are the kinds of rights of all three governments: have to secure contract rights, property rights, First Amendment rights, Second Amendment rights, that kind of thing. Those are the privileges and immunities of citizens of the United States.

[00:08:50] **Ilan Wurman:** There's a question out there, by the way, and we can talk about it maybe with *Brown v. Board*, whether public privileges like public education are covered under the privileges and immunities. Are public privileges the kinds of things that are these fundamental rights that offer governments have to secure? I have a new paper in the Virginia Law, where I argue yes, they are and I explained why. I'm not going to get into that there, but let's just assume for the sake of argument that public universities, public schools are, are covered. The question then becomes what is an abridgement of the right.

[00:09:21] **Ilan Wurman:** So we know the Black codes were an abridgement. Why? Because race has no reasonable relationship to why we have contract rights or property rights. So the Black codes in the south that said the newly freed people couldn't own property, they couldn't own guns. These were abridgement because race has nothing to do with contract rights,

property rights, and so on. So they were abridgements of these privileges and immunities of citizens. So how does this apply potentially to affirmative action programs?

[00:09:54] **Ilan Wurman:** The first thing that I would say is, actually, the privileges or immunities clause is more helpful, I think, to proponents of affirmative action, because it allows for disparate impact analysis. I mean, there's some disparate impact analysis, right? The law could be facially neutral, but if there's a disparate impact on race, there's a debate over whether that should be unconstitutional without an intent to discriminate. Well, the privileges or immunities clause says, "No state shall make or enforce any law which shall abridge the privileges or immunities." So you can enforce laws that in fact, in practice, abridge these rights. So you don't need discrimination on the face.

[00:10:34] **Ilan Wurman:** That's a lot. So how did that apply to affirmative action? Well, I know we're going to talk about the history. There are lots of examples of so purportedly race conscious legislation that Congress has enacted. There are lots of briefs, some of them, I think, were put in the notes already, in the chat, that say, "Look, Congress is allowed to enact race conscious legislation." Now, I think this is kind of trivial, right? Because Congress passed these laws that say, "The states are discriminating in the Black Codes. Stop discriminating against Black person. Stop discriminating against, on the basis of race."

[00:11:05] **Ilan Wurman:** That's race conscious and truly trivial sets. It's like we know that the 14th Amendment says stop discriminating on the basis of race. If Congress passes a law that says stop discriminating on the basis of race, yes, that's race conscious but it's totally trivial. It's totally useless to the question. But affirmative action. Why is affirmative action more difficult? It's because unlike this legislation that Congress enacted, creating a Freedmen's Bureau. Because Black people were not getting protection of law from courts in the south, contract rights weren't being enforced. So they set up courts so that the contract rights and property rights of the newly freed people could be enforced and so on.

[00:11:45] **Ilan Wurman:** Why saying striking down the Black codes, why are these all different? Because they're not zero sum. They're not zero sum. Affirmative action seems different because we're not talking about, "Sure, all people should have the opportunity to go to school, to public schools if they want. All individuals shall have the right to contract if they want. All individuals shall have the right to own guns. All individuals shall have the right to own property, irrespective of race." Those are obviously constitutional things, right? When a private university that gets funding says, as it turns out in the Harvard case, "when we have a fixed number of spots," it's not the same thing, it is a zero sum game.

[00:12:24] **Ilan Wurman:** And when you have to, all of a sudden, use race as a factor to get people admitted who otherwise wouldn't be on the basis of other criteria, and in the Harvard case, it turns out, to do that, you must deny individuals of another race a position that they otherwise would have qualified for. And the data show, I'm not a statistician, I'm a lawyer, I don't know anything other than what the parties tell us. It seems that there's discrimination against Asian Americans on the basis of race.

[00:13:01] **Ilan Wurman:** And so this is different, because all of a sudden, it's not just a state trying to remedy past discrimination, it's not just a state trying to remedy disparate impact,

because none of that would be making or enforcing a law that abridges privileges or immunities. It is trying to remedy what they understand to be systemic or the result of historical discrimination that requires making laws that abridge the rights of other people on the basis of their race.

[00:13:29] **Ilan Wurman:** And that's why it's really complicated because the former goal seems to me totally plausible under the 14th Amendment. But if it has the impact of discriminating on the basis of another race, all of a sudden, what's the answer? It's really hard. And that's why I refuse to write a brief. But you knew that when you invited me, Jeff, to participate in this. And so that's the best direct answer I'm going to give you. You can even call that a direct answer.

[00:13:52] **Jeffrey Rosen:** Thank you very much indeed for it. And it well sets up the next part of our conversation, which is to dig into the text and original understanding. Jin Hee, you've heard Ilan make his argument that he thinks that the right to attend public schools should be considered a privilege or immunity of citizenship, and although he thinks it's a hard question, to parcel that out on the basis of race is an abridgment of privileges or immunities of citizenship.

[00:14:24] **Jeffrey Rosen:** In the oral arguments in the Harvard case, Justice Jackson had a very different view of the original understanding and noted to all sorts of race conscious laws that Congress passed at the time of reconstruction and suggesting in her view that the point of the 14th Amendment was to help Black people, not to require colorblindness. Can you please give us your understanding of the original understanding of the 14th Amendment and why you believe it is consistent with affirmative action?

[00:14:58] **Jin Hee Lee:** This is a very important question and I feel, I think, it touches upon kind of two fundamentally different viewpoints of what equal protection and race discrimination is. So let's take the colorblind argument, which is what the plaintiffs in the formative action cases have brought. And what they seem to be arguing is that our constitution is colorblind, that we shouldn't see race. We shouldn't even think about race. And in many ways that race is bad. That it would be wrong to acknowledge race or to have that be a part of any kind of consciousness in terms of decision making and so forth.

[00:15:46] **Jin Hee Lee:** And we've seen that in a lot of just current events. The movement among the many conservative activists to remove books that discuss race or arguing that words like racial equity and cultural competence are actually proxies for discrimination and so forth. So this is a very real kind of, what I consider, a dangerous viewpoint, but it is a viewpoint that many people feel very strongly about. But it's one that I think is very wrong and inaccurate, and doesn't really understand the nature of inequality and also the nature of inequality at the time that the 14th Amendment was enacted.

[00:16:33] **Jin Hee Lee:** Because when we think about, again, going back to what I said earlier about the time of the late 19th century, we were in a situation where a large swath of our population were not even considered human beings. They had no legal status, they were not even recognized as citizens at all. And of course, in order to remedy that, we would have to change their legal status and change the laws to recognize that that's unequal, that it's wrong for the law to treat people differently on the basis of race.

[00:17:12] **Jin Hee Lee:** But I think what's really important for all of us to kind of understand and to know, and I think everybody kind of knows this instinctively, is that you can say that the law is equal and that you shouldn't discriminate. But that doesn't mean that inequality disappears. You have generations and generations of a society that had treated a whole group of people as not even second class citizens, not as citizens at all. And so there is the nature of the inequality that we're talking about, that the 14th Amendment was addressing, was not just that the law treated people differently. It was because that everyone had considered this group of people to be inferior.

[00:17:57] **Jin Hee Lee:** And that was the reason why they were treated differently. And just by saying that, "Okay, we're going to change the law," those systems of inferiority continue to persist. And it's actually, in many ways, kind of cementing and sustaining preexisting inequalities to kind of embrace this colorblind notion because it's actually coincidentally very advantageous. Colorblindness is very advantageous for people who had the advantages, you know, during the time of expressing very explicit discrimination. And then to say, "Okay, we're just going to say that race doesn't matter, but the world is going to be the same."

[00:18:40] **Jin Hee Lee:** And that is the country that we have inherited and that is the country that we live in today. It's not to say that, of course, 2023 is not the same as 1868 or even 1950. But to say that all problems of race discrimination, of racial inequality, have been solved is ignoring the realities of what we see on a daily basis. Now, what's really remarkable too, is that the arguments about why we should not be race conscious because it discriminates against other people, that it's a form of reverse discrimination, it creates stigma for people who are victimized, these are arguments, actually, that were made in the late 19th century.

[00:19:25] **Jin Hee Lee:** These are arguments that have been made along. So never in this country have we fully embraced a full blown effort to remedy the inequalities in our country, because the same arguments we hear today were made centuries ago. And so there's always been this obstacle to try to really achieve true equality. Now, I think the conception of what equality is, and I appreciate what Ilan said about the privilege immunities clause because the notion of citizenship, I think, is very, very important in this conversation.

[00:20:07] **Jin Hee Lee:** Because at the time of slavery when Black people were not considered human beings and not considered citizens. And what does citizenship mean? And the 14th Amendment not only recognized Black people as full citizens for the first time but also that they were entitled to the equal protection as citizens. And what does that mean to be equal as a citizen in this country? And I think that is actually the very difficult question that we need to answer, which is, "What is it to be equal in this country?"

[00:20:44] **Jin Hee Lee:** And then we'll talk about Brown in a little bit. But a key component of citizenship, in addition to voting, which is why we have the 15th Amendment, which is such an important part of citizenship, but a key component of citizenship and being equal citizens, is public education. Because as the Brown decision said, that is the foundation of good citizenship, is our public education system. This is where children go to learn. To learn about our country, to learn about our role in this country, to learn about each other.

[00:21:17] **Jin Hee Lee:** And I think that is just very, very important to understand, that when we think about equality, we think about what does it mean to be a citizen in this country, to have equal access to all of the benefits that everybody is entitled to as a citizen in this country. What does that look like? What should that mean? And the role of education and ensuring that equal citizenship among everyone in this country. And education is such an important part of that because education is the gateway to so many opportunities. It's where we advance ourselves.

[00:21:58] **Jin Hee Lee:** And that's one of the kind of great things about the American dream, is that everyone can kind of work really hard in advance. And so that through education, education is such an important part of that. But education has, for too long, been denied to certain groups of people. And it's undeniable that inequality has fallen on racial lines persistently throughout our history. The other thing that I just kind of want to just mention is in this act of citizenship and being active and being able to, as a citizen, have a say, as to your government, as to the country that you live in.

[00:22:34] **Jin Hee Lee:** Now, one of the kind of ironies about originalism and talking about what did the framers think when they enacted the 14th Amendment and all the legislation that passed? We have to remind ourselves at the time that the framers were all white, that Black people were not able to participate in that civic debate. They were not able to engage in that conversation about what does it mean to have equal protection under the laws. And I think that in itself is something that we should be thinking about, is that you're having institutions where Black people are excluded or predominantly excluded, where they're not able to contribute their experiences, their perspectives.

[00:23:20] **Jin Hee Lee:** And the development of our civic institutions is a harm to everyone. And I think that's one of the reasons why Justice Powell in the Bakke decision, which is one of the first cases that dealt with the formative action really talked about why this really affects the legitimacy of our multiracial democracy. And that really does. Because if we have selective higher, educational institutions, that exclude large groups of our population, then what does that say about the legitimacy of those institutions as well as the leadership positions that those institutions often fuel. So that's my brief answer to your question, which is a very hard question. But I know Ilan has much to say and has been doing a lot of scholarship on this issue.

[00:24:14] **Jeffrey Rosen:** Thank you so much for that extremely thoughtful answer to the question. And Ilan, you've heard Jin Hee's answer which began by emphasizing that the framers of the 14th Amendment did not intend, she said, to forbid all of racial classifications but only those intended to stigmatize or degrade. And then she said that the text of the 14th Amendment requires equality of citizenship and that equal access to education is necessary to ensure that equal access. I'd love your response. In your book, in discussing Brown, you say that the case for desegregation is simpler under the original meaning of the privileges or immunities clause than Brown suggested.

[00:24:57] **Jeffrey Rosen:** You say if public education is a privilege of citizenship and you can see that that's not obvious as a matter of original understanding, and if the purpose of the segregation laws was, as everyone knows, the perpetual subordination of one class of citizens, then denying the same rights to this privilege is an abridgment of the privileges or immunities of citizenship. It's obvious that subordination violates or abridges privileges or

immunities. But what is your argument for why racial classifications that are not intended to stigmatize or degrade or subordinate are also an abridgment of privileges or immunities under the original understanding?

[00:25:37] **Ilan Wurman:** So I don't know that they are. I haven't conceded or stated that I disagree with Jin Hee's position on this. I agree that the crux of the meaning here is subordination. You can't make or enforce laws, which in fact, in practice, abridge the privileges and immunities of citizens. That means you can't make or enforce laws that in fact, lead to Black Americans or Asian Americans or any other Americans on the basis of skin color, at least. And you can't make distinct, other arbitrary distinctions.

[00:26:09] **Ilan Wurman:** But what those other arbitrary distinctions are is much more debatable, but we know race is what they thought was an arbitrary distinction. So if a law leads to unequal contract rights or unequal property rights or unequal educational privileges, then that's what abridges our privileges and immunities. They have less rights. You basically create a favored class of citizens. So if you go back to the mid-1800s, just after Reconstruction or during Reconstruction, there were no complaints about Black only schools because they hadn't really had schools before.

[00:26:47] **Ilan Wurman:** I mean, there were white northerners who came down to give instruction, but what white students were going to come and so on? They thought, at the time, that it would be better for their own education to at least have all Black schools at the time. Now, over time, it turned out that this paradigm of having separate schools was a recipe for inequality. Why? Because you give them fewer resources, it creates the stigma. So what I'm saying is in *Brown v. Board*, it was an obvious case, and why? Not because there's a distinction on the basis of race on the face of the statute, though that should always raise eyebrows.

[00:27:26] **Ilan Wurman:** But because as Charles Black said, he was a legendary professor at Yale Law School who grew up in Texas. He said, after the December after *Brown v. Board*, he said, "What's all the fuss? These cases were easy. Once judges open their eyes to what every Texas School boy knows." Remember, he was a Texas school boy. That the Jim Crow Laws, the separate but equal laws were not intended to keep the two races separate and happy and equal, but precisely to keep one in subordination to another. That is what makes it unconstitutional. And I agree with all of that. And this also, by the way, I don't know if flag, the implications for affirmative action, it's not clear to me, by the way, and I'll get to that at the end of my answer.

[00:28:11] **Ilan Wurman:** But this also makes sense of the congressional legislation that Jin Hee talked about. It's true. The northern Democrats oppose things like the Freedmen's Bureau. They said, "Oh, it's class legislation. You're giving special treatment to, you know, the Black population." It's like, "No, no, no. We're trying to give them equal treatment. White people have their rights enforced in court just fine. The Ku Klux Klan isn't going after white people." Well, most white people. White people in league with Black Americans were also victims and so on. So we need courts just so that they have the same privileges and immunities. We need the Freedmen's Bureau.

[00:28:52] **Ilan Wurman:** So again, what does this say? It says race conscious laws that Congress enacts in order to strike at discriminatory practices in the States. Sure. Obviously, they're constitutional. And obviously, they're race conscious. But they're race conscious in a trivial sense. In the sense of saying "Yes, don't discriminate on the basis of race," is a race conscious statement. But that's sort of trivial and again, I think kind of useless to the affirmative action question, which is sort of zero sum and requires, or in some programs, denying people on the basis of race and opportunity that the otherwise might have had.

[00:29:32] **Ilan Wurman:** That's what makes it a hard question. The last thing that I want to add here is, when Jin Hee says about white men participated or drafted. That's true. Just like it was only men who drafted the 19th Amendment granting women the right to vote. I mean, at some point, it's the people in power when they expand the franchise and they expand the democracy, they're the ones making that choice to expand. It's worth commenting that a lot of the freed people in the south did participate, in Reconstruction, in the ratification process of the 14th Amendment.

[00:30:10] **Ilan Wurman:** And actually, if I may, since you mentioned the book and I have it here, this is the cover of my book. It's called The First Vote. These are three Black Americans, It's a farmer, a merchant and a soldier. They're voting in 1867 before the 15th amendment. Why? Because the Reconstruction Acts empowered the freed people in the south to participate in the voting process that elected new state constitutional conventions, that elected ratification conventions. Some of them participated in the ratification conventions for the 14th Amendment. Yes, it's true, Congress forced this down the southern states' throats but they lost the war that they started, so I'm not going to lose any sleep over that.

[00:30:51] **Ilan Wurman:** So there was widespread participation in the south among the freed people. There were so-called colored conventions were conventions of Black Americans, they would get together and they would opine on the issues of the day and their grievances. And there's a beautiful passage that I quote, I think it was in the Alabama Colored Convention of 1867 that says, "What do we mean by privileges or immunities? We just mean we want the same right as you to walk on the street, take the public trolley. That's all we want."

[00:31:19] **Ilan Wurman:** The same privileges and immunities that you give white people, we want, too. So they were very much in the throes of this debate. They were very much involved in this debate even if they weren't actually in Congress until 1870, I believe was the first member, might have been earlier but I'm pretty sure 1870 at least was when Hiram Revels became senator from, I believe, Mississippi.

[00:31:43] **Jeffrey Rosen:** I heard you say something, a significant area of agreement with Jin Hee, namely that in your view, the privileges or immunities clause, if construed according to his original understanding, does not forbid all racial classifications but only those that stigmatize and degrade. And that it's an empirical question. It's not obvious in your view, whether or not a law, in this case, affirmative action, is creating a favored class of citizens that stigmatizes or degrades or not. And you say that's a hard question.

[00:32:16] **Jeffrey Rosen:** Jin Hee, as you hear Ilan's answer, I want to now ask you to talk about Brown. Because in your brief, you say, "Students for fair admission now seeks to turn

Brown on its head, invoking that seminal ruling to ask the court to turn back the clock and cause Harvard to be out of reach too many students of color, who due to persistent inequalities in K12, educational opportunities are not able to gain that competitive edge to assure their admission." Tell us why you think that Brown is consistent with affirmative action? And why forbidding affirmative action would seek to turn Brown on its head?

[00:32:57] **Jin Hee Lee:** One of the reasons why the Brown decision was so transformative is because it really viewed the nature of inequality under the 14th Amendment as something in connection with the subordination of Black people. Because in Plessy v. Ferguson, there was this sense that, "Oh, you know, people are being treated equally, you separate but equal would be fine," because it's a matter of kind of society and social preference that people don't want to be associated with each other, and not recognize it.

[00:33:34] **Jin Hee Lee:** And I think it didn't grapple with the question of, as Ilan has alluded to and actually spoke about, why is it that they wanted to be separate? They wanted to be separate because they considered Black people to be inferior, to be a subordinate, to be less than. And that was something that Brown addressed head on. And to give credit to the lawyers that litigated Brown, to kind of explain that to the court. That understanding of the 14th Amendment, needing to address that component of inequality, it's not just whether technically or if there's some sort of abstract away, one can say that one's equal under the law.

[00:34:14] **Jin Hee Lee:** But behind that distinction, that there's some sort of stigma, that there was some sort of sense of subordination that was very much underlying that distinction, that racial distinction. And the connection of public education, the fact that this was happening in the public education system, having this really deep impact on the citizenship of our future people in this country, future citizens. That children were being taught that this kind of separate treatment, the notion of inferiority by race was a natural occurrence in our country. Like that was something that was ingrained in the very kind of social structure that was developing the citizens who would then go on to become voters and leaders of this country.

[00:35:09] **Jin Hee Lee:** And so I think all of that made Brown an incredibly powerful decision and also one that did not, and this is what's really kind of ironic, that the plaintiffs as if they have kind of tried to flip Brown on its head saying that for some reason, Brown would be in support of the notion that race consciousness was somehow akin to Plessy. And that only colorblindness would be consistent with Brown's understanding of the 14th Amendment.

[00:35:50] **Jin Hee Lee:** And I think there's another component of this that's really important in the higher education space. Because Ilan mentioned the claim of discrimination against Asian Americans, which has been a very, very controversial and much discussed topic around this case, especially the case against Harvard. And I think that one of the things that has been inaccurately discussed is who is qualified and who is entitled to be accepted to selective colleges, universities like Harvard? And what is the criteria that they are looking for?

[00:36:30] **Jin Hee Lee:** Now, Harvard has never said and then they've made this very clear in their brief, but I think we can all agree, none of their brochures or their promotional materials have never said that what they are looking for are students with the highest standardized test scores, that students with these particular extracurricular activities, students

that had this particular GPA. Now, certainly, there's probably a minimum level that they would want, so that the students could succeed and be able to fully benefit from the academic opportunities of Harvard. But certainly it's probably more of a threshold, it's not for the people who have the highest scores, for example.

[00:37:17] **Jin Hee Lee:** So when we're talking about affirmative action, especially for places like Harvard, what we're talking about are trying to select students, all of whom are qualified, all of whom have exceptional test scores, all of whom who have exceptional grades. They could probably admit five, ten times their incoming class of the people who applied to Harvard. And so, what's been misconstrued, I think, is this notion that certain students, and especially Asian American students, are being rejected from Harvard so that less qualified students can be accepted.

[00:37:59] **Jin Hee Lee:** And I think that is just simply not true. I mean, that's something that SFFA can argue and people, opponents to affirmative action can argue. And that certainly would be the case, if, for example, Harvard said, "I'm going to admit all of these students because they're Black, regardless of their grades or their SATs is." But that's not what's happening. What's happening is that Harvard has all of these very qualified exceptional students, all with a myriad of different characteristics and different assets and different elements that they can contribute to the student body.

[00:38:36] **Jin Hee Lee:** And it could be things like, it could be their interest or academic interest. It could be where they live, it could be whether their parents went to college or not. And then to say, though, that that race is completely irrelevant in trying to think about, "Okay, we want to have the most diverse student body that we can with all of these differences." Now, it's not to say that race is the only thing that matters, but to say that it doesn't matter, and that's what colorblindness is trying to say, in some ways discriminates against the students where race has had a really formative part of their lives. And I think that's something that Justice Jackson had spoken about quite eloquently in the oral argument.

[00:39:19] **Jin Hee Lee:** Because you can have someone talk about a lot of things and maybe race is not a big part of their lives, but it's more likely that a person of color would have race be something that's very important in their lives, that they would consider to be a positive attribute, that they consider to be something important that the college university should know about. And so I think that's just really important to know because this assumption that Asian American students are being discriminated against, when we're not talking about that Asian American students are underrepresented. Or any kind of indication that Harvard does not like Asian American students, or that they have a bias against Asian American students.

[00:39:54] **Jin Hee Lee:** The argument about Asian Americans being discriminated against really hinges on the assumption, which is not proven, that they are more entitled to be accepted to Harvard or these other schools than other students. And when you look at those arguments, it's almost always reliant on test scores and GPAs. And, and I think this is indicative of the inequalities in our K-12 system.

[00:40:35] **Jin Hee Lee:** Because students who have access to AP courses, students who have access to test prep, students who have access or the ability to have lots of different extracurricular activities, it's oftentimes not dictated by potential or intelligence or

capabilities or anything like that or talent, it's oftentimes dictated about resources. And again, these resources have been unequal, as long as they've had public education system. So I think that that is something that really needs to be corrected because if you compare the students who got accepted who are not Asian American, and the students who didn't, it's just to say that the ones that didn't get accepted are more qualified, it's just an assumption that people make.

[00:41:21] **Jin Hee Lee:** And I really want to challenge everyone to think about like why do we make that assumption. And I think this goes to the heart of why the equal protection clause is really important when we talking about affirmative action. Because so much of racial stereotyping is embedded in how we think about affirmative action. Because it's very easy to assume that a Black student or a Latinx student is not qualified. Because that is a stereotype. That is something that people have believed and have said for many, many generations. And there's scientific research that shows that we do have these biases, these inherent biases.

[00:41:57] **Jin Hee Lee:** There's also a stereotype that Asian American students are smarter and that they work harder. And that's a stereotype that's very much alive. And in my mind, that's just as dangerous. It's just as dangerous to say that a student is more likely to be smarter or to be more likely to be successful at a school because of the race. Because that means that another student is not as smart because of their race. And so I just really want people to challenge, to think about, why do we assume that certain students are more entitled to go to a college or university as opposed to another student? What are the criteria that we're talking about?

[00:42:39] **Jin Hee Lee:** And I'm not saying that schools like Harvard do a perfect job in their admissions process. Certainly not. And I'm not saying that there's not other ways of making things more equitable. But when we're talking about affirmative action, what we're essentially talking about is can you consider race at all? Even a little bit? Is this any consideration or is it absolutely prohibited and something that a college or university should not even think about or look at? I mean, it's black and white that way.

[00:43:07] **Jin Hee Lee:** And what I would suggest is that you should be able to think about it. How much you think about it, that's up for debate. But you should be able to consider race as one of many factors when deciding what your incoming class is going to be, among all of the students that are all qualified. Any of them would be equally capable of succeeding in a place like Harvard.

[00:43:30] **Jeffrey Rosen:** Thank you so much for that extremely thoughtful intervention. Ian, you heard Jin Hee just say that the constitutional question under Brown and under the 14th Amendment is "Can you consider race at all"? And she says, "Yes, Brown and the 14th Amendment, as originally understood, did not require complete colorblindness, only a ban on subordination. And to forbid any consideration of race is to discriminate against Black students and to also make stereotypes about their relative abilities."

[00:44:03] **Jeffrey Rosen:** Just focusing on Brown, is it right or not that you think that Brown is basically forbidding subordination? You quoted Professor Wright, "everyone knows that the purpose of segregation was to degrade and stigmatize Black people" and

therefore, you say it was an easy case, because it was clear that there was subordination involved. Is that right? And do you reject the idea that Brown requires total colorblindness? And for you as the question whether or not affirmative action subordinates and degrades? And how would you think about that question?

[00:44:38] **Ilan Wurman:** Yeah. That's a great question. And I'm going to try to answer it in what Jin Hee raised. I try not to agree totally with Jin Hee because I do agree with a lot of what she said and which is why, I think, by the way, this is a difficult question. So let me back up and say first of all, by the way, Brown rejected the original meaning. They said it's too late in the day, the history is too complicated. They should have seized the original history by the horn, they should have reversed slaughterhouse, they should have gone to the original privileges or immunities clause and it would have made more sense.

[00:45:08] **Ilan Wurman:** So to that extent, I reject Brown because I think the original meaning makes a better case for the outcome in Brown than the court inbounded. So the question is, and this is why it's hard, and I'm not trying to dodge. And I'm not trying to trick it on giving an answer, but this is why I refused write a brief. What the clause prohibits is abridgement. But we know that states routinely regulate rights all the time. They can require licenses under certain conditions for getting a firearm. They can prohibit certain kinds of contracts, that they are unconscionable. So states make regulations of rights all the time. Time, place, and manner restrictions on speech rights.

[00:45:48] **Ilan Wurman:** The question is, what is a regulation of a right and what is an abridgment of that right? Because we know states are allowed to regulate. What they can't do is abridge. How do we know what the difference is? What is an abridgment? That is the million dollar question. I guess a million dollar used to be a lot of money, like in the '90s or something. So you know, \$1 trillion, \$1 billion question that no one's asking, because this is being litigated under the equal protection clause. When the real clause is the privileges or immunities clause, and I think the answer, and it's by no means obvious, but I think it would be helpful to the affirmative action folks. I don't know that they're right under it.

[00:46:25] **Ilan Wurman:** But here's how I would propose answering it. In my view, the answer is, a regulation is a regulation rather than an abridgment if the purported regulation reasonably relates to the purpose of the right. If it reasonably relates to the purpose of the right, here's what I mean. This is why the Black codes were unconstitutional because skin color has no relationship whatsoever to contract rights or to property rights or to gun rights or to assembling. So it is totally rational. This is, by the way, why a gay code that said gay people can't enter into contracts, gay people can't own property, gay people can't have guns, would be equally and as obviously as unconstitutional as the Black codes and they don't have to decide to being gay's a protected class, whatever that is.

[00:47:12] **Ilan Wurman:** Why? Because sexual orientation has nothing to do with the purpose of contract rights and property rights. Now, should marriage be defined as between a man and a woman? Is that a regulation of the content of the rights of marriage or is it an abridgment of that right? Well, this is a much harder question. Because unlike the gay codes, we know sexual orientation has something to do with the purposes of marriage. And this is why the purposes of marriage were debated in the Obergefell case, it turns out gay Americans can participate in the welfare institution, the health and economic element of the institution and the love, the longing, dignity element.

[00:47:49] **Ilan Wurman:** And even today, child rearing and bearing, if not equally then close to equally, they can participate. The point is that's the question we should be asking. Is limiting marriage to a man and a woman reasonably related to the purpose of marriage or not? I'm not saying I have the right answer to that question. I think it's a difficult question. But I think Obergefell, by the way, is plausible under that. Certainly not clearly erroneous, such that it should be overturned under Justice Thomas's theory of precedent.

[00:48:15] **Ilan Wurman:** Why do I talk about all of this? Well, as Jin Hee said, who is entitled to admission. Supposing all of these people, have the minimum threshold? And say Harvard doesn't allow anybody with a 400 SAT. But they'll allow anybody with at least 1,000. On that assumption and on the assumption that, which I don't know if it's true, I didn't litigate these cases, I didn't sue Harvard. I'm not an expert on any of this. But assuming it's true that the applicants of a certain race have, on average, a lower GPA and a lower SAT score than, say, the Asian Americans do. So to get into Harvard as an Asian, you have to score better.

[00:48:58] **Ilan Wurman:** Let's assume that's all true. And I don't know if it is but let's assume it's all true. Could it still be reasonably related to the purpose of higher education to say, "Okay, but we want a melting pot of a society in higher education. We want to create the next generation of citizens and therefore, we need folks of different races and ethnicities and nationalities and backgrounds and so on, such that it may be that Asian Americans have to score higher to get it"? Because there are more of them. There are more high scoring of them. Whatever the reason is. Is that reasonably related to the purpose of higher education?

[00:49:34] **Ilan Wurman:** It's a hard question. It's a hard question. And sometimes, I feel like I'm the only person who thinks this is a hard question when everybody else is so sure that they know what the answer is under the Constitution. And so I think it's a legitimately hard question, and what I will say is it might depend on what they say the purpose of the race consciousness is. And this is goes back to the particular programs. If the purpose is to remedy historic discrimination, then letting in an immigrant that came from the UK who recently immigrated to the UK from a North African country and then recently came to the United States, treating them the same way as a descendant of an enslaved person in the United States would not be reasonably related to that purported purpose.

[00:50:23] **Ilan Wurman:** So if that's the stated purpose, most affirmative action programs, as far as I know, don't have a checkbox for saying "descendant of a formerly enslaved person in the 1800s in America." They don't have that checkbox. So that wouldn't work. If it's "No, we don't care if you were formerly enslaved. We think skin color matters for whatever reason in society, in life, such that people shouldn't be exposed to individuals of different skin colors." Okay, that now becomes a hard question and maybe it becomes a policy question. And if it's a policy question, maybe it should be left to the democratic process.

[00:50:59] **Ilan Wurman:** The point is these are hard. These are hard. And I don't have ultimate answers to these questions but what I am sure about, is that this is the analysis that should have been done in these cases. This is reasonably related to the purpose of the right under the privileges or immunities clause. But of course, no one purported to do the analysis because no one wants to go back and overturn slaughterhouse and go back to the original meaning of the privileges or immunities clause, even though we should do that.

[00:51:23] **Jeffrey Rosen:** Thank you so much for that answer. And I'm going to sum up what I've heard at this point, because we're coming to the end of our time, to say how struck I am in this very thoughtful conversation, that there's both less difference between both of you and your views. And also, the both of you see that the text and history of the 14th Amendment even can stream light of their original understanding, doesn't look all that different from the doctrine as it currently stands at the court. And Sheldon Nahmod asks a good question, "What are the originalist arguments in favor of using race as a factor in admission to public universities?"

[00:52:04] **Jeffrey Rosen:** If I can sum up what I just heard, Ilan says it was that the 14th Amendment as originally understood only prohibits classifications intended to stigmatize and degrade caste affirming classifications. And if a race conscious measure is reasonably related to the purpose of higher education, then it's not an abridgment of privilege or immunity, it's not intended to stigmatize. And then Ilan said you can reasonably debate whether favoring recent immigrants rather than the descendants of enslaved people is or is not related to the purpose of higher education, or whether or not skin color is related to intellectual diversity. But, of course, that's very much the debate that we're having under the current doctrine.

[00:52:49] **Jeffrey Rosen:** I hear both of you saying that if the court does hold that the 14th Amendment forbids all racial classification and requires colorblindness except when there's a threat to life and limb, that would not necessarily be consistent with text original understanding and would certainly represent a big shift in the law. And if I have that right, then this has been a very constructive conversation about the areas of agreement and disagreement that both of you have about the 14th Amendment.

[00:53:19] **Jeffrey Rosen:** I think with that, because it's even more important to end on time than to continue a great discussion for much longer, I'm going to thank very sincerely our great panelists. I'm going to thank the University of Pennsylvania Journal of Constitutional Law for co-hosting this great event with us. And most of all, thank you so much, Jin Hee and Ilan for a superb, thoughtful, and illuminating conversation about affirmative action and the 14th Amendment. Thank you.

[00:53:55] **Tanaya Tauber:** This episode was produced by Lana Ulrich, Bill Pollock, John Guerra and me, Tanaya Tauber. It was engineered by Dave Stocks and Bill Pollock. Research was provided by Lana Ulrich, Sam Desai, Emily Campbell, Sophia Gardell and Liam Kerr. The program was presented in partnership with the University of Pennsylvania Journal of Constitutional Law. We've hosted interesting initiatives on constitutional change, including our constitution drafting project, in which teams of different viewpoints drafted their own constitutions.

[00:54:28] **Tanaya Tauber:** Check out the Constitution Drafting Project on our Special Projects page at constitutioncenter.org/debate. At the same page, you can check out our full lineup of exciting programs coming up this winter and register to join us virtually. As always, we'll publish those programs on the podcast, so stay tuned here as well. Or watch the videos in our media library at constitutioncenter.org/constitution. Please rate, review, and subscribe to Live at the National Constitution Center on Apple Podcasts or follow us on Spotify. On behalf of the National Constitution Center, I'm Tanaya Tauber.