The 14th Amendment and the History of Reconstruction

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[00:00:03.6] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center. And welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. On February 10th, the NCC and the Federal Judicial Center convened three of America's leading scholars of Reconstruction to discuss the history and meaning of the 14th Amendment. Sherrilyn Ifill is the Vernon E. Jordan, Esq., Endowed Chair in Civil Rights Law at Howard Law School, where she's launching the 14th Amendment Center for Law and Democracy. She's also the former president of the NAACP Legal Defense Fund. Pamela Brandwein is a professor at the University of Michigan and author of Rethinking the Judicial Settlement of Reconstruction. Ilan Wurman is the Julius E. Davis professor of law at the University of Minnesota and author of *The Second Founding: An Introduction to the Fourteenth Amendment*. Enjoy the show. Ladies and gentlemen, welcome to the National Constitution Center. It is such an honor for the National Constitution Center and the Federal Judicial Center to convene judges from across America to come to Philly to celebrate the Super Bowl win.

[00:01:30.3] Jeffrey Rosen: I think I saw a slight descent there from the 8th Circuit, but it's very meaningful to reconvene this great collaboration between the NCC and the FJC. We had to take a pause because of COVID. We're now back in business, and this is one of the most illuminating continuing judicial education programs in the country. It's a great honor to convene judges of different perspectives to come to Philadelphia on Independence Mall across from Independence Hall, to reflect about the core values of the Declaration and the Constitution and to bring together great American historians and legal scholars of different perspectives to explore core questions at the center of the Constitution. Today we take up one of the most towering and significant of those questions, and that's the Constitutional legacy of Reconstruction. It's so great to do it here at the NCC. We are here with a Legacy of Reconstruction exhibit. And after the program, we're going to go see Dred Scott's Freedom Petition and Frederick Douglass's inkwell, and rare copies of the Reconstruction Amendments. And then I want you all, both those in the audience and those who are watching online, to go online to the interactive Constitution and look at the drafts of the Reconstruction Amendments.

[00:03:02.6] Jeffrey Rosen: Kurt Lash digitized all of the early drafts so that we could put them online and you can see how an early draft of the 14th Amendment would have protected voting rights. But that draft fell off because there wasn't enough support in Congress. You can see how the language changed from Congress shall have the power to protect to no state shall abridge.

And by tracing the evolution of the text, have a sense of the deep contestation about every aspect of the amendment that is reflected in the final amendments. It's that contestation that we're here to discuss today. We have two really significant panels on the historical origins of the 14th Amendment and its meaning before and after it was passed. And we couldn't have better historians to discuss it. Pam Brandwein, let's jump right in. Your book Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth really is one of the most important and illuminating introductions to the deep areas of contestation that surrounded so many of the final clauses that ended up in the 14th Amendment. Why don't you start us off by telling what the context was, why was it, and what were some of the big areas of debate about its meaning?

[00:04:22.9] Pamela Brandwein: Sure. And it's wonderful to be here. And I guess the easiest way to start is to be clear about the differences among the Union Coalition. And so understanding that, first of all, the Anti-Slavery Coalition, the coalition that formed for Free Free Soil as a policy, was made up of just a wide variety of factions. And among those factions were everybody from black activists who had agitated for equal property contracts, suing rights, to white supremacists who wanted the western territories for free white labor. And so there was an agreement among the Republican faction that slavery should be contained. It should not extend into the western territories with the idea that you're eventually going to suffocate it. But the objective was contested. Is the rest of the country for freedom? Is it for black equality, or is it really for white labor? And so there's that faction or there's that coalition. And then understanding the Union Coalition is also vital because once the South fired, once South Carolina fired on Fort Sumter, you have a group called the War Democrats. These are the Popular Sovereignty Democrats. They wanted western territories to decide the slavery question for themselves. And once South Carolina fired on Fort Sumter, these folks who believed in white popular sovereignty, this is Stephen Douglas, this is Andrew Johnson.

[00:06:11.6] Pamela Brandwein: These war Democrats then joined the Union Coalition. And so once we get to Reconstruction, there's a very broad group in Congress that all supported the war because the Southern states had seceded. So everybody left in Congress supported the Union effort, but it ranged from more radical Republicans to these War Democrats. And so the agreement to fight the war just breaks down and you have multiple lines of contestation. And one of those lines was between Republicans and the old War Democrats who believed in white popular sovereignty. And they said, okay, well, the war is over. We now have formal emancipation and the South is going to renounce their war debt and they're going to say, okay, no more secession. But they believed in the black codes in the South because that's still white popular sovereignty and you have formal emancipation. So for the War Democrats, the issues of the war are over with the 13th Amendment. For the Republicans, and again, there are going to be divisions among Republicans. They said emancipation means much, much more than formal emancipation. And so you have these new arguments over what emancipation means, over what the 13th Amendment means. And those arguments unfold actually after the passage of the 13th Amendment.

[00:07:45.3] Pamela Brandwein: And so it's in debates over the Civil Rights Act of 1866 and then debates over the 14th Amendment that you have the Northern Democrats, the old War Democrats, folks can be fighting for the Union and against all Reconstruction policy. Those are

the War Democrats. And then you have the Republicans who disagree among themselves over, well, what is the meaning of civil rights? What is the meaning of freedom? And so you have arguments among Republicans over, well, is it civil rights, property contracts, suing, testifying, equal criminal penalties, this is in 1866. Then you have more radical Republicans who will say, well, freedom means more than that. It means more than equality in those rights. It means equal suffrage in 1866. And those arguments by radicals were rejected by centrists immediately, but with deep, deep, deep resistance to even the most basic equal civil rights in the South. Centrists move, they move, they expand their definition of freedom. And so yes, there's an argument over what freedom means. And that gets incorporated into arguments over what the 14th Amendment is for. Because Republicans came to understand very quickly that the 13th Amendment wasn't going to be enough, that it was already being litigated in mid-Atlantic states.

[00:09:06.4] Pamela Brandwein: New York had a case over the 13th Amendment involving landlords and tenants, where you have case law early that says, well, all the 13th Amendment does is give formal emancipation and that's it. You had a case in Delaware that said, well, we're going to get rid of the Civil Rights Act of 1866 because we don't believe that black folks have a right to testify against white folks. And so the 13th amendment became unreliable in Republican minds as constitutional law very early on. Even the Civil Rights Act of 1866, which was originally passed to enforce the 13th Amendment, the authority of that even becomes undermined by the courts. There are Republicans, all Republicans wanted to overturn the Dred Scott decision. They wanted to establish citizenship. Folks came to realize that, oh, the 13th Amendment really isn't a guarantee for black citizenship in the North. And so you need a citizenship clause beyond the citizenship clause in the act of 1866. And so the arguments among the Union Coalition, northern Democrats versus Republicans, and then among Republicans give us the 14th amendment. But that really just extends the argument. It opens up, it continues arguments over what is the meaning of equality, what is the meaning of freedom?

[00:10:34.2] Pamela Brandwein: And in a context where the Ku Klux Klan is mobilizing with tremendous effect, you have arguments over what does it mean for a state to guarantee the equal protection of the law when in all of these Southern jurisdictions, civil authorities cannot be counted on to enforce the law. And so when states and local authorities are doing nothing, does that count as a deprivation of rights? And there's a consensus among Republicans that it does, that the unequal enforcement of the law when it comes to political violence and racial violence counts as a violation of equal protection. And these things unfold as arguments over the 14th Amendment are being debated. So I will stop there for now.

[00:11:19.4] Jeffrey Rosen: That's so helpful, because you set up a series of important disagreements which help us understand the terms of debate. First, you said that there was a disagreement about whether you just needed to end slavery or whether you also could pass the Civil Rights Act to guarantee civil equality. And then that disagreement among Republicans about what was civil equality. Was it just civil rights in the Civil Rights Act, or did it include political or social rights? And then that question of how to enforce it. Do you need a state to refuse to act? Or could the federal government act proactively to prevent private deprivations? Ilan, in your important and clear and really marvelous book, you make a textualist argument for the meaning of the 14th Amendment based on its original public meaning, although not its legislative history. And tell us about the relationship between the Civil Rights Act of 1866,

which gave all people the right to make and enforce contracts, to sue and be sued, and to engage in private rights. And you can do the whole amendment if you think you can do it quickly. But focus on the privileges or immunities clause for this round, because that's gonna be the source of much of our conversation.

[00:12:34.6] Ilan Wurman: So first, I just want to correct one small part of the record. How do you unburnish one's credentials? I am not a historian, but I rely on wonderful people in this room. And what I'm trying to do as a legal scholar is figure out, in light of all this historical scholarship on the Objectives of the 14th Amendment, what language did they use? And my view is that I think the 14th Amendment and actually much of the rest of the Constitution is written in what scholars have called the language of the law. They have these terms, privileges and immunities of citizenship, protection of the laws, due process of laws, have these long antebellum. I say antebellum. I mean, going back to Magna Carta legal meanings. And these legal meanings, I argue in the book, were successfully deployed to solve the problems that were confronting the framers in the 39th Congress. So one of these problems was citizenship rights. Not only diversity jurisdiction, for example, in the Dred Scott case, but are free black citizens of Northern states entitled to the privileges and immunities of white citizens in other states? There's a clause in the Constitution, Article 4, that seems to say they are.

[00:13:41.9] Ilan Wurman: And so this was one of the problems they were confronting. There was the equality within a state, right? So that's the Interstate Equality, Article 4. Then there's equality within a state, not just the black codes in the South. But in the next panel, you know, Kate Macer has a wonderful book explaining that this had been going on in the north, too. And there were these pushes for equality among a state's own citizens as well. And then even if you establish equality, it doesn't do you much good if the Ku Klux Klan can interfere with your rights, right? It's one thing to guarantee due process against government depriving you of rights, but the government isn't the only one who can deprive you of rights or annoy you or interfere with your enjoyment of rights. We all have neighbors, right? Private parties can interfere with your use and enjoyment of rights, too. And that is what I think the equal protection clause does. And so what I try to argue in the book, and I guess I've convinced one person, which is great.

[00:14:33.8] Jeffrey Rosen: Well, I didn't say convinced, I said illuminated.

[00:14:39.0] Ilan Wurman: Is that these legal terms solve these problems, or at least they thought they were solving the problems, and they would have solved it if various actors hadn't abandoned it and the Supreme Court hadn't abandoned the language and the promise in various cases. So to answer your question directly, you can set up those three sorts of problems. It doesn't necessarily answer how they thought they were solving them. So a lot of people think that the privileges or immunities clause was intended to incorporate the Bill of Rights against the states, that this is how you guarantee equality, just nationalize rights. Nationalize the first eight amendments. No state can violate the first eight amendments or the other fundamental rights of citizenship. And now everybody's equal in that sense. But that raises interesting questions. Can you, above the fundamental floor of privileges and immunities, are you allowed to discriminate in the provision of those kinds of rights? Anyway, the claim that I try to make is that the privileges or immunities clause actually was not intended to incorporate the Bill of Rights

against the states. It was presumed that all the state governments guaranteed these fundamental rights to their white citizens because all free governments had to.

[00:15:48.0] Ilan Wurman: And the objective was to just ensure that they don't arbitrarily discriminate in those rights against black citizens or citizens of any color. And so there's no question that the 14th Amendment was intended to give a constitutional basis to the Civil Rights Act of 1866. As Pam just said, some people, the Republicans, thought that the 13th Amendment empowered them, but that was an open question whether the 13th Amendment empowered them to interfere in the civil rights legislation. And even if it did, what happens when the Democrats take over as they did in 1875? What's to stop them from repealing the civil rights legislation? So James Garfield, who was then a representative, said, it's actually wonderful, James Garfield has some of the most wonderful lines in the debates. When they were pushing for the 14th Amendment, they were accused of the Civil Rights Act that they had enacted was, they thought it was constitutional. They had said it was constitutional. So why do you need the 14th Amendment? So they were accused of being sort of duplicitous. Aha. You're admitting that the Civil Rights Act was unconstitutional. You're admitting you all violated your oaths.

[00:16:56.5] Ilan Wurman: And what did James Garfield say? He's like, no, we need the 14th Amendment to guard against the sorry day when the gentleman's party will take over this House and repeal the civil rights legislation. And so there's no question that they had to figure out a basis for the Civil Rights Act. And what I try to show is if you use the legal historical language of what protection of law was, which was protection against private violence, against Ku Klux Klan violence is an example. Due process of law, protection against government deprivations of existing rights. The only clause that does the work of getting us the Civil Rights Act of 1866 is the privileges or immunities clause. And so what I argue is that really it's just an equality provision. States can regulate and vary the rights that they offer. They just can't arbitrarily discriminate. Now, how do you know it's an arbitrary discrimination? That's the whole problem. But the upshot is I think most people are wrong about incorporation as a historical matter, maybe not as a normative matter. I think under my view, it means California can ban handguns. Right? It just can't say only white citizens are allowed to have guns.

[00:17:57.8] Ilan Wurman: I think it means California can pass a law that says you require a license to operate a laundromat in a wood building. What it can't do is deny every Chinese applicant a license and grant all the white applicants a license. So they're allowed to regulate the rights, but they can't arbitrarily discriminate in the provision. At least that's the claim that I try to make. And I went over too long as it is.

[00:18:21.0] Jeffrey Rosen: No, that's great and look forward to digging into all those questions. Sherrilyn, you have argued for what you call a radically transformative argument of the vision of the 14th Amendment because that's what many of its proponents sought. And you've invoked the anti-caste principle that Charles Sumner and others invoked as a core of an amendment that didn't just constitutionalize the Civil Rights Act, as Ilan says, but guarantees full equality before the law to all individuals. Tell us more about your vision of the 14th Amendment and why you think it's rooted in its history.

[00:19:01.2] Sherrilyn Ifill: Thanks so much, Jeff. Thrilled to be here always at the National Constitution Center. I think it's important to give a little bit of political dynamic to this because we should remember what was happening in this period when the 14th Amendment was being conceived and drafted. We had just gotten through the Civil War, 600,000 people dead. And in fact, the Civil War was still going on in places around the South. In Texas, there were still skirmishes. In what is now Oklahoma, there were still skirmishes. So it wasn't all settled. This was a very unstable time. We have Lee's surrender at Appomattox, and six days later the one man who was believed to be the man who could hold the Union together, the president, is assassinated. That is the context in which Congress is coming forward to try to figure out how to stitch together this country. The new president, Andrew Johnson, who had been Lincoln's vice president, is, as Pam said, one of those who was a Union man, but was not necessarily an anti-slavery man and was certainly a very explicit racist, and certainly believed in the inferiority of black people. And so part of the struggle that develops is Johnson's idea of Reconstruction and Congress's idea of Reconstruction.

[00:20:22.6] Sherrilyn Ifill: Johnson's idea of Reconstruction is to let bygones be bygones. Bring all the Southern states back in, the war is over and let us proceed as a nation. But you have members of Congress who are deeply concerned about that scenario. How do we know that the people that we're bringing back in who will be representing their states, are in fact loyal to the Union? How can we simply allow people who participated and even led insurrection to come forth and be part of the government without some measure of understanding their loyalty to our country? And so they have a different idea of Reconstruction, and they also have an idea of what will be necessary to make the 13th Amendment true. Now, yes, we did have the Civil Rights Act of 1866, and this is where Johnson comes in. Congress passed the Civil Rights Act of 1866, and President Johnson vetoed it. Now, Congress is able to override that veto, but it becomes now apparent that a president or even a new Congress might overturn the Civil Rights Act of 1866. And that is largely the impetus for deciding that these rights have to be enshrined within a constitutional amendment so that they cannot be moved.

[00:21:41.4] Sherrilyn Ifill: The other thing that I think is important is that this is such a dynamic period. The people who are working on this project of the 14th Amendment are learning as they go. President Johnson, who, as I said, believed that we should let bygones be bygones, seeks to shore up his position by sending a good friend of his, an emissary, Carl Schurz, who was a German national, to go down South and investigate what the conditions are in the South in the belief that Schurz will come back with a report that says the South is ready to rejoin the Union. Let's move on with this. Meanwhile, the joint committee on Reconstruction is doing their own investigation of conditions in the South as well. So these are not just men sitting in a room writing. There is some research that is done that becomes the platform for thinking about what is necessary. And Carl Schurz, who's the great buddy of Andrew Johnson, comes back with a report that's not the report that Johnson was expecting. He comes back with a report in which he is surprised and dismayed by the level of insurrectionist spirit that he says remains throughout the South.

[00:22:50.8] Sherrilyn Ifill: He's dismayed by the level of white supremacist ideology that exists in the South. He is able to give account of black codes that were beginning at that time, and so the use of law enforcement to return black people to something like slavery. He talks

explicitly about the belief that seems stubborn among Southern whites that the only way black people will work is by being whipped. And he expresses deep concern about educational opportunities for black people when recalcitrant southerners are in control of the educational system. And that's the report that he comes back with to Andrew Johnson. The joint committee is also concerned. As a matter of fact, the joint committee is deeply concerned because they have experienced former Confederate generals and even the vice president of the Confederacy, Alexander Stevens, who arrived at the United States Congress saying, we are here. We want our seats. We represent our states. I've been elected by the people of Georgia. Let's go. And they barred them from entering.

[00:23:54.5] Sherrilyn Ifill: So they're having their own experience with this effort to try and return to power without any demonstration of loyalty. And in the Schurz report, what he says that's very alarming is he says in his account, most whites in the South, there are some who have said, we lost the war, let's just get on with it so we can get back to making money and living our lives. But he says most actually just want to get back to power. They actually don't believe they did anything wrong. They actually have no loyalty to the Union. They actually don't think that black people should be free and certainly never equal. But what they want to do is yada, yada, yada, get on with whatever stuff you're doing so that we can get back to power.

[00:24:40.1] Sherrilyn Ifill: And so it's important to know that all of that material is influencing those framers who go into the room, who now, after the veto and overcoming the veto of the Civil Rights Act of 1866, realizes that this is something that could change and needs to be enshrined in a constitutional amendment. And it is those reports that influences the 14th Amendment. We get section three on insurrectionists returning to government out of that experience of the joint committee. We get section two, which creates a punishment regime for Southern states that will not allow black men to vote out of what they learn is none of them believe that Southern states will allow black men to vote. And I say men because at that time, women could not vote. So they're very much informed by this, what they are seeing on the ground.

[00:25:28.5] Sherrilyn Ifill: And I think this is important because when we're interpreting the 14th Amendment, there is that language that is sometimes impenetrable, but it's critical to understand the context in which they were making decisions about the language, making decisions about what to include, what are the things they argued about and didn't argue about. Yes, indeed. They did understand that Dred Scott had to be overturned. And that forms the first sentence on birthright citizenship, which I know you all are going to talk about later. But when you do talk about it, note the positioning of power, because the 14th Amendment is really a reordering of power, of the power dynamic between the federal and the state government. The first Constitution and the Bill of Rights is all concerned with protecting us against the excesses of the federal government. And what the Civil War teaches us is that we also need protection against the excesses of state governments. And so the opening line of the 14th amendment is, every person born in the United States, born or naturalized in the United States, and subject to the jurisdiction thereof, is a citizen of the United States and of the state wherein they reside.

[00:26:40.8] Sherrilyn Ifill: Your state citizenship flows from your national citizenship. And you know this. In the early 1800s, you were a Virginian, you were from Pennsylvania, you were

a New Yorker. Your national citizenship wasn't really that important. But the 14th Amendment changes that. And note that reordering, the repetition of the words no state shall. This is fundamentally an effort to enshrine in the federal government the power to protect that which these framers believed and knew Southern states would not protect on behalf of black people. And so understanding that context to me, feels essential to trying to figure out what privileges and immunities means, figuring out what birthright citizenship means, figuring out what equal protection means. Why do you need equal protection if privileges and immunities encompasses equal protection? So there's a lot there, but this is an amendment, Eric Foner, who I think is going to be with you tomorrow, calls the 14th Amendment, and I agree with him, the most consequential provision of the Constitution after the Bill of Rights. And yet outside of this room, because I know you all are esteemed and learned. As you know, most people on the streets would not be able to tell you a framer of the 14th Amendment.

[00:27:53.5] Sherrilyn Ifill: They could tell you about the first Constitution, they could tell you about Hamilton, they could tell you about Jefferson, they could tell you about Washington, but they wouldn't know Bingham, they wouldn't know Stevens, they wouldn't know Sumner, they wouldn't know Frederick Douglass, because Kate and others will talk about this. There are lots of influences on the 14th Amendment in the many years before it. So I think understanding that context is really critical. You can't just walk up to the 14th Amendment and think you can just read the words, at least in my view. This was created in the midst, in the crucible of national crisis. And the people who created, drafted and ratified the 14th Amendment had to have a powerful vision of this country that had never been, which is what I find most exciting about it. They were creating a country that had never existed. And in that way, they are very much like the civil rights activists who also tried to give the 14th Amendment meaning, who were also creating a world that they had never seen. They had all been raised in essentially legal apartheid in the South, and they had a vision that it could be different.

[00:28:58.3] Sherrilyn Ifill: Well, that's who these radical Republicans were. They also were creating an America that had never existed. We never had an America where black people were free and equal citizens, where they were counted as whole persons for purposes of representation, where they were entitled to equal protection of laws. So without understanding that dynamic context, I think we're doing a disservice to the power of what I consider to be really one of the most consequential measures of the Constitution.

[00:29:25.3] Jeffrey Rosen: So powerful, you present it so compellingly. And calling out those framers, Bingham, Stevens, Sumner, Frederick Douglass, as well as Carl Schurz, who wrote that report that galvanized the framers and the unsung heroes of the civil rights movement, both in the antebellum period and afterward, all the way up to today, is just crucial in teaching the history. And that's why all of the historians who we'll be talking to today have performed such important service in telling those stories.

[00:29:56.7] Sherrilyn Ifill: I am also not a historian.

[00:29:58.0] Jeffrey Rosen: You are indeed. You're a legal scholar.

[00:30:00.8] Sherrilyn Ifill: I've been anointed.

[00:30:01.2] Jeffrey Rosen: We did the best panel over the summer at the astonishment where we told the story of the 14th Amendment, the assignment was in 20 minutes. And just by telling the stories, it just brings it to life. And I think we want to do a podcast series.

[00:30:14.9] Sherrilyn Ifill: I do. We are going to. You don't know that, but we're going to work on that.

[00:30:17.8] Jeffrey Rosen: It's going to be great. Well, teaching history through storytelling is crucial. And that's just what we're going to do today. Pam, let us focus on the debate over the Civil Rights Act of 1875. You tell the story. Charles Sumner on his deathbed, my bill, my bill, don't let them forget my bill, expires. And then the bill which he had proposed originally to cover a range of public services, including the right to go to schools in a non-discriminatory manner, is whittled down so that it forbids discrimination in public accommodations, theaters, public transport, and that passes. And then the Supreme Court strikes it down in the civil rights cases by Justice Bradley, who seems to be the zelig of Reconstruction, is just there to strike down central pillars of Reconstruction at every moment, starting with the Ku Klux Klan Act of 1871 to the Civil Rights Act of 1875.

[00:31:25.1] Jeffrey Rosen: Pam, you really tell that as a story between different visions of Reconstruction between centrists and moderate Republicans who have different visions of Congress's power to forbid forms of private discrimination, as well as a different understanding of what the distinction between civil, political and social rights is. So tell us about the debates over that amendment and what it can teach us about what the 14th Amendment means.

[00:31:49.7] Pamela Brandwein: Sure. I actually wanted to start by underscoring something that Sherrilyn had said in terms of the envisioning of a new country, because the centrists, before I say something about the limits of their egalitarianism, because there were limits to to their egalitarianism in Congress, the things that bound them to the radicals and Reconstruction legislation was really centrist legislation. The centrists moved to embrace a number of the policy positions that the radicals where they were in the avant garde, especially in terms of voting. But the centrist Republicans had deep, deep, deep commitments to re-envisioning this country. And it was the centrist Richard Henry Dana, who originated what was called grasp of war constitutionalism. And this was the theory by which the centrists, along with the radicals, authorized their reinterpretation of the United States States as a biracial polity. And it was this idea that the South was still prosecuting the war. The war didn't end with Appomattox in the minds of the centrists, because they were still prosecuting the war in the South. And this grasp of war constitutionalism is what authorized for the centrists the Reconstruction Act of 1867. And this happened after the South, all the Southern, all the ex-Confederate states except Tennessee refused to pass the 14th Amendment.

[00:33:31.9] Pamela Brandwein: They said, no dice, we're not passing it. And Congress was like, okay, we've gone through all of this. This amendment must pass before you guys can come back into the Union. And this act of 1867 authorized the military to go back into the South. They were going to reconstruct Southern governments. Black suffrage was provided by statute. And it was that measure that enfranchised black men in the South. And you got these Reconstruction

governments, and it was these governments that passed the 14th Amendment. So there were really two 14th Amendments. The one that Congress debated in 1866 that was not passed, and then the one that finally got passed after the Reconstruction Act of 1867. And the reason I wanted to emphasize this before turning to the limits of centrist Republicanism is that there was complete consensus on black equality and civil rights, property contracts, suing, equal criminal penalties, equal punishment if you were attacked because of your race or your contract rights were infringed because of your race. The centrists believed that that was a violation of equal protection if local authorities did not provide a remedy. And this was sort of the core basis on which centrists and radicals agreed. And they came to embrace the right to vote on top of that.

[00:35:09.1] Pamela Brandwein: Now, when it came to public accommodation rights, the right to be buried in a cemetery where there were white and black people, the right to travel on integrated ladies cars, the centrists in Congress tended to reach their limit. The radical Republicans had been pressing for equal public accommodation rights. And this was where the centrists were, this is kind of the third rail for them because their egalitarianism ran up against the idea of white purity becoming at risk. And there are beliefs even among Judge Hugh Bond. Judge Hugh Bond was one of the very strong Reconstruction judges. Even Hugh Bond, who would put Klansmen in jail, said, I believe just because I believe in black equality, and I do believe in black equality, that doesn't mean I should eat or sleep with a black man. And this is coming from a judge who is Reconstruction down the line. And so one of the things to understand about centrist Republicans is their very mixed racial ideology. They're committed to egalitarianism, but only up to a point. And so this notion that racism is a dichotomy is something that needs to be put aside to understand centrist Republicans.

[00:36:45.3] Pamela Brandwein: Because when we think of racism as a dichotomy, we've got Frederick Douglass and we've got the Klan, but you're not really actually able to understand the centrist Republicans. And when it came to the Public Accommodations Act, the centrist Republicans, they bottled up Sumner's bill for five years. They weren't going to let it get to the floor. And centrist Republicans, Matthew Carpenter, senator, strong supporter of Reconstruction, supported Myra Bradwell in women's suffrage. Carpenter got the bill out clean with just the public accommodations provisions, not the school provisions, which were really the most incendiary. And even when it was just the public accommodations provisions, the bill wouldn't pass. And it really passes because Sumner died. It was passed as a memorial to Sumner. And even Republicans didn't put a state action requirement into it. So all of the other legislation had state action requirements in it, which were understood to also include the notion of state neglect. But they put the Public Accommodations bill out there without a state action requirement, knowing that the courts were probably going to strike it down because it lacked the state action requirement, and that it was really understood as a memorial to Sumner.

[00:38:07.8] Pamela Brandwein: And when it gets to the Supreme Court, you have a decision that I think is actually mostly misunderstood, because folks don't understand that there's a vocabulary of rights that is being used at the time to distinguish between civil rights, again, civil rights at the time, not our definition of civil rights, much more narrow. Property contract, suing, testifying, equal criminal penalties. And then this category called social rights, which was sort of invented, doesn't have a legal history in the same way that civil rights has a legal history. And then the category of social rights was sort of invented once emancipation came online as sort of a

possibility to preserve an area of caste, to preserve that area of society where white folks maintained a white superiority over black folks. And again, that's where centrists reach their limit. But this vocabulary, civil, political, social, was used by the court in the civil rights cases. And so in the civil rights cases which struck down this act, which centrist Republicans had predicted back in 1875, Justice Bradley points to the Civil Rights Act of 1866 as valid, paradigmatic corrective legislation. And he says, this is what corrective legislation looks like when you have a state neglect requirement, property contract, suing, testifying, civil rights are valid, but public accommodation rights are social rights.

[00:39:41.7] Pamela Brandwein: And centrist Republicans had actually never really been committed on principle to social rights. Committed to civil and political, but not social. And so that act gets struck down. And one of the things I think is unfortunate about the historiography of Reconstruction is that that distinction between civil and social has not been preserved. And so in addition to this notion of state neglect, which I actually think is articulated by Justice Bradley in this opinion, the civil rights cases have been read as this wholesale rejection of civil rights, when it actually is not. It's a rejection of what were called social rights. And this understanding of what counts as a state denial of rights has also been read through a 20th century lens. And that when you understand the vocabulary of state neglect that was developed in multiple sites at the time, newspapers, Congress, state-level conventions, Bradley actually uses that language when he's talking about the deprivation of civil rights in addition to political rights. So this social rights notion is carved out, and again, it's the limits of centrist Republican egalitarianism.

[00:40:58.8] Pamela Brandwein: And so understanding the vocabularies by which freedom was debated and in which centrist Republicans moved to embrace a larger and larger understanding of black equality. This was their limit. It was tied up with notions of white purity, which they subscribed to, even though they were committed to these other rights.

[00:41:21.3] Jeffrey Rosen: It's such an important reminder that the central questions over the Civil Rights Act were essentially contested. Could Congress ban discrimination without state action or not? Sumner said yes, the moderates said no, and the Court sided with the moderates. Was public accommodation a civil right or not? Bradley said no. Justice Harlan said yes, because trains and steamships were common carriers and it was a quasi-public accommodation. Your scholarship suggests there was no single original public meaning of this text, but really essential disagreement on these central questions. Ilan, you said some people disagree with your vision of Reconstruction and the privileges or immunities clause. And among them, of course, was the guy who wrote the 14th Amendment, John Bingham, who Sherrilyn called out. And Bingham actually stands up in Congress and said, I'm writing this to incorporate the Bill of Rights because I read Chief Justice Marshall and Barron in Baltimore. And Marshall said, if you want to incorporate, use the words no state shall. And Bingham says, imitating the Chief Justice and imitating him to the letter. I put those words in the Constitution because I wanted to incorporate the amendment. But you argue in your illuminating and powerful but not necessarily entirely convincing book that that original understanding doesn't matter.

[00:42:44.0] Jeffrey Rosen: And you also argue that the original understanding doesn't matter on the question of whether school segregation is unconstitutional and whether Brown is right. Because although it's true that some people stood up in Congress and said, don't worry, schools

aren't going to be covered. And while it's true that schools were removed from the Civil Rights Bill because people didn't think they were a civil right, you say it doesn't matter what people thought then if schools were a civil right in 1954, then Brown is. Okay. So broadly, I guess I want you to say more about why your approach, which really is textualism, not originalism, is persuasive, given the fact that these questions that Pam has just been flagging, are schools a civil right or not? Does Congress have the power to ban private discrimination or not? Are essentially contested. There's no single public meaning in the text, and the original understanding is often on the other side. So why should we accept your interpretation?

[00:43:45.7] Ilan Wurman: Okay. Wow. So I'm looking at the time, which is here. There are two things I will try to address, I'm going to start with the John Bingham point. It is true that in 1871 he came up and he distinguished the rights of state citizenship from the rights of federal citizenship in the Bill of Rights. And he said, my intent was that those were covered by the privileges or immunities of citizens of the United States. That was in 1871 though, five years after he drafted it. I'll get to the 1866 speech in a moment. And I already flagged to you that James Garfield has some of the most wonderful lines in the historical record. In that same debate, he responded to Bingham on a related point and he said, the gentleman may make history, but he cannot unmake it. I was there in 1866. This is not what you said in 1866. This is not what the discussion was. Even Jacob Howard, who is believed to have this incorporation speech, said the entire point was to get rid of the class legislation in the South. It was not anything about incorporating or making applicable the Bill of Rights.

[00:44:45.8] Ilan Wurman: So when John Bingham in 1866 said the Civil Rights Act was unconstitutional because of a want of congressional power to enforce the Bill of Rights against the states, what could he possibly mean? What did the Civil Rights Act of 1866 have to do with the Bill of Rights? Contract, property. Now, there were some due process rights in there, of course, to sue in courts, there was some protection of law and so on. But for the most part, the subject matter of the Civil Rights Act of 1866 is not overlapping with the subject matter of the first eight amendments. So what did he mean when he said we need a power to enforce the Bill of Rights in order to get the Civil Rights Act, which required equality in contract and property and so on. Well, it all goes back to his understanding of Article 4 of the Constitution, the privileges and immunities clause, guaranteeing the citizens of each state all privileges and immunities of citizens in the several states. He had a reading of it. This is an anti-slavery reading of that clause which required the states not only to treat interstate travelers from other states equally with their own citizens, but to treat their own citizens equally, the state's own citizens equally.

[00:46:00.4] Ilan Wurman: This is what they thought made various black codes in the Northern states unconstitutional. And so when he says to enforce the Bill of Rights, he also tells us what he thought the Bill of Rights included. He actually says these provisions of the Bill of Rights. And then he says due process of law and Article 4, the privileges and immunities clause, he defined as being within the Bill of Rights. The Bill of rights as the first eight amendments, sometimes referred to as the first eight amendments, but it had much broader and varying definitions at the time. So how do you get the Civil Rights Act of 1866? Well, he said these provisions of the Bill of Rights, including Article 4, and he had a view of Article 4 that required states to treat their own citizens equally. That's how you get it. And all of his statements in 1866

are consistent with that until 1871 where he did change his tune. And then, I just will invoke Garfield's sort of response to that. Look, and I may be wrong. And obviously there's a range of original, plausible original meanings. I don't deny any of that.

[00:47:01.8] Ilan Wurman: What I'm trying to get at is what seems to me to be the best historical understanding. And there are other historical understandings and who's right? Well, it depends on how many people we convince, I suppose, to agree with us. You can falsify certain things, but can you say this is the best reading of multiple plausible meanings? It's very hard to falsify or to prove. Really quick. On the Brown v. Board, I just wanted to, again, echo. They totally made up the concept of social rights. This is absolutely true. I have a paper that tried to go through antebellum uses of the word social rights. It was identical to civil rights. They just defined social rights to be civil rights until they got to the late 1860s when they had to implement the privileges or immunities clause of the 14th Amendment. And they tried to claw back. The Democrats tried to claw back on it. And so they said, well there's, when the Republicans said, well we don't mean that this requires social equality. The Republicans, I don't think they were saying anything new there actually. What they meant is if you strike down the anti-miscegenation laws, it doesn't mean you have to marry, you have to associate with someone of the other race.

[00:48:13.2] Ilan Wurman: But the Republicans never denied that public accommodations were a civil right. They never denied it. None of the Republicans did because as you said—

[00:48:22.8] Sherrilyn Ifill: The centrists did.

[00:48:25.0] Ilan Wurman: Some of the centrists did. Well, James Wilson, he has this ambiguous phrase where he says, well, it doesn't mean you'll have to go to the same schools and things like that. But it's not clear that he meant that schooling was not included in the Civil Rights Act. Right? And so it just seems to me. Where was I going with this?

[00:48:42.8] Sherrilyn Ifill: Oh, I'm sorry.

[00:48:43.3] Ilan Wurman: No, no, it's okay. I wanted to be responsive to the point. But anyway, so what they were trying to say is that public accommodations, there's these wonderful lines that say it is a civil right. When you take a train, you must associate with, to take a song, the gypsies, the tramps and the thieves along with everybody else, everyone. That's not an association. Everybody has the same right to access public accommodations. They understood that as a civil right. Was public education a civil right? Except with maybe James Wilson or which Wilson was it? All the Republicans said public education, if financed through a scheme of general taxation, was a civil right and therefore privilege and immunity of citizenship. As far as I know, the record might reflect differently or there might be disagreements. So that's what I would say.

[00:49:38.3] Jeffrey Rosen: Thank you so much for that. Sherrilyn, as I listen to this really great and deep historical conversation, I am struck by how much turns on contested meanings of the same text. Ilan said, we've got to pick the best meaning. You have argued that the best meaning includes putting a central emphasis on anti-caste legislation. And people stood up in the debates

over the amendment and said, this is meant to end the idea of a caste system and laws that imply inferiority or subordination. What's the consequences of that for your vision of the interpretation of the 14th Amendment today? And why do you think that's a better interpretation than others that focus more, for example, on colorblindness?

[00:50:27.9] Sherrilyn Ifill: Well, we should talk about color blindness in a minute, but I think it's important to try to figure out what was the goal, what were we trying to accomplish with the 14th Amendment? And in 1868, there wasn't even really a public education system in the South. Public education is a result of Reconstruction as a result. In the South, I mean. In the North, there were some schools and very few could go to them, but there were schools in the North. The South did not have a system of public education until the Freedmen's Bureau began to create schools. That's really where it began. So thinking about whether schools would have been conceived of as part of the rights associated with the Civil Rights Act of 1866 or even the 14th Amendment at that time, is a bit of a strain because this is not the role that education played and public education played in the South, which was the focus of the amendments. And that's why Chief Justice Warren says in Brown, whatever was the situation in the 19th century, today it is, education is the very foundation of citizenship.

[00:51:51.8] Sherrilyn Ifill: And it is hard to imagine any child becoming successful without the opportunity to be educated. Right? When I ask students in my seminar, what do you think are the privileges and immunities of citizenship? And to a fault, every one of them says, well, first the right to vote. And I say, well, it's actually not. But that's what they think. And who's to say it's not, right? Because today it's very hard for anyone to think of the concept of being a citizen without being able to vote. That was easy to imagine in 1868 because women were citizens and couldn't vote. So there actually was a template for it. But today, I think we see those things as being coterminous. And so I guess what I'm suggesting is it makes more sense to me to go to the goal. And if the goal was to remove caste, if the goal was to ensure that we were not creating classes of citizens, this is where the public accommodations piece comes in for me. Because if the purpose of separating, back to Justice Warren again, is to imply the subordination of one of the groups that you're separating, then it serves the maintenance of a case system.

[00:53:09.2] Sherrilyn Ifill: And therefore, it is what the 14th Amendment was meant to get at. And that's what Earl Warren says in Brown, which is he recognizes that the purpose of segregated schools is not because they're not separate and equal and they never could be. So the purpose of it is to suggest the inferiority of one group. And once you do that, you are violating the spirit and the intention of both the 13th and the 14th Amendment, to be perfectly honest. So I think that's why I'm constantly saying that just read the words, especially in this dynamic period, doesn't help us. It doesn't tell the whole story of how we should be looking at what these provisions mean. The other thing I wanted to say is I talked earlier about the framers learning in real time. And this is why the Ku Klux Klan hearings of 1870 and 1871, which very few people even know happen, are so important. So here, Congress, because of the proliferation of mob violence, and President Grant is quite concerned about it as well, holds a series of hearings. They hold them in Washington, DC, and they hold field hearings around the corner. And it's some of the most difficult testimony to read.

[00:54:25.3] Sherrilyn Ifill: But black people come and explain what is happening to them, what they have experienced as a result of Ku Klux Klan violence, mob violence throughout Alabama, Georgia, Tennessee, throughout the South. It is harrowing and horrifying. And that, of course, is the basis for the Ku Klux Klan Acts, the enforcement acts of 1870 and 1871. And the creation of the Department of Justice, by the way, to provide a federal mechanism for being able to prosecute on behalf of black people who are facing this kind of violence. I mention this because, once again, this is not a phenomenon that was fully in full flower in 1866 and 1867 when the 14th Amendment was being considered. This was something that really began to hone in and get very, very out of control in 1867, 1868. They're hearing stories back in Washington, DC This compels the creation of the statute. And I think it's important because we see a Congress, many of these are the same members who were the members who were in Congress when the 14th Amendment were drafted, are learning in real time through the course of these additional Civil Rights Acts, what is necessary to effectuate what they're trying to accomplish with the 14th Amendment.

[00:55:47.7] Sherrilyn Ifill: I mean, this is why Section 5 of the 14th Amendment giving Congress the power to enforce it is so important. They're learning in real time. And the same happened in the 20th century with the Civil Rights Act of 1964 and the Voting Rights Act and so forth. These are all places where Congress is then learning about a changed or switched or even newly developed phenomenon that purports to undercut the purpose of the 14th Amendment. But to see the same members of Congress dealing with that, churning over five years and trying to make adjustments to ensure the integrity of the 14th Amendment is, I think, the story of that period. That it is not that one thing happened and then another thing happened and then another thing happened. It is that there is this dynamic happening in which, in this new world that they have created a country we've never had before. They are learning new things about what citizenship means. They are learning new things about what citizenship means. What do they know about being thrown off of rail cars or having to sit in the smoky section in the back? They don't know anything about that.

[00:56:54.9] Sherrilyn Ifill: What do they know about mob and Klan violence and what it can mean to have to live in the woods for weeks, as some black people did because they were so afraid of the Klan coming to their homes. So they're learning in real time and they're making the adjustments all to effectuate the intention of the 14th Amendment. And that strikes me as considerably more important. The colorblindness piece. The colorblindness piece was, the concept of colorblindness was argued by the attorney Albion Tourgée, who litigated Plessy v. Ferguson. That's where it comes from. And then it's picked up by Justice Harlan in his dissent to Plessy v. Ferguson and now suddenly has become canon. But it's not in the 14th Amendment. And I don't think that the Reconstruction Amendments were meant to be colorblind at all. The 14th Amendment in Section 2, the punishment regime, where it purports to or suggests that states that do not allow black men to vote will have their representation reduced, is using very express terms to talk about race and gender. The Civil Rights Act of 1866 talks about people, black people having the same rights as white people. There was no concept of colorblindness during this period.

[00:58:10.8] Sherrilyn Ifill: There was a concept of equality, but not the idea that you didn't notice race. So it comes from the advocacy of Albion Tourgée, who was a northerner and a

brilliant civil rights lawyer who came to live in North Carolina. It is picked up by Justice Harlan in his dissent. In his dissent, when Justice Harlan talks about our Constitution is colorblind, it is immediately followed by his statement that says, but there is a race of people so different from us that we would not consider them sitting equally on a rail car with white people, and that is the Chinese. So even Harlan is not colorblind. So how in the 20th century it has become canon and it has now been enshrined as what apparently the 14th Amendment was meant to advance. I think it's just not true.

[00:59:04.2] Pamela Brandwein: Harlan also says there is no caste here.

[00:59:06.9] Sherrilyn Ifill: He does.

[00:59:07.4] Pamela Brandwein: I mean, those lines are right next to each other in his opinion. He's like, our Constitution is colorblind. There is no caste here.

[00:59:14.3] Sherrilyn Ifill: But there is a race of people.

[00:59:16.2] Pamela Brandwein: But your argument about caste, he also uses anti-caste language and that's been forgotten.

[00:59:22.2] Sherrilyn Ifill: He does. He does. And so we're picking and choosing in Harlan's dissent what we like and what we don't like. But it's very complicated, to your point, Pam, it's a very complicated set of things that are in Justice Harlan. If you read that opinion, and as we all did in law school, we only read that section, we didn't get the whole thing. And so he's a good guy. But if you read the whole thing, is he a good guy? So he's a fixed guy. I think he's a good guy, but he's a complicated guy, as they all were. So we can't just snatch one piece and then suggest that that now is canon without grappling with how we would put that together with the other pieces. And I would say the same thing for the 14th Amendment. And I know you're gonna talk about birthright citizenship. There were members of that Congress who were very much concerned about birthright citizenship who asked the question, shall we allow the child of the Chinese laborer to be a citizen? Will we be overrun? And excuse me for the offensive language, by the Malay and the Mongolian in California? And yet those same representatives vote for the amendment with birthright citizenship.

[01:00:38.2] Sherrilyn Ifill: One even saying I accept that the children of the Chinese laborer and at this point Chinese people cannot even become citizens of this country, is a citizen if he is born on this soil. So it's not just biracial. There's other things going on that they are very aware of and that they're engaged with and that they're talking about. And so I think that the amendment warrants a more robust and fulsome analysis of that 360.

[01:01:08.9] Jeffrey Rosen: We are at time. Thank you for beginning our conversation so thoughtfully. Please thank our panelists. This program was presented in partnership with the Federal Judicial Center. It was streamed live on February 10, 2025 from the National Constitution Center. To watch the full show, including a second panel discussion that delves into the broader legal and social effects of Reconstruction, visit constitutioncenter.org/medialibrary. This episode was produced by Samson Mostashari and Bill Pollock. It was engineered by David

Stotz, Greg Sheckler and Bill Pollock. Research was provided by Cooper Smith. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional illumination and debate. Check out the new Constitution 101 class that we launched in partnership with Khan Academy. Sign up for the newsletter at constitutioncenter.org/connect and always remember as you wake and as you dream that the National Constitution Center is a private nonprofit. We rely for that reason on your support, and now is an especially good time to signal that support by donating to the National Constitution Center. $5, $10 or more. You can do that at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.