

The Forgotten Years of the Civil Rights Movement

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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, the Senior Director of Town Hall Programs. In this episode, prize-winning historians, Kate Masur, author of *Until Justice Be Done: America's First Civil Rights Movement, from the Revolution to Reconstruction* and Dylan Penningroth, author of the new book *Before the Movement: the Hidden History of Black Civil Rights*, explore the central role of African Americans in the struggle for justice inequality long before the social movement of the 1950s and 60s. Jeffrey Rosen, president and CEO of the National Constitution Center moderates. This program was streamed live on October 5th, 2023. Here's Jeff to get the conversation started.

[00:01:00] Jeffrey Rosen: Hello, friends. Welcome to the National Constitution Center and to today's convening of America's Town Hall. I'm Jeffrey Rosen, the president and CEO of this wonderful institution. Let's inspire ourselves for the discussion ahead, as always, by reciting together the National Constitution Center's mission statement. Here we go. The National Constitution Center is the only institution in America chartered by Congress to increase awareness and understanding of the US Constitution among the American people on a non-partisan basis.

[00:01:29] Jeffrey Rosen: It's now a great honor to introduce our panel. Two historians who have written definitive accounts of the early struggle for civil rights in America, starting in the antebellum era. Kate Masur is Board of Visitors, professor of History at Northwestern University. She's a finalist for the Lincoln Prize and the Pulitzer Prize for her most recent work which we're going to discuss today, *Until Justice Be Done: America's First Civil Rights Movement, from the Revolution to Reconstruction*.

[00:02:02] Jeffrey Rosen: And Dylan Penningroth is Professor of Law and History at the University of California Berkeley, where he's also associate dean of the Program in Jurisprudence and Social Policy. He is the author, most recently, of the superb new book, *Before the Movement: The Hidden History of Black Civil Rights*. Welcome, Kate Masur and Dylan Penningroth. It is such an honor to convene you both. And you both tell the story of how civil rights understood in the antebellum era as private law rights to contract, to sue and be sued, to give testimony, and to travel were both exercised by free African-Americans in the Antebellum

era, challenged and suppressed, and ultimately led to the passage of the 14th Amendment, which declared them to be among the privileges or immunities of US citizenship.

[00:02:57] Jeffrey Rosen: Kate Masur, start us off in this amazing story. You begin in the 1820s, where Massachusetts is recognizing the rights of free blacks, and as is Ohio. But at the same time, these states are imposing restrictions on free blacks, including to travel and testify. First, tell us what exactly were civil rights in the antebellum era, and how did free African Americans both exercise them, and find them challenged?

[00:03:24] Kate Masur: Well, thank you so much for having me and having us. It's such a pleasure to be here with you and with Dylan Penningroth and to talk about our books, especially his brand-new book. So yeah, I'm so happy to talk about kind of the convergences and divergences of our work. So one thing that I think we'll need to do, and hopefully the audience will go on this journey with us in this podcast or in this session, is to get a little bit away from what we assume civil rights to be.

[00:03:56] Kate Masur: And this is something we can talk about. But back in the beginning of the United States, back in the antebellum period when people... people did use the term civil rights, but what they meant was usually, as you said, rights to own property, to sue and be sued in court, which goes along with owning property because you have to be able to defend your ownership of property. And also, rights to what we might call personal liberty, the ability to travel, to move from place to place.

[00:04:25] Kate Masur: So these kinds of rights about property, about court and testimony, and about liberty, where the sort of package of rights that people usually meant when they talked about civil rights back then. The civil rights of free African Americans were a very contested question from the founding of the United States. If you think your way back to that period, you'll think about how the Constitution permitted slavery to continue into the New Nation. And the only people who could be enslaved were people of African descent.

[00:05:02] Kate Masur: But there was also a category of people who were people of African descent who were not enslaved. And the question of what rights did they have was really fraught, and it really depended on where people were. So just to give a very general example in the slave states after, by the 1790s and the early 19th century, slave states were really doubling down on restricting the rights of free black people for a variety of reasons. While in the free states they were not necessarily going in the opposite direction. So some free states were handling the issue differently from others.

[00:05:40] Kate Masur: A place like Massachusetts had more or less, at least on the books, a commitment to equality, racial equality, in civil rights. So the idea that black people have the same civil rights as white people. Whereas in a place like Ohio and other places in the Midwest, very often these states had laws that restricted the civil rights of free black people very explicitly by requiring them to register with local officials when they moved into the state, by barring them from testifying in court cases and a variety of other measures that were really laws on the books

that explicitly abridged and restricted rights by race. So explicitly about restricting the rights of free black people.

[00:06:28] Jeffrey Rosen: Thank you so much for setting us up so well and helping us understand that core meaning of civil rights as travel, the right to be sued, to give testimony, and to engage in the ordinary occupations of life. Dylan Penningroth, you begin your amazing new book by telling the story of a distant relative who told the story of how his father in the antebellum era, who ferried Confederate soldiers across a river, was actually paid for his services and was able to exercise his contract rights at the same time that he was enslaved. Tell us about that story and how that is a window for you onto the way that black people exercised civil rights in the antebellum era.

[00:07:17] Dylan Penningroth: Sure. And thank you so much for having me here today. It's such a pleasure to be able to talk about these ideas and this history with all of you. The story that I want to tell you is about my great-great-great uncle, a man named Jackson Holcomb, who was an enslaved man in Virginia. Cumberland County, Virginia. And I remember hearing about what my mother used to call the mother country. I grew up in New Jersey, and one of the many stories that I heard is about how Jackson Holcomb had a boat.

[00:07:57] Dylan Penningroth: And during the closing days of the Civil War, a bunch of Confederate soldiers came up to him and asked him to ferry them across to the other side. He did so, and when they got to the other side, they paid him. And I remember hearing the story, and at some point, it occurred to me that there was something odd about the story. It seemed as though the Confederate soldiers were treating Jackson Holcomb as if he had rights to property and rights to make contracts, two things that slaves emphatically did not have. Slaves did not have rights.

[00:08:35] Dylan Penningroth: And so, I got really interested. I wanted to know more about this. I wanted to know, how does a slave own a boat without rights? How does a slave make a contract without rights? What does that say about slavery? What does it say about rights? And what I came to realize is that there's this whole world of privileges that's sitting right next to the world of rights that we're most familiar with. The word privileges appears in the Constitution's Privileges or Immunities Clause, and it has this very kind of contested, sometimes ambiguous, meaning.

[00:09:10] Dylan Penningroth: And that, for me, has been a door to try to unlock in legal terms what was going on. But there's this story that I'm really interested in, which goes along with this story of black legal lives. I really want to tell that story as a way of opening a new window on black life itself. So, I want to put black life at the center. Race relations forms an important part of the story, but really the heart of the book is black people's lives.

[00:09:46] Jeffrey Rosen: And you bring that story to life so vividly and so well, and the story of your great-great uncle is an unforgettable place to start. Kate Masur, you tell...Dylan just mentioned the Privileges and Immunities Clause of Article IV. And then of course, there's the Privileges or Immunities Clause of 14th Amendment. And you tell the story of how abolitionists,

starting in the 1820s, invoked the Privileges and Immunities Clause of Article IV, that amazing story of the man who petitioned John Quincy Adams for his freedom in the District of Columbia.

[00:10:26] Jeffrey Rosen: And Quincy Adams signaled that he was indeed free because of his rights under Article IV. And you also tell the story of how Article IV, the Privileges and Immunities Clause was invoked by African American sailors in Southern ports in the 1830s, the amazing story of the Negro Seamen's Act, which really was constitutional window into these debates. Tell us about these incredible stories.

[00:10:51] Kate Masur: Yeah, thank you for that prompt. I mean, one of the things I was really wrestling with and thinking about in my book, *Until Justice Be Done*, was, where are these struggles and arguments over the rights of free African-Americans happening? At what jurisdictional level? And so a lot of the movement to get these kind of racist discriminatory laws in the free states, like the kind that they had in Ohio and Illinois, for example, a lot of the struggle to get those repealed was at the state level and actually did not invoke the US Constitution because they're sort of...it was difficult to claim at that time before the Reconstruction amendments that explicitly anti-black laws actually violated the US Constitution.

[00:11:38] Kate Masur: But when people traveled from state to state or into the District of Columbia, which is not a state, it became more possible to invoke the United States Constitution because interstate issues were involved. And so the Privileges and Immunities Clause that you're talking about, Article IV, Section Two, sort of says something. And the language as people acknowledged back then and now is pretty ambiguous. It says something about state citizenship and the rights of citizens of the state to be entitled to the privileges and immunities of citizens of the several states.

[00:12:16] Kate Masur: And what that meant for free African Americans was kind of unclear. And you had...and the kind of ability to make constitutional claims under that part of the Constitution, it was a very new situation, right? We're talking about the early days of the Constitution itself. And so I argue that, I mean with greater and greater intensity, beginning with the Missouri Compromise, in which the debates in Congress significantly invoke the Privileges and Immunities Clause with respect to the rights of African-American citizens of a state like Massachusetts, which recognized or began to increasingly recognize the citizenship status of black residents. Both Massachusetts and New York very clearly did by the 1820s.

[00:13:04] Kate Masur: Did black citizens of those states have a right to migrate and move into other states? Could a state like Missouri pass a law or put in their state constitution that they were more or less excluding black migrants, which is what a lot of slave states wanted to do, and to some extent, what some free states wanted to do? So this was debated in the United States Congress during what I call the second Missouri Compromise.

[00:13:35] Kate Masur: And then as you mentioned, I mean, there's this kind of amazing story of a man named Gilbert Horton who was a black sailor from New York, a state that recognized that its black residents were citizens of the state. Who is working on a ship, and he gets off of his ship in Virginia, and decides to go into Washington, DC where he is arrested under the idea that

he is a black man in a slaveholding jurisdiction and does not have free papers with him to show authorities. And this is in 1826.

[00:14:10] Kate Masur: Well, it turns out that, so in due course, the authorities of the District of Columbia advertised as if he had been an enslaved person, put an ad in the paper saying "This man is incarcerated. Gilbert Horton is incarcerated." The ad described him and said his owner should come forward and if his owner doesn't come forward and he can't prove his freedom, he'll be sold into slavery in keeping with the law in the District of Columbia.

[00:14:37] Kate Masur: Well, thanks to the way that media worked at that time, the advertisement in a prominent Washington DC newspaper made its way to New York where people immediately said, "We know Gilbert Horton, he's a free man. He's from Westchester County." And people in his hometown, including his father, who was a free black man, and a man named William Jay, who was the son of founder John Jay, get up a petition campaign, and they use their connections to, as you said, contact John Quincy Adams, the president of the United States. Kind of mobilized to prove Gilbert Horton's freedom so he could get out of jail, which they indeed did.

[00:15:15] Kate Masur: But as you say, one of the central claims they make for why it is illegal to hold him in prison for no crime other than being a black man in Washington DC is it's a violation of his rights under the Privileges and Immunities Clause of the United States, now of the US Constitution. Now, there's a whole other kind of longer-term story of the unfolding of that argument that African Americans should be entitled to a right to travel from state to state and place to place, including to slaveholding jurisdictions under the Privileges and Immunities Clause. But this sort of upshot of the story is it's not until that notion is codified in the 14th Amendment that it's possible to really say all citizens, including citizens of every race or color, have that right. It doesn't actually happen until 1868.

[00:16:08] Jeffrey Rosen: That's such a central constitutional point that you bring to life so well, that these basic rights of travel and contract were asserted under the Privileges and Immunities Clause. But until the 14th Amendment definitively established that all people, black and white, are citizens of the United States, that they could not be reliably enforced. Dylan Penningroth, Kate Masur has talked about the constitutional protection for privileges and immunities. You talk about a series of antebellum cases involving private law rights. You tell the story of Samuel Chisman and the right to contract, who was a free black tenant farmer who was able to put up a horse and a cow to make a contract. And you also talk about the New York African Society for Mutual Relief and the Daughters of Africa Society, both of who exercised the illegally enforceable right of association. Tell us about some of those antebellum cases.

[00:17:05] Dylan Penningroth: Kate, I think, has put her finger on a really important part of the story that I think we're both telling. So, the US Constitution forms an important part of the law that must inform what the characters in our stories are doing. But a lot of the action unfolds in state legislatures, in state courts, and indeed in local courts. And I spent a lot of time working in local county courthouses going around and trying to collect documents related to black people's cases.

[00:17:48] Dylan Penningroth: You mentioned Samuel Chisman. That's a case that I found along the way. It turns out that I wasn't the first person to find Samuel Chisman's case. Luther Porter Jackson, a pioneering black historian in the 1940s, had also done work in local courthouses in Virginia. And he did this because he was really interested in black people's achievements in the face of racial oppression.

[00:18:21] Dylan Penningroth: And he was very clear, as were many black historians before the 1960s, that when you think about what black people were able to achieve, a lot of this is unfolding in the world of property, in the world of contracts, and in the world of associations, such as churches, mutual relief associations like the New York African Society for Mutual Relief. That's where black people's achievements were. Now, of course, they're not unconcerned about racial discrimination. They're not unconcerned about the US Constitution, but they are very, very interested in compiling a record of black people's achievement in this world of, what you might call, the rights of everyday use.

[00:19:10] Dylan Penningroth: And so, Samuel Chisman, as you pointed out, he's a tenant farmer in Virginia. He's a free African American and he is in court trying to negotiate his debts. And what that case does for me is something more than demonstrating black people's achievements in the world of property. It's showing that they were an integral part of the economy of the South, both before the war and after the war. And they were an integral part of it, precisely because this world of property and this world of contracts did not make reference to race.

[00:19:52] Dylan Penningroth: There was no separate law of Negro property. There was no separate law of Negro contract. The world of property law is very, very conservative, doesn't change very fast. And so when black people enter into contract relations, when people, black people, buy land or borrow land, they are now part of the legal relations. They're part of a web of legal relations that white people are also a part of. And so white people are deeply affected when black people do things in the world of property and contract, and also when things are done to black people in the world of property and contract.

[00:20:33] Dylan Penningroth: So when black people get lynched, it affects the people to whom they owe money. It affects anyone who might need or want to buy the land that they owned. It's not to say that black people could not be lynched, but those webs of relations made clear that black people were people with rights and that they were, in a sense, people whose rights were intertwined with the rights of white people.

[00:21:04] Dylan Penningroth: So you probably, many in the audience have been hearing a lot about critical race theory. It's often made out to be a kind of boogeyman infesting our children's schools. One of the really important insights of critical race theory, and the legal scholar Derek Bell, is this idea of interest convergence. And I think Samuel Chisman's case is a perfect example of that. White people in the antebellum period were often perfectly willing to allow black people to have rights, to exercise rights, precisely because letting them exercise rights converged with their interests as white people.

[00:21:51] Jeffrey Rosen: So interesting and such an important reminder of the centrality of that debate over rights in the antebellum era. Kate Masur, take us now from the antebellum era to the 14th Amendment. The familiar story is that in an effort to ensure that black people have the same privileges or immunities or rights of contracts, Congress after the Civil War passed the Civil Rights Act of 1866, which guaranteed black people the same right to make contracts and soon be sued as whites. But Southern states subverted that with the black codes that essentially denied those rights and restored a form of peonage.

[00:22:38] Jeffrey Rosen: And a core purpose of the 14th Amendment was to give Congress the power to pass the Civil Rights Act and make clear that black people have the same privileges or immunities of civil acts as white people. You give far more context and nuance to that story by talking about how both before and after the Civil War, states like Illinois were trying to deny the civil rights of black people with acts like the Logan Act. And there was pushback in the courts. So, take us through this crucial part of history and help us understand the central purpose of the 14th Amendment.

[00:23:13] Kate Masur: That's, [laughs] that last thing. Okay.

[00:23:15] Jeffrey Rosen: [laughs].

[00:23:15] Kate Masur: Central purpose of the 14th Amendment.

[00:23:16] Jeffrey Rosen: 17 years.

[00:23:17] Kate Masur: No problem.

[00:23:17] Jeffrey Rosen: 17 years.

[00:23:18] Kate Masur: In three minutes or less.

[00:23:19] Jeffrey Rosen: You can do it.

[00:23:21] Kate Masur: No, I mean, I do... one of the goals of my book, and one of the things I thought a lot about that made me kind of want to write this book was the idea that there was more to the story of where the 14th Amendment and associated statutes like the Civil Rights Act of 1866, and really also the 13th and 15th Amendments. There's more to the story of where they came from.

[00:23:49] Kate Masur: But let's take the 14th Amendment, than the kind of more or less conventional wisdom, conventional narrative, which is that as the Civil War ended in the spring of 1865, and then Congress does not come into session until December of 1865. There's a sort of period in the summer and fall of 1865 when Andrew Johnson has kind of begun to implement his vision of a reconstruction or restoration of the Southern States policy. And there's all of this

violence that white people are sort of meting out against African Americans in the South. They are white southerners, going after black Southerners. And also, to some extent, white unionists are also the victims of this kind of violence and harassment.

[00:24:36] Kate Masur: Southern state legislatures begin to convene to create new concepts. State constitutional conventions begin to convene, to create new constitutions under Andrew Johnson, the president's policies. And they begin to pass these black codes, which are going to kind of attempt to restore slavery in everything but name. Fully repressive policies toward African Americans. And this is, again, the conventional story. Congress comes into session in December of 1865 and says, "We can't have this. This is not what the war was fought for." And they begin to hammer out the Civil Rights Act of 1866 and what becomes the 14th Amendment to kind of put a break on what they see the states were doing in 1865.

[00:25:18] Kate Masur: This is partially true but what I am showing and trying to show in my book is that the Republicans in Congress in 1865-66 were drawing on these arguments about African-Americans and sort of race and civil rights that had been going on in the north in particular for decades before. And that actually, quite literally, many of the men who were making these policies at the federal level now had been involved in one way or another in this antebellum kind of civil rights movement.

[00:25:53] Kate Masur: And so they had been talking about and thinking about, for example, why and how it was that African Americans were prohibited, couldn't be kind of...their rights under the Privileges and Immunities Clause were not recognized when they traveled. What was going on here? Why couldn't Congress assert power to tell South Carolina and other Southern states to stop enforcing these laws that discriminated against free black people traveling into the state?

[00:26:21] Kate Masur: Also, why could Ohio or Illinois evidently kind of prevent black migration into their states, or say that citizens or non-citizens, African Americans could not testify in court, had to register with local officials. And so they are fully cognizant of not just what had been going on in the Southern states, but what had been going on in the Northern states. And they bring their ideas into this incredibly intense period of framing new legislation and the Constitutional amendments.

[00:26:54] Kate Masur: And I will say that many people, when we talk about Section One of the 14th Amendment, we recognize that there are four sections within Section One. There's a declaration of birthright citizenship. There's the Privileges or Immunities Clause. There's the Due Process Clause and the Equal Protection Clause. And it's really important since this privileges and immunities issue has already come up, and that's associated with citizenship. It's important to me to also kind of remind us that the Due Process Clause and the Equal Protection Clause of the 14th Amendment apply to persons, right? Not only to citizens.

[00:27:29] Kate Masur: And that this is partly a response to the recognition that many of the civil rights that we have been talking about did not require citizenship in order for a person to have those rights. And so the question of whether someone was a citizen actually didn't matter

very much a lot of times for, like, the question of whether they could own property or the question of whether they could give testimony in court or the question of whether they could move from place to place.

[00:27:58] Kate Masur: Not very many Republicans in the North would have defended the idea that, for example, a non-citizen immigrant from Germany or Ireland didn't have the right to travel from place to place or to own property. They believed those people did, whether they were naturalized or not. And so we are talking about these people, the Republicans in 1866, kind of developing the 14th Amendment. They're putting a lot of things into that section one alone.

[00:28:29] Kate Masur: Not to mention the other sections, to kind of cover questions about the rights of citizens, the rights of non-citizens, how to think about the Bill of Rights. So there's a lot of thinking that's going into it, and a lot of it is drawing on these earlier antebellum debates and discussions.

[00:28:45] Jeffrey Rosen: That's such a great and crucial contribution that you make, both teaching us that debates over the scope of the Privileges or Immunities Clause were formed by these antebellum debates. And also reminding us of the overlap among the clauses, because, as you say, some of these basic civil rights, including travel and property, were not limited to citizens, but to all persons, citizens and non-citizens alike. Dylan Penningroth, you describe the facts of the Civil War. You talk in your chapter, *Does Color Still Matter*, about how Reconstruction introduced a new legal order in which the law is formally colorblind in some spheres, but color conscious in others, citing the famous or infamous slaughterhouse case, which read the Privileges and Immunities Clause out of existence.

[00:29:37] Jeffrey Rosen: And you also talk about how for many black people, the law in the wake of the 14th Amendment had not to do with the Constitution, but areas like family law, divorce, and inheritance, where gender and familial inequalities persisted. To introduce us to this crucial question of how much the 14th Amendment mattered to the legal rights of black people and the way that they continue to exercise their rights, both within and outside of constitutional law.

[00:30:06] Dylan Penningroth: Well, it certainly mattered a great deal to African Americans. It set a baseline below which Southern state officials ought not to sink. That's not to say that they never did, but the federal law laid out a marker. But in my story, the real kind of mystery and the interesting conundrum that I had to figure out is how is it that right after the Civil War ends, you have for example, ex-Confederate colonels representing black clients in court.

[00:30:48] Dylan Penningroth: They're, in fact, one of them is doing so in an office, just a block and a half from the statue of Robert E. Lee. That was the site of the infamous Charlottesville violence a few years ago. So there's this really interesting sort of question that I was confronted with when I started to realize that most, if not all, of the African Americans I saw in the court records, the local courts from the county courthouses, going to court over property, over contract, over their churches, they were being represented.

[00:31:26] Dylan Penningroth: If they had a lawyer by white men, nearly all of whom were Democrats, none of them were interested in principles of anti-subordination or anti-discrimination. They didn't really think much about the 14th Amendment. They were there, I think, because black people made good clients, especially if the black client happened to be a church or a fraternal order, or some other deep pocketed organization. And white lawyers actually fought over the control of black clients.

[00:32:04] Dylan Penningroth: In fact, one of the reasons that they shut African American lawyers out of the legal profession in the late 1800s was precisely to preserve their access to black people's legal business. So there's a story there that I think is really interesting. I think that there's another part of the 14th Amendment that Kate was just alluding to and that is the way that the 14th Amendment begins to carve out this sphere for the exercise of corporate power.

[00:32:43] Dylan Penningroth: And one of the stories that I find really fascinating here is how African Americans were exercising these powers of association before the Civil War. But then after the Civil War, you really see this, almost an explosion of black associational life. You see them forming one after another. They form black colleges. They form black fraternities, A Phi A, Kappa Alpha. All of these fraternities that we've come to know so well. Black churches. These really take off in a big way in the late 1800s after the Civil War.

[00:33:26] Dylan Penningroth: And I think they're taking advantage of this, these opportunities that the developing feel of corporation law presents. And so that provides a basis for African Americans to organize and channel their energies. That is, after all what a corporation is for, it is a legal tool that allows a group of persons, individual human beings to join their energies, to pool their resources and channel it towards some goal that they ostensibly agree on. So what that does is it allows African Americans to achieve these collective goals.

[00:34:08] Dylan Penningroth: The other side of the story, though, is when you look inside these associations, what you see again and again is this recurring tension over the question of whether members of associations, black associations and corporations, whether they have rights that a court can defend, or whether they merely have privileges which they hold at the pleasure of the minister or the leader of that association. And so this tension threads through African American history, and it runs right through the Civil Rights Movement when black corporations like the NAACP, like black churches, the National Baptist Convention, the SCLC, the Montgomery Improvement Association, these are all black-run corporations.

[00:35:07] Dylan Penningroth: These questions come back to the forefront, and they come back one way to see how important corporation law is to African American organizing is to look at what happens to the most famous organization that chose not to incorporate, and that's the Student Nonviolent Coordinating Committee, SNCC. They were emphatically not a corporation. Some of them said that they weren't even an organization, they were a radical democracy. And they did incredible work, but they did not last very long. And I think that that short-lived experience is an illustration of how powerful corporation law could be in pursuing the interest of African-Americans.

[00:35:53] Jeffrey Rosen: It's so interesting you tell so many unforgettable stories of cases involving the rights of individuals in associations like the black members who were expelled from their church and claimed that they had a property interest in the membership and were vindicated. And that amazing case Bouldin against Alexander in 1872, where the court had to decide what kind of disputes a secular court could decide about a minister who was alleged to have misused church funds and vindicated contract rights. Kate Masur, I asked you to sort out the whole 14th Amendment in three minutes.

[00:36:31] Dylan Penningroth: [laughs].

[00:36:32] Jeffrey Rosen: And you did a wonderful job. And now I'm going to ask you the \$60,000 question that is the most contentious question in constitutional law under the 14th Amendment today. And that is-

[00:36:42] Kate Masur: Great.

[00:36:43] Jeffrey Rosen: ... Based on your definitive studies of the Privileges and Immunities Clause, is the Supreme Court correct when it says that the Constitution is colorblind and allows for no racial classifications in the affirmative action cases? Or was Justice Ketanji Brown Jackson correct that the Framers of the 14th Amendment, including the Privileges and Immunities Clause, did not mean to prescribe racial classifications that were designed to help black people rather than hurt them?

[00:37:21] Jeffrey Rosen: And sorry to throw that question at you, but I have to ask, because you're the one who knows. And, then after you've taken a stab at that question, help us understand how the 14th Amendment after the slaughterhouse case read the Privileges and Immunities Clause out of the Constitution was, and was not, invoked on behalf of black people.

[00:37:42] Kate Masur: Okay. So the [laughs]-

[00:37:45] Jeffrey Rosen: [laughs].

[00:37:47] Kate Masur: So I'm glad you asked a real, really up-to-date, really important contemporary question about whether we should understand the Equal Protection Clause, in particular, of the 14th Amendment to preclude any kind of racial classification, particularly in this case, policies designed to enhance or kind of make more possible the ability of African Americans and other racial minorities in the United States to have access to certain forms of higher education, which was the issue at hand in the Supreme Court case last year.

[00:38:31] Kate Masur: And one of the questions, as you imply, is because this court is quite interested in what they call original meanings, original understandings of these constitutional measures. Did the people who adopted, passed, and adopted the 14th Amendment think that it needed to have what they call a colorblind interpretation? That is to say that it required not only

no... does it sort of no...zero attention to race, right? Everything from now on has to be completely kind of neutral in regard to race.

[00:39:07] Kate Masur: And I was part of a group of people who actually supplied an amicus brief for that case. And so I gave this a lot of thought and did quite a bit of research on the particular question, right? And the particular question is, at least from a historical perspective, if you go back to that time, and you look at the people who supported passage of the 14th Amendment at that time, was there much in, or anything in, the historical record, either to say that it required a colorblind interpretation, or to say that they were open to the idea that there still could be race-conscious ameliorative policies.

[00:39:40] Kate Masur: That is to say, policies that were race-conscious designed to uplift or aid African-Americans in particular as slavery was being abolished. What we found is that these Republicans were quite comfortable with race-conscious ameliorative policies. Anyone who has looked at the 14th Amendment knows that the committee where the language was hashed out, did not keep very detailed records. And so there's a kind of lacuna in the records where we might want to go to find well, what did that committee literally say about these issues?

[00:40:14] Kate Masur: Everyone knows that, that those records are not there. So one of the things that we and other people interested in this question have to do is look at surrounding discussions of other kinds of policies. And the evidence is clear, and I can give particular examples, but that these folks actually were supportive of race-conscious ameliorative policies when it came to thinking about civil rights themselves, when it came to thinking about education in particular.

[00:40:42] Kate Masur: And when people at the time complained and said, you have this Freedmen's Bureau, you're giving special privileges to African Americans, or, you have this law that sounds like it's an equalizing measure, but it's really giving black people these special rights. I mean, even Andrew Johnson, the president of the United States, said that at the time. He said that in a veto message of the Civil Rights Act of 1866. Congress overrode those vetoes. Every time those arguments were made, they were met with a majority in Congress who said they disagreed and wanted to go forward with race conscious ameliorative policies.

[00:41:18] Kate Masur: And so the evidence is quite clear that they were having conversations that were very similar to the ones we have now about affirmative action, and that the majority will, which was reflected in statutes passed by Congress and in the 14th Amendment itself said, "We are comfortable with these race conscious ameliorative policies." So that's what we said in the brief, and you can ... and the brief is available, if anybody wants to take a look at it.

[00:41:42] Jeffrey Rosen: Thank you so much for summing it up so very well. I have to ask the follow-up question because the opinion came down and in it, Justice Thomas, at least, said well the Freedmen's Bureau was formally race neutral and applied to white refugees as well as Freedmen. Did you find in your brief examples of race conscious policies that were not formally open to white people as well?

[00:42:06] Kate Masur: Yeah. So, Justice Thomas also said that the Freedmen's Bureau policy was not race conscious because the status of Freedmen was a status as opposed to a racial category, because there were many African Americans who were not literally Freedmen at that time. So that was also the argument. In practice, first of all, the Freedmen's Bureau policies, for example, establishing schools, those schools were open to all African Americans. They were not ... The schools did not make a distinction about whether a person had been enslaved in 1861 when the war began or not.

[00:42:45] Kate Masur: Okay. So in practice, there was not a distinction being made in these Freedmen. If a black person came to the Freedmen's Bureau for aid for relief, somebody wasn't saying, "Well, you have to show that you were enslaved in 1861 to get this relief." So that's point number one about that. Point number two is there are a lot of other policies we can point to that were race conscious that use racial terms, that don't use the term Freedmen. So, the Civil Rights Act itself says citizens of all races are entitled to the same rights as white citizens.

[00:43:15] Kate Masur: Now, Justice Thomas has an argument there. He says, "That's not an anti-subordination measure. That's somehow an equalizing measure." But I mean, if you read the act itself, you will see that it is literally what people talk about when they say that ... use the kind of terminology of anti-subordination. They're acknowledging that people are being subordinated on the basis of race. And they're saying that, now it is time to have people of all other races have the same rights as white people already enjoy. So those are just kind of two examples I would provide. And, there are many other things I could say about these kind of discussions.

[00:43:53] Jeffrey Rosen: Thank you. So illuminating, and thank you for that exchange. Dylan, let's now, in the final quarter of our program, introduce our readers to the incredible sweep of history that you describe between Reconstruction to the Civil Rights Movement of the 1960s. And you have so many examples of court cases where black people wielded the law in a vernacular way, as you describe in your chapter about goat sense where they were able to be knowledgeable about law for self-preservation in the, in the shadow of the law, and so much else. So take us up from the 1860s to the 1960s.

[00:44:42] Dylan Penningroth: [laughs]. Sure. So I'm glad that you mentioned that phrase, goat sense. I think it's such a redolent term. It comes from the autobiography or the biography of Nate Shaw, which was written by Theodore Rosengarten. Nate Shaw was a tenant farmer in Alabama from the 1880s through the 1970s. And he was involved in a very famous, or became famous because of Rosengarten's book *Showdown* involving the Southern Tenant Farmer's Union.

[00:45:21] Dylan Penningroth: So he's often seen by historians today, rightly so, as a kind of symbol of the promise that could have been of an interracial movement that would've supported rights for African-Americans and poor white farmers. It's kind of a labor unionism in the 1930s. He was all that, but he was also someone who was deeply involved in thinking about his rights as a property owner. And as someone who made contracts.

[00:46:01] Dylan Penningroth: Now, to my knowledge, he was not a regular player in court. I don't know that he ever appeared in a lawsuit of the type that I examined in the courthouses, but

you can see even from just reading Rosengarten's book that Nate Shaw thought an awful lot about law. And so there are certain points in his narrative where he talks about things like having the right at the end of a tenancy contract to pick up and take with him anything that isn't tied down. And so I went and looked at the Alabama laws from that period, and I found that he was exactly right. Tenants had the right to take things that were not affixed to the ground.

[00:46:48] Dylan Penningroth: So if the building wasn't nailed down, you could pick it up and take it. Horses, cows, corn, all of that could go with you under certain restrictions. And so I came to realize that this, and he talks about goat sense. And I came to realize that what he was really talking about was basically the understanding of law that any adult ought to have, sort of like the sense that God gave a billy goat, I think is what he meant. And so not everybody had the same amount of goat sense. They certainly were not legal experts, but they knew enough about law to make their way through their lives.

[00:47:31] Dylan Penningroth: In fact, I would go so far as to venture to say that they knew about as much law as you or I do. When it comes to sort of regulating your affairs of everyday life, there are certain things that you kind of know what to do and you know not to do. And then anything beyond that, you need to go find a lawyer, and you kind of have a sense of where that line is. And so that's the story that I'm telling in the latter half of my book. And what I wanted to show is what happens to that story of the rights of everyday use. What happens to African Americans' goat sense.

[00:48:13] Dylan Penningroth: And what I think happens is that it never goes away, but the fight against Southern white supremacy comes to dominate national consciousness in a way that crowds out our memory of those rights of everyday use. And black southerners, and northerners, frankly, constant engagement with them, it leaves us, it has left us I think, with an impression that when Thurgood Marshall and the Legal Defense Fund went south, when the SNCC activists went south to organize voting rights, that they were meeting people who were afraid to go to the courthouse, who knew nothing of their rights.

[00:48:58] Dylan Penningroth: In fact, SNCC activists literally say this, that they need...that what the activists need to do in the South is they need to teach the folk about their rights. And I think that that is a really important thing to say rhetorically, but I think it says more about what it took to organize activists than it does about what ordinary black southerners actually knew about law. If you look at the docket books, you can see that black people were going to court all the time. And so I really wanted to sort of tell a story about how the rights of everyday use get used all the way through, but that the Civil Rights Movement of the 1940s, 50s, and 60s takes the idea of civil rights. Lifts it up into the world of the sacred.

[00:49:56] Dylan Penningroth: It becomes literally sacralized in large part because the argument is so often being made by African American ministers, people who are literally leaders of churches, men of God. And then it gets returned back in a way that that I think is kind of cut off from the way that most African Americans thought about and experienced their civil rights on an everyday basis. So I think both stories of civil rights are kind of flowing side by side. They're both incredibly important. They're both true. And I think that it would be really

interesting for us to pay more attention to the other story. And that's the one that I've tried to lift up in my book.

[00:50:46] Jeffrey Rosen: Such a powerful story. And you put it so clearly, the story of how black people exercised ordinary legal rights coinciding with the sacralization, as you just put it, of civil rights in the 1960s. And it all comes to a head in that unforgettable story you tell about Thurgood Marshall talking to Richard Kluger, where Marshall says that "We had to try this case like any other case with damages, just as if your car ran over me, you'd have to pay out."

[00:51:16] Jeffrey Rosen: And you parsed that by saying, why would Marshall give this story about personal injury law when talking to *Brown v. Board of Education*? Because as you say, he knew that black people knew how to use personal injury law and knew perfectly well what personal injury lawsuit was. Kate Masur, time for closing thoughts in this really deep discussion reflecting. You've written a, a definitive book about the first Civil Rights Movement, which we've been talking about. When you fast-forward to the 1960s, what lessons did the Second Civil Rights Movement draw from first?

[00:51:56] Kate Masur: That's an interesting question because, I don't actually really know the answer to that question. The one thing that I've done a lot of work on the period of Reconstruction, and one thing that historians have often been interested in is to what extent did movement organizers in the 50s and 60s remember or think about Reconstruction, right? Because that is the most...kind of other period of dramatic opening in American history where a lot of things related to race and equality were possible. Where we got these three incredibly important constitutional amendments and the first federal civil rights statutes. And the evidence is sort of mixed.

[00:52:42] Kate Masur: I mean, Americans, famously, are always reinventing themselves. Reconstruction, the history of Reconstruction itself was taught in a very warped and racist way into the 20th century. So even if you had learned about Reconstruction in school, you would not have necessarily seen it as a model or an example to follow if you were involved in trying to kind of bring down Jim Crow. The same is not true for black families. And some historians have done really interesting work on how Black Americans kept alive the sort of memory and history of Reconstruction and what it had meant for African Americans, even after white Americans kind of shut it down and then rewrote the history in a way that tried to erase it and distort it.

[00:53:28] Kate Masur: So as far as going back to the earlier civil rights era, I mean, I feel like one of the things that I really want to do, people remember Frederick Douglass and Frederick Douglass was part of this First Civil Rights Movement. But one of the things I wanted to do in my book is put a whole other kind of cast of characters on our radar. There were so many black Americans who were involved in this struggle, who people should know about. People ... Somebody ... John Jones, the most famous black Chicagoan of that period, who spent 20 years trying to get the black laws of Illinois repealed. A man named David Jenkins, who was really important to the Ohio Movement.

[00:54:04] Kate Masur: And then also the white people who joined this movement, who helped fight to bring down those racist laws of the Midwest who pushed ahead for the nationalization of the idea of ... racial equality and civil rights, and ultimately in voting rights. I thought these stories were really important to recoup, in part because they form a longer trajectory of the story of fights for racial equality and racial justice that I think it can only help us to really know the extent of those histories and also the extent of the American story of white opposition to racial justice.

[00:54:51] Jeffrey Rosen: Wonderful. Thank you, thank you so much for that. Dylan Penningroth, last word to you in this great discussion. As you sum up the teachings of your wonderful new book what should all of us learn from the hidden history of the Blacks Civil Rights Movement?

[00:55:12] Dylan Penningroth: I guess I'd point to two things that stand out for me after doing the research for this book. I guess the first one is just a really deep sense of appreciation for the diversity of black life that goes hand in hand with, is intertwined with, the commonality of racial oppression. That I think is something that I was interested in from the start, and my research left me with an even deeper appreciation for.

[00:55:47] Dylan Penningroth: I guess the second one is just to, I've come away with, and I hope that readers will find that the law, we think, when we think about this thing called the law, that it's not just one thing. I think it's often tempting, especially when thinking about black people and law to fall into the trap of thinking that it's all about the Supreme Court. What's the court going to do next week? Will Congress ever pass a law on the subject?

[00:56:21] Dylan Penningroth: But it's not, the law is not just one thing. And I think that's something that Kate's book brings out beautifully. The law is Brett Kavanaugh and it's also your local county judge. It's also true, I think that the law enables many things and closes off other things. So for example, the law enables white supremacy, but it also enables, as I show in my book, a black patriarchy. Black men at various points in the story take advantage of their rights, their civil rights, to impose their vision of freedom on black women who are, after all, the majority of members in most churches at that time. And so you get these really interesting tensions that recur again and again.

[00:57:16] Dylan Penningroth: And then I guess the last lesson that I take from this is that white supremacist violence, like we saw committed against George Floyd, has been with us in this country since before its inception. And I think what's really striking, is that black people throughout this history have been using rights in the face of that violence. That is to say that black people using law has and can coexist with police violence, white supremacist violence committed by the state.

[00:58:00] Dylan Penningroth: And I think that it's really important for us to stop and ask ourselves why? Why did African Americans turn to law again and again in the 1830s, the 1880s, the 1960s? I think we should be asking ourselves, why is it that African Americans turn so often to law, to rights? And I think it's especially important because we're now confronted with a

former president who has quite explicitly tried to weaken Americans' collective faith in the rule of law.

[00:58:37] Jeffrey Rosen: Thank you so much, Kate Masur and Dylan Penningroth for an illuminating, deep, and really invaluable discussion. Thank you so much, dear We The People friends, for taking an hour out of your day to learn about this crucially important constitutional history. And as always, the best follow-up is to read Kate and Dylan's books, *Until Justice Be Done: America's First Civil Rights Movement, from the Revolution to Reconstruction* and *Before the Movement: The Hidden History of Black Civil Rights*. Kate Masur, Dylan Penningroth, thank you so much for joining.

[00:59:11] Dylan Penningroth: Thank you.

[00:59:12] Kate Masur: Thank you.

[00:59:17] Tanaya Tauber: This episode was produced by Lana Ulrich, Bill Pollock, and me, Tanaya Tauber. It was engineered by Dave Stotts and Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith, Derek Shavell, and Yara Daraiseh. Check out our full lineup of exciting programs and register to join us virtually at constitutioncenter.org. As always, we'll publish those programs on the podcast, so stay tuned here as well, or watch the videos. They're available in our media library at constitutioncenter.org/medialibrary. 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.