Short Circuit | Episode 153

The Wire and Dairy Cows

Anthony Sanders 00:01
Hello, and welcome to *Short Circuit*, your podcast on the Federal Courts of Appeals. I'm your host Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice.

We're now nine months into the pandemic and as we are all, all too familiar with people have come up with a panoply of activities to keep them occupied while staying at home. Many have begun new hobbies like baking or birdwatching. Others unfortunately dabbled in new vices like substance abuse or listening to podcasts. Meanwhile, quite a few have been catching up on classic TV shows, which depending on your perspective, could count as a hobby, or a vice. For example, I've heard from several people that have watched or even rewatch the Wire, David Simon's HBO series from the mid-aughts, about cops, gangsters and just about everyone else in Baltimore. But watching it now does show that it's as you'd expect, dated in some ways. You can't help but notice that one thing McNulty's, his band of misfits could have used in addition to a measly wire was a drone, then they could potentially track the movements of everyone in Baltimore. That's something the Barksdale clan could never have outsmarted. And neither could thousands of innocent people, which is why we have a Fourth Amendment.

The Fourth Circuit reviewed a challenge to a real-life program that does just about that last week. We'll be looking at that case in a moment. Another you might say different series from the wire is all creatures great and small--the BBC period piece adapted from stains Harriet's novels about veterinarians in Yorkshire. Originally produced in the 1970s and 80s, a remake has actually just appeared this fall. Much of the action if that word qualifies and describing what happens in the show revolves around dairy cows. Well, they had some dairy cow drama of their own last week at the Washington State Supreme Court. The court address whether the State Constitution's Privileges or Immunities Clause, a phrase that might be familiar to some listeners, in conjunction with the state's Wage and Hour laws protects the privileges of dairy workers in providing the immunities of overtime. I have no idea if wage and hour laws of veterinarian practices came up on all creatures great and small, but I'm sure it would have made for a thrilling episode, just like this case. We'll be talking about that decision today.

Joining me this week are two IJ senior attorneys Dan Alban and Wesley Hottot. Both very familiar with pandemic hobbies and vices.

Let's first turn to Dan, who is going to present the Fourth Circuit case, Dan, is the wire the greatest show ever made?

Dan Alban 03:00
Well, it's certainly among them and the Wire actually is a great setup for this case, because it involves surveillance in Baltimore, electronic surveillance. But in this case, as you mentioned, it's about drone surveillance flying over the city, photographing up to 90% of the city for 12 hours at a time, every single

day. And so, not only with the Barksdale Klan, and, you know, various criminals who are outside be photographed by these drones, but so would hundreds of thousands of Baltimore residents who aren't committing any crime but are still being surveilled. The case is *Leaders of a Beautiful Struggle v. Baltimore Police Department*, and the majority, written by Judge Wilkinson finds that this surveillance program, which is the Aerial Investigative Research Program is constitutional--does not violate the Fourth Amendment. And Judge Wilkinson describes in great detail how this program works, and, you know, discusses the Fourth Amendment cases, especially *Carpenter v. United States*, which was decided a couple of years ago by the US Supreme Court. And it's important, I think, to understand just a little bit about *Carpenter*, because both the majority opinion and the dissent focus on *Carpenter*. So, *Carpenter* was a case that involve the use of surveillance by cell site location info, that is not GPS info but info gathered when cell when your cell phone pings a cell location site. In that case, the Supreme Court ruled that it did violate the Fourth Amendment to without a warrant obtain this cell site location info that enabled law enforcement to track the location of a suspect. I think in that case, it was something like 84 times a day, as the cell phone was either used or pinged a new cell site, because it enabled law enforcement to with quite a bit of details, so very similar to GPS, track the exact location of the suspect, each time, the cell phone pinged the cell towers. And you can imagine if, if a cell phone is doing that, you know, 80 to 100 times a day, you could get a pretty good idea of where someone has been each day. And if part of the investigation is where they at the scene of a crime or where they, you know, at a location with other people that are suspects in the crime, it could, it could lead to very valuable evidence for the police. But it can also lead to terrible civil liberties violations because if everyone's cell phone data is available, to the government like this, everyone's location could be tracked, and so, the Supreme Court rejected the attempt to use this cell site location data in *Carpenter*.

But Judge Wilkinson thinks that this this surveillance program, this drone surveillance program over Baltimore, is not similar enough to *Carpenter* to violate the Fourth Amendment. And he points to a handful of key aspects of the program that he thinks differentiate the program from using cell site location info. So, he, first he points out that the, these drones are only up for 12 hours a day, weather permitting, they're only taking the photos during daylight hours, not at night. He points out that it only enables outdoor surveillance, unlike, you know, cell, cell phone location info. Obviously, in most buildings, your cell phone is still in contact with a cell tower and can still report its location data. They're just using regular cameras, you know, maybe high definition but regular cameras, to conduct this, this aerial surveillance and so they don't see inside of buildings, once somebody goes inside a building, you can't track them anymore. And then another critical fact is that the resolution for people is reduced to a single pixel. And the this isn't based on the capability of the cameras, they're apparently able to do far more than that, but based on concerns raised by community groups, and other people involved in instituting this program. The agreement that was reached was the, the resolution for a single person will be reduced to this pixel, and thus, nobody can be identified by this one pixel. It's not even, you know, what color clothes or you're wearing is supposed to not matter. You know, they're supposedly unable to identify people by race or gender. They can just see that there is a pixel going into a building or walking down the street. And so, Judge Wilkinson says, “Look, that's, that's not enough to raise the sort of Fourth Amendment concerns that that are, that were at issue in *Carpenter*,” and, you know, basically says, this is, this is something that is far more limited. It doesn't even have the same capabilities as street level surveillance cameras, which often use facial identity, facial identification technology, can see far more about what someone's doing, have much closer on the ground resolution. But of course,

street level cameras, you know, are only generally going to, going to be capturing the area outside of a business or a single intersection or a single part of a street, not the entire city like this drone aerial surveillance program does.

At the end of the day, he says, “Look, it's possible that these could violate the Fourth Amendment if they operate in a certain way.” But he wrote, he writes, “the basic problem with plaintiffs’ argument is that people do not have a right to avoid being seen in public places.” And so, he says, look, because all you can do is identify that there are pixels moving in and out of buildings, and you would have to use other surveillance technology to figure out who those pixels are and what's going on, the, the program kind of viewed in isolation is, is free from these Fourth Amendment concerns.

09:34
And then towards the end of the opinion, he sort of adopted an ends-justifies-the-means argument that actually reminded me a lot of Dirty Harry. And for those who are not familiar, haven't spent their pandemic isolation watching Dirty Harry movies, Dirty Harry is this sort of extremely aggressive cop, a fascist cop, who does not care all that much about the civil rights and civil liberties of suspects that he's going after, and frequently fails to get a warrant or do other things. But we, the audience, are supposed to be okay with it because we know that the bad guy is really the bad guy, and at the end of the day, everything comes out okay.

And so in Dirty Harry, at one point, the district attorney is telling Dirty Harry why he's got to let this this serial killer go and says, “You know, you, we have all of the evidence that you've got was obtained illegally, you know, every, every single thing you did was illegal and dirty.”

Harry says, “Well, what about the rights of you know, the victims? What about the rights of the lady killed?”

And Judge Wilkinson sort of mirrors that in, in the, at the end of the opinion, talking about the rights of folks who are who are murdered on the streets of Baltimore, who are robbed on the streets of Baltimore. And points out, you know, all those people have their rights denied without due process, you know, and that justifies why we have this program.
Now, that's not normally how constitutional rights are supposed to work. It's true that, you know, the surveillance program is allegedly designed to help prevent murders and other crimes on the streets of Baltimore. But, you know, the, the rights of people who are being surveilled, like the plaintiffs in this case, who are community activists and organizers, and hundreds of thousands of people in Baltimore who are not committing any crime, but still being surveilled, have to be taken into account. And in the ends-justify-the-means is not normally how we conduct constitutional jurisprudence. Nonetheless, that's how Judge Wilkinson ends his opinion.

Now there's a dissent in this case that I think is more persuasive by Chief Judge Gregory that sort of pushes back on a lot of the, the facts that Judge Wilkinson and relies on, and points out that, sure, if you view all of this in isolation, if this was the only if this was the only technology or methods that the police had at their disposal, it would be pretty difficult for them to figure out who people are. But merely by having a phone book, or a directory or something that shows the houses that people live in, you

would be able to generally trace just about everybody because most people spend the night at their house. And so, in the morning, when it's daylight, you can track them as they leave their house and follow them about wherever they go during the day and have a pretty good idea of what they're up to. Because even if you can't track every single pixel all the time, you can still follow them to certain locations and then you can cross merge that with the surveillance camera data, other, other information that you might have about someone's location. And when you view all of these things holistically, it is a massive surveillance program that can in fact, individually identify all of these people who are being surveilled without a warrant and tracked at a level that the *Carpenter* Court said it wasn't comfortable with--said that was that violated people's, people's rights, because every aspect of, of their behavior was being tracked for days at a time.

And in this case, the, the surveillance program stores, I think it was 45 days' worth of data. And so, you, you could easily identify and track someone for a month and a half, using a combination of this aerial surveillance, plus street level surveillance cameras,

13:53
the license plate tracking cameras, all kinds of other surveillance things that are available to police without even getting a warrant without ever having any, any basis for suspicion. And, you know, lots of people could be tracked this way. And that's of great concern to Chief Judge Gregory.

And so, you know, it's an interesting sort of tug of war, I suspect that this case will be headed to the Supreme Court very soon to address, you know, how does *Carpenter* apply to this to this aerial drone surveillance program? And should we look at it in isolation and not imagine what, how you could combine the aerial surveillance information with other capabilities that the police have? Or is that view, as the dissent puts it, putting one's, putting one's head in the sand about the program's capabilities, and you should really be more skeptical of the first of all the government's claims about the limits that that it puts on the technology even though it may be could go further than that. And that it also is too reductive in only focusing on the capabilities of these drones, and not all of the capabilities that police have, once they have access to that drone surveillance information. And so, you know, Judge Gregory says, "Look, it doesn't matter if you're getting the information from these cell site location info from cell phones, or if you're getting it from drones flying overhead for 12 hours a day, you're still getting information about people's past movements for up to 45 days at a time, and that, in and of itself, is what reveals the intimate details about people's lives and violates the Fourth Amendment."

Wesley Hottot 15:50
Well, how long do you think it is until, you know, this technology is used as evidence in a particular criminal case? And would that perhaps be a better illustration of its Fourth Amendment problems?

Dan Alban 16:04
Well, I assume it, it probably has been. I assume if it, I mean, if it hasn't worked, its way up through the courts, I assume that, you know, they're, the reason they have this is to go after crime and they're using it as part of how they build their case. But I don't think it actually matters that much, because the, the Court, neither the majority, nor the dissent, thought there were any standing issues. So unlike some of the, the cases involving like a *Holder v. NSA*, or some of the cases involving kind of government

electronic surveillance, where you don't know whether the government's surveilling you or not, if you are out on the streets of Baltimore, you are being surveilled by this program, because it's capturing, I think there's three different surveillance planes that are up at a time in between the three planes, drones, they're capturing 90% of the city at once. And so, even if at any particular moment, somehow, you're in the 10%, that's not being photographed, just being out and about in Baltimore, means you're being surveilled. So, I don't, I don't think it, I don't think there are any standing issues for the plaintiffs. It might in some cases illustrate how exactly in a criminal prosecution, how they, they sort of put all these techniques together to overcome Fourth Amendment protections. So, I suppose that could be a more vivid illustration of the problem.

Anthony Sanders 17:30
One thing that that I know that I can't remember if this is the Senate or the majority, but it was something like only three or four different identifications of pixels, you know, whether the person or not, is enough to figure out exactly where they are. And so, it's not that much information you need once you know, who said like someone is one of these pixels in order to figure out everywhere they went during the day.

Dan Alban 17:59
You're right. So I think that was, well, I'm not sure if we're talking about the same thing or not. But I think the plaintiffs had evidence that if you just could identify four randomly chosen points of data from someone's movements, movements over the course of the day--and I think in the plaintiffs' study, it was done using that cell phone location data but the same thing could have happened with this aerial surveillance program--they were able to identify individuals, just they're able to identify 95% of individuals, just with four points of location data. And you can imagine how that would be the case, right. Like how many people start the day off at your house, go to your place of work, and, you know, then you know, some other location that maybe is unique to you in some way your favorite restaurant, or where you go to get lunch, or the grocery store that you shop at? It would be relatively easy, frankly, just based on knowing where someone started their day to identify that person. And it might be that yes, you know, going into a house or going into a building, you're outside the view of the surveillance, and you depending on the building, there might not be many people going in, or there might be a lot of people going in. So, you know, someone going into a subway station or something like that, it would be obviously very difficult to track them coming out of the subway station until you know where the pixel goes. And if the pixel goes to their place of work, you know, you know, it's a limited number of people that would be going to that building. But some buildings, you know, the only people going in and out of them are, you know, like a small business or something. There's probably a limited number of people going out, in and out, and if you see one pixel going from someone's place of, you know, someone's place of business to their home every day for 45 days, you have a pretty good idea who that who that pixel is, even if you can't see you know what color jacket they're wearing or something.

Anthony Sanders 19:56
One thing that struck me about the Court's analysis was it, you know, this was a reasonable expectation of privacy case, not a, say, a property rights case like we've had in some recent Fourth Amendment cases. And they it seems like the court, court took the like the most extreme reasonable expectation of privacy cases from the Supreme Court and just kind of wrap them all together. Like,

there's this case that says, you know, surveillance just above your house, aerial surveillance just above your house, that's actually for any normal person is going to be pretty intrusive, is not a reasonable, does not violate a reasonable expectation of privacy. And then wraps that with the statement in *Carpenter* that says that ordinary cameras on the street, you know, that's good, that's going to be okay. And so, when you put them all these little bits that don't violate reasonable expectation, privacy test, put them all together, well, that's not going to the, you know, the sum is not going to violate the reasonable expectation of privacy. Whereas *Carpenter* tells us that it's when you put them all together, that's when the real problem is and just completely lies past that.

Dan Alban 21:03
Yeah, it's interesting how the majority does kind of cobbled together a whole bunch of different opinions, like cases that say, you know, flying 1000 feet over someone's backyard, you know, or even a few hundred feet, I think one of them over someone's backyard, is not is not enough to violate their privacy. Combine it with some of the other cases and say, well see, you know, this, this program is no worse than that. But when it comes to analyzing what the police are actually doing, it, of course, only views the aerial surveillance in isolation. And of course, flying over someone's backyard at 1000 feet and taking photographs is very different than hovering over their backyard for 12 hours a day, every day, and taking photographs.

Anthony Sanders 21:43
Only 12 hours a day. I mean, come on.

Dan Alban 21:45
Right? The court makes a lot about the fact that it's, you know, only weather permitting, and not at night, as those make a big difference and seems very credulous about the government's claims that yes, it is, you know, really following these, these restrictions, and even though the cameras have the capability of doing the photography at night, and even though the cameras have the capability of, you know, viewing people and much greater resolution that could identify them, of course, they're not doing that. They're only, they're only looking at the one pixel. And, you know, given the number of abuses that we've seen using a wide variety of surveillance programs, I think it's a bit irresponsible for a court to be that credulous about it. I understand that, you know, they're bound by the evidence that's presented to them, but you don't have to have been paying that close attention to know that these surveillance technologies get abused constantly because there's almost no consequences for doing so, and at worst, you know, a cop is gonna get a slap on the wrist for it. And so even a lot of the limitations they claim they abide by, those probably go away if there's something that they consider important enough to waive those protections.

Anthony Sanders 23:08
Well, a different kind of protection that Americans often are worried about is Wage and Hour laws, and how those are fairly distributed across the economy. So far away from Baltimore, in the fields of Washington State, people work milking dairy cows, and their concerns are brought to the Washington State Supreme Court in, in an opinion that somehow was able to combine John Bingham and the birth of the 14th Amendment and the, the, the Washington state legislators' requirement to enact these kinds

of laws plus the dairy industry. We have an interesting case, if not quite a coherent case, that Wesley is going to tell us about. So, take it away.

Wesley Hottot 23:56
So, this case is *Martinez-Cuevas v. the DeRuyter Bros. Dairy, Inc.* from the Supreme Court of Washington, it was decided on November 5, and it addresses whether the overtime protections that is to say, the requirement that you pay your workers for time over 40 hours per week spent on the job, whether those statutory protections apply, have to apply to agricultural workers based on the Constitution. So, agricultural workers in Washington State, like many states are specifically exempted from the overtime provisions of state law. And two dairy workers, representing a class, sued their employer arguing that Washington's Privileges or Immunities Clause as well as its Equal Protection Clause, made that statutory exemption unconstitutional. In other words, the Constitution requires the legislature to protect the overtime pay of agricultural workers, despite the legislators' express intent not to.

And, you know, there's a lot of telling evidence about the challenges faced by dairy workers in particular, you know, these two, plaintiffs *Martinez-Cuevas* and Aguilar, were working at a dairy farm that had 3000 cows that operated 24 hours a day, seven days a week, all year round. And they were routinely made to work, I think it was 85% of the time, they had to work overtime every week. They weren't compensated for the work that they did before their shift or after their shift, and seem really to have elicited the sympathy of the court in terms of how they were treated, I think it's a matter of public record that a lot, a lot of agricultural workers are, are treated poorly by their employers. And, you know, it's one of the concurrences points out there disproportionately migrant workers, either undocumented Latinos or, or people that are here legally, who are overwhelmingly Latino, in ethnicity. And so, the trial court in this case held that there was a privilege or immunity that was covered here, but reserved for trial, the question of whether or not the legislature had a reasonable grounds for exempting agricultural workers. And that struck me as a little strange. I mean, I don't understand how you're going to have a trial over the legislature's reasonable grounds for something, except perhaps if you know, we're going to trot out justifications about keeping prices for agricultural goods low and that benefiting the general public and the like.

But the Washington Supreme Court granted discretionary review in this case, took it up and ruled in favor of the dairy workers by a vote of five to four. And the majority relies on two constitutional provisions: the Privileges or Immunities Clause of Article I, Section 12 of the Washington Constitution, and the Hazardous Employment Protection Provision of Article II, Section 35 of the Washington Constitution. And what this does is it requires the legislature to pass laws necessary, it says for the protection of workers and hazardous fields, and it names to mining and I think its construction, and then it says and other similar occupations. And so, the majority agrees with the trial court that there is a fundamental right, to equal protection,

28:21
equal statutory protection in the context of dangerous employment. So, the idea is that because Article II, Section 35 requires those protections, and because the legislature has granted them to other workers in dangerous fields, the legislature cannot without a reasonable grounds deny them to

agricultural workers. Whereas the trial court wanted to have a trial about whether there was reasonable grounds, the majority goes on to help hold that there really couldn't possibly be as a matter of law, given the nature of the work, given the purposes of the Privileges or Immunities Clause as it was originally enacted; that is to protect people from special privileges that were being given at the time of Washington's founding in 1889 to big businesses. As a brief aside, this was a populist period in American constitutionalism and the Washington Constitution, along with those of many Western States, was really animated, in part by concerns about, you know, evil banks and railroads and big corporations that were taking over state legislatures, allegedly, and this provision, among others was, was designed to protect the little guy. And so, the, the court looks at the history of the privileges or immunities clause as it's been applied at the federal level. That, the 14th Amendment's Privileges or Immunities Clause, and in Washington State, and in doing so, I think really confuses the two provisions. It's sort of something we see a lot in state constitutional law, there's kind of a free borrowing from federal jurisprudence without a real explanation for why things might be different. And the dissent in the case by cheese Chief Justice Stevens and joined by three others, really takes the majority to task for that, and points out sort of the difference the different motivating. The motivate the different motivations for Article I, Section 12 versus the 14th Amendment. As longtime listeners undoubtedly know, the 14th Amendment's Privileges or Immunities Clause was, you know, designed by the reconstruction Congress to protect newly freed slaves and provide them with a broad base of rights against the states, but was quickly limited by the US Supreme Court and the *Slaughterhouse* cases, to really only protecting a very small set of so called federal rights. While the majority in this case says that may be but our state constitution was designed to protect the fundamental rights of state citizenship. And one of those, as we see in Article II, Section 35 is the right for equal protection in the provision of protections for workers in dangerous fields.

31:42
I'm not sure who has the better argument here. I mean, one point that the dissent made that I thought was pretty compelling was that Article II, Section 35 is not a personal right. It is in the section of our Constitution, Article II, that addresses legislative obligations and how the legislature works. And if the legislature is required by the Constitution, as it is, to determine what protections are necessary for dangerous work, its determination that agriculture work doesn't require it should be conclusive, right? I'm not sure I agree with the dissent's idea that there's no way of enforcing that if you're an individual. But I do think it makes sense to say that this is really a restriction on the legislature, not a rights granting provision. Because if it was, it really belongs in Article I with the other familiar rights, like against unreasonable search and seizure that we were talking about in the last case.

There's also a really, I think, it's a practical matter, an interesting debate between the majority and a separate dissent by Justice Johnson, about whether this case is resolving the application of its outcome prospectively only or also retrospectively. And what that means is, in practical terms, are these dairies and other agricultural businesses in Washington now required to pay back wages for overtime? Or does this rule only apply to future wages? And, I mean, I don't think it takes months much explanation to see that this could have profound impacts, particularly during the pandemic, on the viability of a lot of agricultural businesses around Washington. I mean, I suspect a lot of them would be bankrupted if they had to pay years' worth of minimum wage back pay.

And, you know, again, I'm not sure who has the better argument there. The majority kind of dodges it by saying it's, it's not at issue in this case. The dissent says, of course, it is and we should only be applying this prospectively. Agricultural businesses have relied on this for 60 years, and, you know, the previous understanding that that they were exempt from, from overtime pay, and it would have great impacts on our food supply, if we were to suddenly require them to, to go back on that. There's, there's a separate concurrence as well from Justice González that, that would have viewed the case through the lens of equal protection, and recognized that Latino farmworkers are a disfavored minority that are entitled to at least intermediate scrutiny under the Equal Protection Clause of our state constitution, and would have held as the trial court declined the whole that, that the Equal Protection Clause is violated here. So, you know, this all comes against a backdrop of decades of debate about the, the purpose and scope of Washington's Privileges or Immunities Clause, the Institute for Justice, in fact, has brought several cases trying to tease out what exactly that provision means that our state constitution, and every time it has met with,

35:28
it has met with real resistance from the state Supreme Court. You know, they seem to view by and large, our state constitutional provision, and in the past, they've seemed to have viewed it as being in lockstep with the federal provision, such that it's kind of like the Ninth Amendment, it's really an inkblot, a Rorschach test, not something that's actionable--there's always some excuse for why you can't use it. But here, we see it come back to life in a 5-4 decision, where I think both the majority and the dissent, have their doctrine in their history, somewhat confused. And, you know, I don't say that casting aspersions. This is a complicated history and an ask really hard questions. I think one of the reasons that for more than 150 years now, lawyers and judges have been debating the purposes and the effect of the Privileges or Immunities provision of the 14th Amendment is because the stakes are so high. I mean, if it's true that there is a, a wellspring of rights, natural in character, but undefined in the Federal Constitution, well, then, you know, it's, it's a field day for lawyers, from all kinds of persuasions, to try to assert that their rights are important, their clients' rights are important, and that they're entitled to judicial protection.

You know, we've spent our, our, the life of our firm since the early 90s, trying to provide some content to the concept of Privileges or Immunities. This seems to be the Washington Supreme Court's entry point for, you know, what it would view as the appropriate functioning of that clause that, you know, it's designed to protect the little guy against industry favoritism by the legislature. And, and the legislature is required to have special reasons for, for favoring an industry over the little guy.

Anthony Sanders 37:37
And what ironic thing about that, isn't it true Wesley that the one case IJ has brought and had an opinion on at the Washington Supreme Court was about trash hauling monopolies? If I remember, right, and the courts answer was, well, trash hauling just isn't, it's just not among these privileges or immunities. So, you can favor trash haulers and, and push the little black guy out, and that's perfectly fine. But here, if you're, if you're not providing a protection of, of over time, then that is pushing out the little guy. I mean, I understand the reasoning of this case, if you have that backdrop, but it seems like in a little bit of an odd distinction, especially when the court relies on all this history from the 14th Amendment, which of course, was all about protecting, you know, the right to earn a living.

Wesley Hottot 38:29
Right. And they talk about the trash hauling case, in this opinion, both the majority and the dissent. And they seem to both view it as the difference being that, that trash hauling is really a municipal function, that government then contracts with businesses to do. And since it's a municipal function, they can do it on whatever terms they want, even if they're operating with, you know, private people that are actually doing the business. There's, there's really no similar way of looking at this case, given the nature of agricultural employment, but again, I'm left with the feeling that we've got a lot of words about a lot of high-minded concepts, but there's not a lot of rigor in terms of how these concepts apply to specific instances. And really, what we're getting here is, what commands, what commands five votes at the Washington Supreme Court. If you can get to five because you're representing sympathetic agricultural workers, then you have the Privileges or Immunities right. But if you can't get to five because you're representing less sympathetic trash haulers, you can't I hope that's not what's going on. But you know, this is a 73-page opinion, where the two sides are using largely the same sources to say that the other one is obviously wrong. And I think that this is an area of the law that is sorely in need of some academic and litigation emphasis, so that, you know, we can get to a more grounded doctrine.

Dan Alban 40:18
I thought it was interesting that the majority opinion, you know, basically takes it for granted that the *Slaughterhouse* cases were wrongly decided. And the dissent doesn't really push back that much on it, it sort of says, well, you know, law journal articles aren't precedent and yada, yada, but it doesn't really fight that point. Now, it doesn't need to because the, you know, the meaning of the Federal Privileges or Immunities Clause and the Slaughterhouse cases are only kind of illustrative and incidental to Washington's Privileges or Immunities Clause. But it's kind of another example of courts taking a look at the *Slaughterhouse* cases and saying, yeah, this, this really was wrongly decided back in the day. Now, it's easy for them to do and that has no real impact on how the case turns out because they're again, talking about the federal clause and not the state clause, and ultimately, they're deciding this case under the state clause. But nonetheless, kind of an interesting, maybe footnote to the journal articles out there that that sort of say there's universal agreement that the *Slaughterhouse* cases were wrongly decided, this is sort of example number 37.

Wesley Hottot 41:36
Yeah, it's frustrating, right? I mean, everyone recognizes that *Slaughterhouse* was wrong. But we're not even really beginning to get the, 150 years later, we're still not even really beginning to get the content of what it really ought to be. You know, we all agree it's wrong, but they're probably as many opinions as there are legal scholars as to what would have been a right reading of the Privileges or Immunities Clause. It's, it's fascinating. I mean, I think for those of us that are really steeped in the law, it seems more normal, that there's no understanding of what this means. But you know, for a lay person or someone that's not as familiar with, with constitutional history, this has got to be really befuddling. The fact that there's the see change in our country after the Civil War, which is then echoed in many state constitutions, including Washington's in the late 18th century. And yet, courts have no idea what to do with it. So I mean,

Anthony Sanders 42:42

On top of that, you know, these they were provisions like this one were influenced by the 14th Amendment, but they have their own genealogy as well going back to pre-Civil War state constitutions like Indiana's and Ohio's which have similar language, but from before the Civil War. So, you know, the history is there. It's not that hard to put it together. And yet the courts, it's almost like Privileges or Immunities, it's just become such a Boogeyman in interpretation, that it's an infected state courts, which have their own history of actually interpreting these, these clauses.

Wesley Hottot 43:18
Yeah. Well, one thing I wanted to see someone say here is that this provision is adopted in 1889, that is, after the Slaughterhouse cases. So if it were correct, that, as we always assume that the Constitutional Convention was aware of developments in federal law, they looked at the *Slaughterhouse* cases and said, well, we don't like that we want our own Privileges or Immunities provision that does protect the fundamental rights of state citizenship. Now, that only gets us so far. The question then becomes what are the fundamental rights? So now you have a fundamental right to overtime pay in certain dangerous occupations? I don't know which ones are going to be included. I'm pretty sure lawyer is not going to be but, you know, perhaps a bus driver's a dangerous job? Perhaps it's not. Perhaps police are constitutionally entitled to overtime pay now in the state? Perhaps not. You know, I don't know how this plays out in the end. I do know that if the legislature attempts to repeal this legislatively, that there, that law is probably going to get struck down. We've now constitutionalized the provision of overtime pay for agricultural workers. As a policy matter, that kind of sounds like a good thing to me. As a legal matter, it seems quite strange.

Anthony Sanders 44:43
Well, although it is in the Constitution, right, that the legislature shall do these things which you can interpret you could criticize the court for interpreting that but then also, perhaps the criticism is of whoever you know, the people who wrote the Constitution in 1889 and putting these, maybe it's a right maybe it's a duty of the legislature, but it's, it's in there that the legislature has to act in this way, which shows, you know, some of the follies of putting positive rights in constitutions. We see the same thing, of course of Educational Funding Clauses that many of you listeners may know about where you know, there's a right to an education or there's a right to public funding of education, and then the legislature doesn't do a good job of that. And then you have litigation about well, how much should it be? Of course, you know, we had IJ, sometimes argue, well, you could do that through school choice programs, you don't have to have the state run it all. But all that is in the mix in litigation. Interpreting that constitution, that's pretty straightforward that legislature is supposed to do that. It's not as easy though, as say, you know, striking down a ban on flag burning, that's pretty straightforward thing for courts to do. But when it comes to this kind of policy matter, then then judicial engagement shows some limits because perhaps judicial engagement isn't as, as easy when it comes to legislate.

Wesley Hottot 46:07
Perhaps not I mean, I think that you're right. You know, it's important to remember that a lot of these constitutions are written, of course, with the input of lawyers, but the, the members of the convention aren't necessarily lawyers. I mean, I know that our convention was largely farmers, and, you know, civic leaders that had nothing to do with law. And you're right, that they put it in there that they wanted people to be protected in dangerous occupations, we can debate whether what they meant was the

mines that they mentioned, or agricultural workers or the like. It's certainly possible that agricultural work has become more dangerous over time. So now we're talking about living constitutionalism, or originalism, and I don't know, I mean, I think that if I was a professor at the University of Washington, I would be wanting to teach a seminar about this case.

Dan Alban 46:57
I think we'd be remiss, if we didn't also mention while we're talking about what the scope of the Privileges or Immunities Clause is, that we have a cert petition pending currently before the US Supreme Court about the scope of the, the federal Privileges or Immunities Clause, and that really relates to the *Slaughterhouse* cases discussed in this opinion, which essentially gutted the Privileges or Immunities Clause except for a handful of things, one of which was the right to use the navigable waters of the United States. And so IJ right now as a cert petition for the Supreme Court about whether someone trying to operate a ferry on Lake Chelan can be protected by the Privileges or Immunities Clause, the Federal Privileges or Immunities Clause against a state created monopoly. So, these issues continue to be litigated both in state Supreme Courts, the Federal Supreme Court, and IJ is at the forefront of raising these issues.

Wesley Hottot 47:57
Yeah, that's right. That's, it comes out of Washington, right. So, this is like, you know, our, our state's like ground zero for privileges or immunities litigation these days.

Anthony Sanders 48:06
And that's a case that takes *Slaughterhouse* at its word. And so, you know, you give us in that opinion, a few rights that are of US citizenship, including navigating the, the or the navigable waters, and so take us at its word. And so, we'll see if the US Supreme Court addresses that case, we'll put a link to, to it up on our webpage you can also find it to it's called *Courtney*. It's been litigated for many, many years by a few folks at the Institute for Justice, including Dan. And we like to--not, not including, Dan.

Dan Alban 48:42
No not me. Michael Bendis is the guy that's been litigating this case for many years.

Anthony Sanders 48:45
Michael Bendis is, is the captain of the ship of our effort, in that case, but there, there are others as well. Well, I want to thank Dan and Wesley for weighing in today on our pandemic TV viewing edition. I hope you find your own series to watch this these coming weeks as we get into the holidays.

And for everyone, I'd want to also ask you to get engaged.