

## **Bound By Oath | Season 1 | Episode 4: The Navigable Waters**

**John:** Brought to you by the Institute for Justice's Center for Judicial Engagement, this is Episode 4 of Bound By Oath. I'm John Ross. Thanks for tuning in. On the last episode we talked about the near demise of the Privileges or Immunities Clause of the 14th Amendment. Here's Professor Randy Barnett:

**Randy Barnett:** No State shall make or enforce any law which shall abridge the Privileges or immunities of citizens of the United States. That sounds like a big deal. Yet it's no exaggeration to say that because of the decision in *The Slaughterhouse Cases* and *the United States versus Cruikshank* the Privileges or immunities clause ceased to play any meaningful role. ... It has been all but redacted from the text of the Constitution.

**John:** But of course the Court didn't say it was all but redacting the Privileges or Immunities Clause from the Constitution. Instead, In *the Slaughterhouse Cases*, Justice Samuel Miller said the Clause does protect a handful of rights...

**Justice Miller:** to come to the seat of government to assert any claim he may have ... to seek its protection, .... free access to seaports,... to the subtreasuries, land offices, and courts of justice in the several States. To demand the care and

protection of the federal government ... when on the high seas .... To peaceably assemble [and] ... the right to use the navigable waters of the United States.

**John:** Access to subtreasuries, protection on the high seas -- that's pretty thin. But on this episode we're going to take Justice Miller at his word when he said he wasn't gutting the clause. We're going to talk about one of the rights he said the clause does protect, the right to use the navigable waters of the United States -- a right that in 1873 was not as obscure or unimportant as it might seem to us today.

### **BBO Montage - Justices saying the oath**

**John:** In the nearly 150 years since the Slaughterhouse cases, the Supreme Court has used the Privileges or Immunities Clause to strike down a state law only twice. In 1935, in *Colgate v Harvey*, the Court struck down a Vermont law that taxed income on loans its residents made outside the state -- while not taxing income from loans made to borrowers inside the state. That decision, however, was overruled in 1940. Then in 1999, in *Saenz v Roe*, the Supreme Court struck down a California law that denied welfare benefits to people who had just moved into the state. The Court said that that violated the right to travel, the right of recently arrived citizens to enjoy the same privileges and immunities as the rest of the state's citizens. And that's just about it. In 2010, in a case called *McDonald v Chicago*, Justice Clarence Thomas called for overturning

Slaughterhouse and reinvigorating the Clause, but he's just one justice out of 9. Today it remains mostly dormant.

**Inogo Montoya:** He's dead. He can't talk.

**Miracle Max:** Hoo-huh-hoo! Look who knows so much. Well it just so happens that your friend here is only mostly dead. There's a big difference between mostly dead and all dead.

**John:** Overturning Slaughterhouse would be great. But the Court can start to breathe life back into the Privileges or Immunities Clause by vindicating the rights that even the majority in Slaughterhouse says the Clause does protect.

**Justice Miller:** the right to use the navigable waters of the United States.

**John:** On this episode, we're going to head to out into the wilderness, to Stehekin, Washington, where a pair of brothers are asking the U.S. Supreme Court to use the Clause, for the first time ever, to strike down a state law that violates the right to use the navigable waters of the United States. Full disclosure: This is an Institute for Justice case. At IJ, we love the Privileges or Immunities Clause, and we'd love to see it revived.

**News Guy 1:** All right a fight over freedom and ferries gathering steam and a popular summer destination. Two brothers suing the state over a monopoly given to a Washington State ferry company. They say the company offers poor service.

**News Guy 2:** Well, well, good morning Bill. The Courtney Brothers say they are suing for the right to make a living. They want to run a competing ferry in order to improve their resort business. But the state of Washington is supporting a monopoly in the form of the Lake Chelan Boat Company.

**Cliff Courtney:** Lake Chelan is a 50 mile long lake in North Central, Washington. And there are no roads to the Northwest end of it.

**John:** That's Cliff Courtney. He lives in Stehekin, Washington, a community of about 80 people that is not accessible by car. It's nestled in a national recreation area, and pretty much the only way to get there is by boat.

**Cliff Courtney:** well, we're in the heart of the North Cascades mountains. The North Cascades are a very rugged mountainous range with peaks going to 8 or 9,000 feet. In the 50 miles up lake you go into true timbered wilderness with the Douglas fir and the permanent snowfields and the glaciers and the high mountain peaks. And so it's it's a spectacular part of the nation.

**John:** Cliff and his family run a ranch.

**Cliff Courtney:** We have 15 little cabins. We have the little Norwegian fjord horses that are from Norway. They're kind of a stocky little mountain horse very sure-footed. We still take people into the High Country for a week or more if they want to go in to the High Country. So that's the outfitting part of the business that actually my younger son now is operating so that business is in the third generation.

**John:** If you remember the Lassie movies, one of them was filmed on the lake.

**Cliff Courtney:** I remember there's one scene in there where Elizabeth Taylor's out in a small sailboat that capsizes. I'm not sure a lot of people even have heard of the Lassie series anymore, but they were very popular back in my youth.

**John:** But it's not just the natural beauty that draws people to Stehekin.

**Cliff Courtney:** People love the sense of community and certainly tourism is the mainstay. This is why we're able to survive here. But with a small community comes comes a sense of community and the visitors love to feel that and see that and how that works -- the dynamics of that. I think everybody has kind of a yearning for a community.

And so we're such a small place with only 75 to 80 residents that people can kind of see how it works on the ground.

**John:** I visited Stehekin for a couple days, and in that time I got waved at more by passing strangers than in like a couple years back home.

**Cliff Courtney:** You try to be independent, but you also end up interdependent so especially in times of crises you'll see people come together in ways that are pretty special. And whether it be fires, we have lots of wildfires we get floods. Everybody's a little bit different. They might have a different religion or different political viewpoint, but in a community all that is put aside when you have any sort of catastrophe or something that threatens your community.

**John:** Cliff's great grandfather arrived in the area in 1889, and he forged a living out of the wilderness.

**Cliff Courtney:** Over the years as the family expanded we couldn't all just make our living outfitting so one brother does construction had part of the seaplane operation for number of years. One other brother has the barge service, everything has to be barged in. Another brother runs heavy equipment, and his wife runs a little bakery here. Another brother does carpentry. And so yeah, we've done whatever it takes to live here. We love the place. We want to stay here. But really Stehekin every service we provide in the long

run wouldn't be here without tourism. And of course that's why this issue is so big. It isn't just about the community getting back and forth, but we have to get people here to enjoy the area because that's how we make our living. That's the lifeblood of this community is the tourist dollar.

**John:** In recent years, it's gotten harder to get to Stehekin.

**Cliff Courtney:** So you can get to Stehekin by foot or on horseback. But the nearest trail that you can hike in is about 19 miles.

**John:** There used to be shorter hikes starting from a roadway within the national recreation area, but that road has been closed.

**Cliff Courtney:** So actually quite a few people used to hike in in the summer. But that's been basically cut off by the National Park Service. Another one is our little airstrip here. We have a little dirt airstrip, and we can still use it for private use, but the National Park Service in their wisdom has closed it for commercial use. So as you can see things are closing in rapidly and making it more and more apparent that we need some other service if this community is going to continue.

**John:** That leaves the ferry boat. The most popular way to get to Stehekin is a ferry that leaves from the town of Chelan 50 miles downlake.

**Cliff Courtney:** Thanks to a law passed by the legislature, we really have a monopoly on the lake where only one company can run a passenger boat and that's Lake Chelan Boat Company.

**John:** The state of Washington only allows one company to operate a public ferry on Lake Chelan. And that company runs a service that leaves a lot to be desired.

**Cliff Courtney:** The schedule is exactly reversed for what people need that want to come here and stay in the valley.

**John:** In the summer, the boat departs for Stehekin at 8:30 a.m. If you're coming from Seattle, it's a 3-hour drive to catch the boat if you don't take rest stops and there's no traffic. Realistically you need to leave before 5 a.m, which is not an awesome way to start your vacation.

**Cliff:** Now we have some spectacular country on the outskirts; getting here is spectacular. We have several mountain passes you drive over. All of those are amazing parts of people's experience, but they need to be able to drive them as if they're on



vacation -- get up at a reasonable hour driving in the daylight. Now you can't do that. Now you have to get up very early or try to drive over the day before maybe taking another day of your vacation just getting here. And then trying to find a motel room for one night in the Chelan area is not easy to do especially in the summer.

**John:** In the winter, the boat company only runs three or four times a week. One round trip a day. But the boat only stays in Stehekin for one hour, so you can't do a daytrip. In the summer, it runs more often, but the schedule is weird. The company has two boats, but instead of staggering their schedules, both boats leave for Stehekin at the same time -- at 8:30 in the morning. Even in the summer, the longest you can stay in Stehekin is three hours -- any longer than that and you have to stay overnight.

**Cliff Courtney:** What we want to do is to fix the schedule to fix the quality of the service and to maybe run boats that aren't quite the workboat quality the state ferry-type quality, but run run a vessel that's a little more quiet and a little more comfortable.

**John:** The boat I took was old and noisy. On my return trip, a coolant hose came loose and the engine overheated, and we had to go at half speed until the crew got it sorted out. The chairs are cramped; there's no leg room. I watched a woman try to take a nap, but there was no way to get comfortable enough. And the bathrooms are kind of gross; there's no fan or ventilation in there and it's right next to the snack bar. So use your imagination. It's not completely terrible. But it could be better.

**Cliff Courtney:** It's time to change and the refining fires of competition would do that automatically, you know, you can try to regulate quality, but really it's competition that that creates quality when you come right down to it. If you don't have any reason to improve your service or to be nice to people or to keep things clean or or what have you you don't tend to do it.

**John:** But don't take don't Cliff's word for that. Take President Obama's.

**President Obama:** The basic notion is this: Competition is good for consumers. And ultimately it's good for business. That's the way the free market works. The more competition we have, the more products, services, innovation takes place.

**John:** Thanks, Obama! Anyway, Washington State see things differently. Here's how a local newscast put it:

**News anchor:** So the state says the monopoly can actually provide better service is that true?

**News reporter:** Well, yeah, the state is essentially arguing that the regulated service being provided on the lake right now is adequate and if the Lake Chelan Boat Company had competition the customers might end up losing some options.

The fear is that profits during the summer tourist season would be split making it less likely that either ferry would run during the winter months when there are very few passengers and the ferries basically operate at a loss.

**John:** That's the theory anyway. If there is competition, companies will eat into each other's profits during the summertime when there are a lot of tourists, and then no one will offer service in the winter because it's not profitable then. If that economic reasoning sounds outdated, that's because it is. The state granted the monopoly in 1929.

**Cliff Courtney:** They did decide that competition was a bad thing -- that if you let numerous companies just take all the cream of the summer crop that maybe none of them would continue to operate in the winter. But the market has changed dramatically since then.

**John:** The number of people visiting the area is actually increasing. But they're staying 50 miles downlake in Chelan. They're not making the trip on the ferry.

**Cliff Courtney:** The number of people in commercial rooms in the Chelan area now just in the last 10 years has increased by 76 percent but yet the number coming to Stehekin on these boats is basically flat or has declined. So it tells me that we're not supplying the service that the visitor is expecting.

**John:** Cliff and his brother Jim think there's a huge untapped market of people who would come to Stehekin both in summer and winter if there were better options to get there. But the monopoly has refused again and again to change its schedule or improve its service. So in 1997, Jim Courtney tried to start a second service.

**Cliff Courtney:** We just want the freedom to be able to haul people up and down the lake and let the market decide which boat they want to ride. And we're not talking about replacing the boat company. We're talking about supplementing the boat company. And in the long run if you believe that activity creates activity, which it really does, the boat company I think will benefit from the extra advertising and the extra enjoyment that people get by coming to Stehekin. And so I don't believe for a minute that this will create any financial burden on the boat company. But it might cause them to refine their service a little bit, you know, that wouldn't be so bad either.

**John:** Of course, the market might decide that having just one service on the lake is the most efficient thing. The point is that there's a huge difference between a monopolist that's legally protected from competition on the one hand and a company that knows that if it doesn't do a good job then someone else can come along and compete with them. By the way, if you are thinking to yourself -- hey, monopolies are illegal, you'd be right! But there's an exception. An enormous exception. Ever since a 1943 Supreme Court case called *Parker v. Brown*, monopolies created by state governments have been immune from antitrust law for the most part. Anyway, the law here doesn't actually say

there shall be a monopoly on the lake. It says before the Courtneys can operate a second service, they first need to get permission from the state. And in 90 years, regulators at the UTC -- the Washington Utilities and Transportation Commission -- have never granted permission for a second service.

**Michael Bindas:** In order to operate a ferry on Lake Chelan in Washington and you need to obtain what's called a certificate of public convenience and necessity.

**John:** That's Michael Bindas. He's my colleague at the Institute for Justice, and he's Cliff and Jim's lawyer.

**Michael Bindas:** You have to prove that the public convenience and necessity requires your proposed service.

**John:** Which isn't as simple as just filling out a few forms; you basically have to file a lawsuit.

**Michael Bindas:** It's an adjudicative proceeding. So there is discovery; there is briefing; there are hearings; there is argument.

**John:** Jim Courtney first applied in 1997.

**Jim Courtney:** It's quite a process -- probably took close to a year. I wound up getting a transportation attorney to represent me because the hearing was looking more complicated than I could do.

**Michael Bindas:** It's essentially no different than a civil lawsuit. And it's expensive and time-consuming is a lawsuit as well. It was a year-long process. It cost him about \$20,000 -- that's 20 years ago \$20,000.

**John:** And existing certificate holders are entitled to participate in the proceedings. If their actual ferry service is a little lax, the monopoly is not at all relaxed about protecting their turf in the state capitol. Before the Courtneys, at least three would-be competitors applied for a certificate -- in 1953, in 1972, and in 1976. In each instance, the Lake Chelan Boat Company opposed the application. And when Jim applied the boat company intervened yet again. Their attorneys cross examined Jim about his experience working on boats, and they parsed his financial records. Which, by the way, is like super invasive; you don't have to share your business plan and financial details with the people you're trying to compete with in most other industries. But that's not the worst thing about this law. The worst thing is that there are no actual objective standards or criteria that an applicant can meet. There are no specific market conditions an expert can point to to show service isn't good enough. Whether or not the monopoly provides adequate service is just kind of a guess, an opinion of the UTC commissioners. And it's an opinion that everyone else has to live with.

**Dave Getchell:** I'm the teacher at the Stehekin school. It's a one-room schoolhouse in Stehekin school district.

**John:** That's Dave Getchell. If you visit Stehekin and bump into him, odds are he'll ask you to come in and talk to his class about your job, your life, whatever you know about -- even if it's just how to juggle. I gave a little talk about the 14th Amendment to two middle schoolers and an elementary school student. Anyway, during the school year if the students have to head downlake for a doctor's appointment, the boat runs so infrequently that they often have to miss two or three days of school.

**Dave Getchell:** So it's difficult for students and their families to get medical care because they have to schedule so far in advance. And they have to be gone so much from school. So they miss school and it affects their academic potential and learning greatly. What I'd like to see is a more versatile schedule so that it would reflect the needs in the community, businesses, school districts people that work up here and visit up here.

**Mike Sherer:** My name is Mike Sherer, and I've been a resident up here initially with my family of five since 1990.

**John:** That's an excavator in the background. When I talked to him, Mike was building a retaining wall.

**Mike Sherer:** Our vision is a Bible Camp here and we have had it to do it the old-fashioned way. We've sawed our own lumber for it and we've had to screen our own gravel for concrete and all that stuff. This is called glacial till and some of these rocks are big as a Volkswagen -- got to figure out what to do with them.

**John:** Mike says the ferry is okay; it's not awful, but it's a drag to plan your life around its schedule.

**Mike Sherer:** And there's only one choice and it's very limited at certain times of the year. It's unfortunate that we don't have a complete free enterprise hand on the transportation on this lake because I believe strongly in competition in the United States. I thought that's what we're all about. So the ferry does for what they do a good job. But there's no options and that's unacceptable in my mind.

**John:** Charles Willis is relatively new to Stehekin. He runs a 28-room lodge.

**Charles Willis:** They're good people, but they don't supply the needs of the community. Certainly we hear guests every day to come up on the boat saying



we wish we could stay longer. Wouldn't be hard to mend the schedule to let them do that, but you know, it's a big lake. Seems to me like there could be some other folks out there operating as well.

**John:** I also spoke to Cliff's sister-in-law Monica Courtney.

**Monica Courtney:** I don't want to sound like my life is a hardship. We chose to live in this isolated remote area, and in that choice, we recognize that not everything that's available to people outside of this remote area is available to us. But I feel like a lot of the private sector within this community does rely on public visitation to make their living, and the way that it works now there are very few options for the visiting public to get into Stehekin and to get out of Stehekin. For example, in years past there has been some winter recreational opportunities here in Stehekin and that's kind of dwindled away. If you want to visit in the winter, you have to have a four-day weekend.

**John:** In 1998, the Utilities and Transportation Commission held a hearing and listened to the Courtneys, and to a transportation expert that they hired. Also they listened to testimony from residents of Stehekin, which was similar to what you just heard. And then the Commission ruled in favor of the monopoly. Here's what the Commission said:

**WUTC ruling (August 1998):** Speculation that some overnight Stehekin visitors might find Applicant's proposed schedules useful, and testimony by several Stehekin residents that they might sometimes prefer, and use, applicant's proposed service is not adequate evidence to show that Lake Chelan Boat Company has failed to provide reasonable and adequate service. ... if applicant's proposed operations were authorized, there would be a material, adverse effect on Lake Chelan Boat Company's existing operations.

**John:** Okay, my coworker Erica read that. I admit that I asked her to try and sound a little bit disdainful. But the decision *is* disdainful. If testimony from the people most clearly affected by the monopoly isn't good enough what is? The law doesn't say, and the Commission *won't* say. Coming up after the break, the Courtneys do something that's never happened before; they ask the courts to protect their right to use the navigable waters of the United States.

**Break =====**

**John:** Thanks for listening to Bound By Oath. If you like podcast, and you want to help spread the word, please leave a review on iTunes.

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**John:** And we're back. In 1998, the Washington Utilities and Transportation Commission rejected the Courtney's application. But the Courtneys didn't give up. On paper, the law applies to full-blown ferry services, so they proposed a bunch of different alternatives that maybe wouldn't require a certificate of public convenience and necessity. One thing they proposed was like a hotel shuttle that would just be for guests at Cliff's ranch rather than being open to the general public. But each time, the state said no, that requires a certificate.

**Cliff Courtney:** It's amazing to me how restrictive this law is. So if I was able to follow their thinking to say, okay, you have to have some regulations so there is some sort of subsidy for the for the winter season it's still amazing how rigid it is where you can't even try any new ideas.

**John:** Next, the Courtneys did what judges are always telling people to do. If you don't like a law, go to the legislature and see if they'll change it. Which Cliff did, and state legislators and the governor listened. And they passed a new law that told the UTC to reexamine its policies. Which the Commission did -- and decided there was no need to change anything. So Cliff and Jim sued the state in 2011. And they did it under the Privileges or Immunities Clause of the 14th Amendment because in 1873 the U.S. Supreme Court specifically said the Clause protects a right to use the navigable waters of the United States, which Lake Chelan is.

**Michael Bindas (oral argument):** Good morning, your honors Michael Bindas for appellants Jim and Cliff Courtney.... the Supreme Court told us in The Slaughterhouse Cases that the Privileges or immunities clause of the fourteenth amendment protects the right to use the navigable Waters of the United States. There are only a few such rights of national citizenship protected by the Clause, but that is one of them.

**John:** Like the plaintiffs in Slaughterhouse, Cliff and Jim argued that the Privileges or Immunities Clause doesn't prevent the state from enacting reasonable regulations.

**Michael Bindas (oral argument):** That's why we're not challenging inspection requirements, insurance requirements, requirements that a crew be trained and capable.

**John:** They are just challenging the monopoly, and they want the courts to take a hard look at whether the state actually has evidence the monopoly is necessary. But before the courts will do that, they have to decide whether there is even a constitutional right at stake. In Slaughterhouse, the Supreme Court said there was. But that was 1873, and since then the courts have not developed any case law on what the right to use the navigable waters means. So Jim and Cliff were really asking the courts to do two things. First, to confirm that the right to use the navigable waters includes a right to use the waters for commerce. And second, to stop the state from infringing that right unless it's

doing something necessary to protect the public. But in 2013, the Ninth Circuit Court of Appeals, one court below the Supreme Court, ruled against the Courtneys and said that the right to use the navigable waters doesn't include a right to operate a ferry.

**Ninth Circuit:** a reasonable interpretation of the right to “use the navigable waters of the United States,” and the one we adopt, is that it is a right to *navigate* the navigable waters of the United States. Here, it is clear that the Courtneys wish to do more than simply navigate the waters of Lake Chelan. Rather, they claim the right to utilize those waters for a very specific professional venture.

**John:** So just like Slaughterhouse, there is no need to determine whether the monopoly actually is justifiable--whether it really does protect the public. Because there isn't a right to operate a public ferry on the navigable waters.

**Michael Bindas:** We didn't fight a Civil War for the right to go kayaking or canoeing. We fought a Civil War to ensure that all Americans could participate fully in the life including the economic life of this country. And therefore if the Clause protects the right to use the navigable Waters, it has to protect the right to use those navigable Waters in Commerce.

**John:** So Cliff and Jim appealed to the Supreme Court. Finally, after nearly 150 years, the Court had the chance to say that the right to use the navigable waters actually

protects a real thing that people care about. And in 2014, the Court declined to hear the case.

**Cliff Courtney:** Our family has lived in this area for well over a hundred years and it seems amazing to us that we aren't allowed to continue to live here and support our families.... If we need that passenger service to support our other businesses like a resort or a ranch or a bakery, we should also have the liberty to do that. They have decided that there's some necessary transportation that needs to be provided. You know granting a monopoly or certificate is a strange way to subsidize something kind of without taking money out of the public coffers, but who does pay for that are other people with their rights.

**John:** But the case isn't over. And that's because the Courtneys made two claims. The first was that they should be able to run a full-blown ferry that's open to the general public. That claim is done. But the second claim was that they should be able to run a more limited service like a hotel shuttle. And for the second service, the Courtneys didn't apply for a certificate of convenience and necessity. Because it would be pointless. You spend a bunch of money applying and then you get rejected. But the Ninth Circuit said listen we don't know for sure that the state would even require a certificate for the more limited service. We just know that they require one for the full-blown ferry. And if the Courtneys don't actually need permission for the more limited service, then there's no need to rule on that claim. Now that makes it sound like the Courtneys didn't do their due diligence before they filed the lawsuit. But they did. The commission's executive director

told the Courtneys they needed a certificate. But the Ninth Circuit said well that's just the executive director's opinion; the full commission never issued a formal ruling voted on by all the commissioners. So the Courtneys went back to get that ruling and indeed the UTC said yes, a certificate is required even for the more limited service. Then the Courtneys had to challenge that determination in state court. Which they did, in a Washington state trial court, and then an appeals court, and finally the Washington Supreme Court, all of which let the UTC's position stand. That took five years, and with those rulings in hand, the Courtneys were finally allowed to return to federal court for their second claim. In the first round of litigation, the Courtney's brief talked about themes we've discussed on previous episodes of this podcast: the Black Codes and how the Privileges or Immunities Clause was intended to secure equal rights for former slaves, including economic rights. In this second round of litigation, my colleague Michael Bindas decided to drill down deeper into the specifics about what the right to use the navigable waters meant in the post-Civil War era.

**Michael Bindas:** Earning a living on the waters in boating and maritime trade was one of the few economic opportunities available to blacks both free and slave actually in the Antebellum Period.

**John:** In the 1800s, the use of the navigable waters was a crucial avenue of economic opportunity for African-Americans. Between the Revolutionary War and the Civil War, as many as half of all native-born merchant seamen were African Americans.

**Michael Bindas:** Blacks were very prevalent on the waters -- both the oceans as well as rivers including the Western Rivers like the Mississippi. It was one of the few occupations that afforded them some degree of status as well as some degree of freedom.

**John:** Free black sailors could obtain pay and status not possible in other occupations at the time. And slaves hired out to work on boats were often allowed to keep some of their pay, and eventually were able to purchase their freedom. This was one of the very few occupations in which black men were allowed to be entrepreneurial. Which is something white merchants and southern governments didn't like.

**Michael Bindas:** You had a whole host of laws in southern states that targeted black sailors and black boatmen. Just one example is an ordinance that the Savannah city council passed that prohibited free black men from piloting vessels on the Savannah River. White pilots pushed for this law in order to limit competition from free black pilots, and importantly the law specifically targeted free black men. Those white pilots who pushed for the law were still free to use slaves in assisting them with their pilotage businesses. So this is clearly an example of industry insiders using the force of law to prevent competition from free black competitors.

**John:** And then there were state laws called the Negro Seaman Acts.



**Michael Bindas:** The Negro Seaman Acts were a series of laws passed by southern states beginning with South Carolina in 1822. What South Carolina's law did was required that the captain of a ship jail any free black sailors on that ship when it entered a South Carolina port.

**John:** That was done out of a fear of slave uprisings, to prevent slaves from even seeing a free black person or asking them for help.

**Michael Bindas:** A number of other states adopted similar laws including Georgia, North Carolina, Florida, Alabama, Mississippi, Louisiana, Missouri, Kentucky. So conservative estimates are that at least 10,000 black sailors were jailed under these laws and likely considerably more. And in those situations perhaps rare, but in those situations where blacks were found to not be in compliance or captains of a vessel were found not to be in compliance with the law, these these free black sailors could be sold into slavery. So there's no question that these were a significant threat to free black men who were just trying to earn an honest living on the navigable waters.

**John:** One of the ways in which black sailors try to protect themselves is something we talked about on episode one: citizenship.

**Michael Bindas:** Beginning in the in the 1790s, the federal government had issued what were called seaman protection certificates to American sailors for the purpose of enabling them to prove that they were American citizens if they were for example taken on the high seas. And from the earliest times that the federal government started issuing these it issued them to black seamen as well. And black sailors typically use them not only to prove their citizenship on the high seas, but also to prove their citizenship when they traveled within the United States. Southern states however ignored these certificates and it was very common for free black sailors who were recognized as citizens under the seaman protection certificates to be captured jailed and or enslaved in the South notwithstanding that they had this attestation from the federal government demonstrating their freedom and their Federal citizenship.

**John:** Whether the Negro Seaman Acts were constitutional was an enormous controversy before the Civil War. In 1823, there's a famous court case where a Supreme Court justice who's riding circuit rules that South Carolina's law is unconstitutional, but he doesn't have the authority to grant the sailor freedom. Several years later, President Andrew Jackson, who didn't like the ruling that the Act was unconstitutional, asked his Attorney General to write an advisory opinion on the matter. That Attorney General was future Chief Justice of the Supreme Court Roger B. Taney. And the opinion Taney wrote for Jackson, that free black sailors could not be citizens, laid the groundwork for his decision in Dred Scott. When Congress is debating the 14th Amendment, not only do they have Dred Scott in mind, but they have the Negro Seaman Acts in mind as well.

**Michael Bindas:** John Bingham, the principal architect of the the Fourteenth Amendment's privileges or immunities clause, actually referenced the Negro Seaman Acts during the debates over the Clause.

**John:** For Justice Miller and the rest of the majority in *Slaughterhouse*, this was all recent history.

**Michael Bindas:** And therefore when the Supreme Court just five years later in the *Slaughterhouse Cases* listed the right to use the navigable Waters of the United States as a right or privilege of national citizenship you have to consider that right against the backdrop in the context of what we've been talking about -- of these repeated attempts to abridge the right of black sailors.

**John:** But in January 2019, a federal district court dismissed the Courtney's second claim, casting aside their arguments about what the right to use the navigable waters meant to black sailors in 1873.

**District court:** the Courtneys devote fifteen page[s] of their twenty-page brief to convincing this Court that the right to "use the navigable waters of the United States" encompasses "a right to use navigable waters in pursuit of a livelihood." In those fifteen pages, much ink is spilled in an effort to explain ... why "it is

inconceivable that Slaughter-House did not intend the right to use the navigable waters of the United States to encompass use in the pursuit of a livelihood.” ...

However, this argument has previously been rejected by this Court and the Ninth Circuit.

**John:** And so the quest to get the courts to strike down a state law for violating the right to use the navigable waters continues. There will be more appeals -- more ink is gonna get spilled. And more cases are still to be decided. Because the story of the Privileges or Immunities Clause starts with a group of people trying to fundamentally change the way individual rights are treated in this country. And that's still the story -- there are different people fighting about it now than there were a hundred and fifty years ago, but they're still fighting about basically the same stuff. The story hasn't ended. And it's not the whole story. The Privileges or Immunities Clause is undoubtedly the heart of the Fourteenth Amendment, the part that is supposed to vindicate Americans' fundamental rights -- to earn an honest living, to speak freely, to travel. But it's not the only part of the Fourteenth Amendment -- and some of the other parts still have some teeth. On the next episode of Bound By Oath, the equal protection clause.

**Credits:** Bound By Oath is a production of the Institute for Justice's Center for Judicial Engagement. This project was edited by Goat Rodeo. Writing and narration by John Ross. Vision and expert guidance by Sheldon Gilbert. Project management by Rachel Hannabass. Research and fact checking by Nicholas Mosvick. With voice work by Chip Watkins, Melissa Lopresti, Erica Smith, and Dan Knepper.