Bound By Oath | Season 1 | Episode 5: Tangled

John: This is Episode Five of Bound By Oath. I'm John Ross, and I beseech you: Please review us on iTunes or wherever you get your podcasts. If you like this podcast and you want to help us succeed, that's the easiest way to do it. And now: the Equal Protection Clause. If a law treats one group of people differently than another, then the government has to have a good reason -- sometimes. Alternatively, if the government is going to treat dissimilar groups as if they're the same, again, there needs to be a good reason -- sometimes. On this episode, we're going to talk about equal protection and how it relates to entrepreneurs who do African-style hair braiding. But before that we'll take a brief tour of the history and meaning of the Clause.

Inogo Montoya: Let me explain. No. There is too much. Let me sum up.

John: In 1868, what a lot of Americans needed was protection. And after the ratification of the 14th Amendment, they started to get it. In 1871, Congress passed a law allowing federal district attorneys to prosecute the Ku Klux Klan -- or, more precisely, to prosecute people who conspired to deprive citizens of the right to hold office, vote, serve on juries, and enjoy the equal protection of the laws. According to historian Eric Foner, by 1872 the federal government had quote "broken the Klan's back and produced a dramatic decline in violence." Where it was safe, and often even where it wasn't, African-Americans voted in huge numbers, as high as 80 to 90 percent of eligible voters. Blacks made up a majority of the population Mississippi, South Carolina, and Louisiana, as well as more than 40 percent of the population of Alabama, Florida, Georgia, and Virginia. Those numbers make it plain; African-Americans were going to be elected in huge numbers across the South, and that in turn should have prevented the rise of

Jim Crow. But instead white supremacy prevailed. And there are many reasons for that, but one of the key reasons is surely the Supreme Court's decision in *United States v. Cruikshank*.

Bound By Oath Montage

John: We talked about *Cruikshank* on Episode 3. In the case, a white paramilitary group laid siege to a courthouse in Colfax, Louisiana in 1873 and murdered 60 or more African-Americans who'd assembled there. It was one of the deadliest episodes of political violence during Reconstruction. A state prosecutor indicted 140 suspects, but he dropped the case after a mob threatened his life. With state authorities unable to enforce the law, the federal government stepped in, and while most of the suspects were able to evade capture, several were caught and convicted. And then, in 1874, Justice Joseph Bradley, who was riding circuit, ruled that the Ku Klux Klan Act was unconstitutional and the federal government did not have the authority to prosecute the killers. That sent a clear message to white supremacists. In the words of Rutgers law professor James Pope, Bradley's ruling "opened the floodgates" to a "new campaign of terrorist assaults on Republican-controlled towns and cities across the South." After the decision, federal prosecutors dropped hundreds of cases because it was uncertain whether they would stand up in court and because witnesses no longer felt safe testifying. Two years later, in 1876, the Supreme Court upheld Justice Bradley's opinion. By that time, white supremacists had retaken control of much of the South.

Evan Bernick: I mean, it's the most basic duty on the part of a state to ensure that people are equally protected by the laws.

John: That's Evan Bernick, he's a visiting lecturer at Georgetown law school and also my former colleague here at IJ's Center for Judicial Engagement.

Evan Bernick: Now what does equal protection specifically mean? Concretely it means that police services need to be supplied equally. Police can't protect some people and not protect other people. And everybody needs to have access to the courts.

John: Access to the courts was a huge deal. It's kind of hard to sue someone who assaults you or see that they're prosecuted if you're not allowed to testify, which African-Americans commonly weren't. To pick just one example in 1866 an African-American named George Ruby made history in Louisiana when he was permitted to testify in court against a white mob that had attacked him for having the temerity to teach at a school set up by the Freedmen's Bureau.

Evan: And people need to be protected not only from the government but from private violence, so the police can't simply say we're not going to protect these people knowing that private actors will attack them, but we will protect these people.

John: If you demonstrated allegiance to a state by living there in peace and obeying its laws, then the state had a reciprocal obligation to protect you from crime.

> **Representative George Hoar**: "It is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection."

John: That was a Congressman speaking on the floor of the House of Representatives in 1871 when the Ku Klux Klan Act was being debated. And here's a Senator speaking around the same time.

> **Senator Frederick Frelinghuysen**: "A State denies equal protection whenever it fails to give it. Denying includes inaction as well as action."

John: In *Cruikshank*, though, the Supreme Court disagreed and took state inaction off the table: Private violence was for state governments to deal with, and if states couldn't or wouldn't protect people who said the wrong thing or had the wrong skin color, well, too bad. The Court didn't quite say that, of course, but it tore the indictment in *Cruikshank* to shreds for not being specific enough. It alleged that the mob was punishing black people for voting in an election -- but was that a STATE election, or a federal election? The indictment alleged that the mob attacked a group of black people -- but were they attacked BECAUSE they were black? It said that the mob prevented people from exercising their First and Second Amendment rights, but the Court ruled that the Fourteenth Amendment does not protect those rights. Reading the opinion in *Cruikshank*, you'd never know that the case was about a mass murder. But everybody pretty much got the message: If states can't or won't punish private violence, the federal courts weren't going to interfere. But unlike the Privileges or Immunities Clause, the Equal Protection Clause doesn't vanish from the story after the Court reads it out of the Constitution. It comes back, in a slightly different form, almost right away.

Evan Bernick: Very quickly after the announcement of the Fourteenth Amendment, courts began to construe the Equal Protection Clause as a generic anti-discrimination guarantee such

that any state conduct that distinguished between A's and B's for no good public-oriented reason was considered impermissible and could be struck down on equal protection grounds.

John: Instead of being about protection from violence, the Clause was interpreted to mean protection from unequal laws.

Evan Bernick: That's largely an artifact of the gutting of the Privileges or Immunities Clause. The Privileges or Immunities Clause is probably the more plausible constitutional source for a generalized anti-discrimination norm.

John: But as we know from the last couple of episodes, the Privileges or Immunities Clause has almost never been used to protect anybody from much of anything.

Evan Bernick: Then state courts and federal courts essentially compensated by moving anti-discrimination work to the Equal Protection Clause instead and also to the due process of law clause. In fact until shortly after the turn of the century the distinction between due process of law and equal protection wasn't all that cleanly drawn.

John: A lot of what we're going to say about the Equal Protection Clause on this episode is also true of the Due Process Clause. They overlap. A lot.

Evan Bernick: So you will have equal protection-like norms invoked in the context of due process cases and vice versa. Both of them could be construed to stand for the proposition that

governments can’t draw arbitrary distinctions between people or generally behave unreasonably.

John: But even though the courts were willing to announce the rule that if states are going to treat people differently then there needs to be a solid reason, they didn’t really follow through and strike down that many laws.

Evan Bernick: At the same time, courts weren't particularly vigorous about enforcing that. So unless you had a facial classification to the effect that like blacks can't serve on juries but whites can the courts wouldn't really look too deeply into the reasoning behind a given state action.

John: If states passed a law where it was plainly written that blacks and whites would be treated differently, then the courts might strike it down. For instance, in 1880, in *Strauder v. West Virginia*, the Supreme Court struck down a law that barred African-Americans from serving on juries. But the Court also said that not allowing women on juries was perfectly okay -- and that part of the ruling didn’t get overturned for almost 100 years. So if you wanted to discriminate on the basis of sex, that was no problem. And if you wanted to discriminate on the basis of race, well you could still do that. You just had to write the law in a way that seemed race neutral. The most famous example is *Plessy v. Ferguson*. In 1890, Louisiana banned black passengers from riding in railcars designated for white passengers and vice versa. Homer Plessy, the plaintiff in the case, was one-eighth black, but under Louisiana law he was considered African-American.

Evan: He could easily pass as white. And he was chosen for the test case precisely to illustrate how arbitrary the distinction that was embodied in the statute actually was.

John: Plessy was chosen by a committee of prominent mixed race New Orleans residents who wanted to challenge the state's Jim Crow laws and thought a mostly white plaintiff would be more sympathetic. Interestingly, the railroad company supported the lawsuit, and the conductor cooperated with the committee to ensure Plessy was arrested and would then be able to challenge the law.

Evan Bernick: Businesses did want to be able to engage in precisely what the state was preventing them from doing, which was offering accommodations to both blacks and whites and allowing them to occupy non-segregated rail cars. And the state is the one that is coming in and saying no you can't do that.

John: But in 1896, the Supreme Court upheld the statute, and said it did not violate the equal protection of the laws.

Evan Bernick: You got an opinion that begins with reasonable sounding language affirming that states can't do whatever they want. They need to take actions that are directed at protecting public health or public safety or public morals or public order.

John: But then, without really much explanation, the Court just says Louisiana's law is consistent with the state's authority to promote order.

Evan Bernick: So neither whites nor blacks are allowed to access accommodations that are meant for the other and the court says, well, that's that's equal. That doesn't violate equal protection even though the evident social meaning and purpose of that statute was to subordinate blacks. So one of the problems that you have in early prediction earlier equal protection jurisprudence, is this kind of formal neutrality that doesn't look into the function or the purpose of the statute and just looks on the face of it to determine whether it facially treats people differently.

John: So by a 7-1 vote, the Supreme Court gave us the doctrine of separate but equal. Only Justice John Marshall Harlan dissented. In part because of that dissent, Justice Harlan is known as the Great Dissenter.

Evan Bernick: And what Justice Harlan points out is that everybody who's familiar with the social context in which this statute was made knows what it was designed to actually accomplish. The idea that it was designed only to promote civil order and civil peace rather than stamp blacks with a badge of inferiority simply blinked reality. So he was prepared to engage in what we would today call judicial engagement -- looking beyond the face of the statute and saying okay well what kind of effect that this actually have? Do we believe the state when it says it was doing this to promote social peace?

John: But even as Justice Harlan wrote that all citizens should be equal before the law, in his dissent in *Plessy* he singled out the Chinese as being so different that they could not be citizens. So Harlan was better than his peers; but even he wasn’t consistent. Another example of this kind of formal neutrality trumping reality is *Pace v. Alabama* from 1883. There, the Court

upheld a law that punished interracial couples who had sex outside of marriage more harshly than couples of the same race. That didn't violate equal protection because it was just as illegal for whites to have an interracial relationship as it was for blacks. Here's what the Alabama Supreme Court said about the law prior to the case getting to the U.S. Supreme Court.

> **Alabama Supreme Court**: The evil tendency of the crime of . . . adultery or fornication is greater when it is committed between persons of the two races . . . . Its result may be the amalgamation of the two races, producing a mongrel population and a degraded civilization, the prevention of which is dictated by a sound public policy affecting the highest interests of society and government.

John: Nasty stuff. Anyway, this super hands-off approach to using equal protection -- and also the due process clause -- in racial discrimination cases lasted for decades, even after all of the justices who participated in *Pace* and *Plessy* had turned over. In 1927, in *Gong Lum v. Rice*, the Supreme Court ruled that a Mississippi law that barred a Chinese-American student from attending an all-white public school did not violate the Clause. And it wasn't just racial discrimination; the Equal Protection Clause wasn't very useful against other kinds of unequal treatment either. For instance, in *Buck v. Bell*, Justice Oliver Wendell Holmes called the Clause quote "the usual last resort of constitutional arguments" -- just something that lawyers threw in their briefs without much chance of success. *Buck v. Bell*, which came down in 1927, upheld a Virginia eugenics law that allowed the state to forcibly sterilize quote "feeble-minded" individuals. Justice Holmes wrote that the public at large had a greater interest in not being surrounded by incompetent people than any one individual had a right to bodily integrity.

> **Justice Holmes**: It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.

John: The plaintiff in the case, Carrie Buck, wasn't feeble-minded and she wasn't promiscuous like the state of Virginia had argued. In fact, she had been raped and impregnated as a teenager by a member of her adoptive family and then put in a mental institution. So the Equal Protection Clause wasn't much use to challenge Jim Crow or other rights violations. But the Court did sometimes use the Clause -- and also the Due Process Clause -- in what we now call economic liberty cases. In these cases, a common theme is that small businesses were treated differently than big businesses or that out-of-state businesses were treated differently than in-state businesses without a sufficiently good reason. One example is *Gulf, Colorado, and Santa Fe Railroad v. Ellis*, where the Supreme Court struck down a Texas law that required railroads, when they lost certain kinds of cases, to pay the opposing side's attorneys' fees. But the law only applied to railroads. In 1897, the Court said Texas didn't have a good reason to treat railroads differently than other defendants. The Clause was also used in labor disputes. In 1921, in *Truax v. Corrigan*, the Court struck down an Arizona law forbidding the state's courts from ordering an end to labor strikes. In the case, former employees of a restaurant picketed outside the restaurant, yelling at customers and using quote "opprobrious epithets" about the Mexican workers who replaced them. The Supreme Court ruled that Arizona's law violated equal protection because it allowed striking workers to do things that other people could be ordered to stop doing. But don't get the wrong idea. Those cases and many others like them aside, it would be wrong to describe the decades before the 1930s as a laissez-faire, free market free for all. According to Professor David Bernstein of the Antonin Scalia Law School,

the courts upheld far more restrictions on economic activity than they struck down. In 1921, for instance in *Douglas v. Noble*, the Supreme Court upheld a Washington State dentist licensing law. The plaintiff in the case wasn't arguing that states couldn't license dentists. Rather, his argument was that the law did not set out sufficiently objective standards that aspiring dentists had to meet. The law allegedly gave carte blanche to a state board -- that was composed entirely of dentists -- to decide who could practice dentistry. The Supreme Court could have said, yes licensing in general is fine, but the requirements to get licensed can't be arbitrary; they need to be related to public safety, and in this case the board's requirements either are or aren't related to public safety. But instead, the Court just said that states can regulate occupations as they want, and if someone says a given regulation is arbitrary, well we're not going to dig too deep into the facts. And the result of that kind of approach was that many states then did impose -- or continued to impose -- arbitrary licensing restrictions. They imposed these as a part of Jim Crow. As Professor Bernstein points out, African-Americans were effectively banned from a variety of occupations. States didn't pass laws that said in writing that blacks couldn't be doctors or plumbers. But they could and they did achieve that same result with occupational licensing laws because courts, as often as not, did not look too hard at the intent behind or the effect of economic regulation. Occupational licensing is only one example of the court's deference to legislators. Sometimes the Supreme Court sat idly by while state and local regulation crushed entire industries. For example, within a year of the invention of the Model-T in 1914, drivers started picking up passengers for a nickel a ride all over the United States in so-called jitney buses. Consumers loved them. They offered much more freedom and flexibility to get around than other forms of transportation. In 1915, the New York Times proclaimed that jitneys were quote "one of the most astonishing businesses . . . this country has seen." But streetcar companies hated the competition and lobbied for regulations specifically intended to

drive jitneys out of business. In 1919, the Supreme Court had a chance to use the Equal Protection Clause to protect jitney drivers' right to earn an honest living. But they declined to hear the case of *Hazelton v. Atlanta*. As a result, by the mid-1920s jitneys had essentially disappeared from at least 125 cities. So up until the 1930s, the Supreme Court was mostly upholding restrictions on economic liberty. But it never really articulated a clear test of how to separate reasonable restrictions from unreasonable ones. That changed with the arrival of the New Deal when the Court finally did articulate a standard. And that standard was that the Court was *always* going to presume that economic regulations were reasonable. The most famous case that stands for that proposition is *United States v. Carolene Products*. But before we get to *Carolene Products* and the most famous footnote in the history of constitutional law, we're going to take a quick break.

Break 1

John: And we're back. Here's Professor Bernick of Georgetown law to talk about *Carolene Products* and the most famous footnote in constitutional history.

Evan Bernick: *Carolene Products* is a fascinating case. It arises from the enactment of something called the Filled Milk Act which makes it illegal to sell in interstate commerce a substance that amounts to evaporated skim milk and butter fats.

John: The Act was a federal law, so this wasn't a 14th Amendment case. Instead, the plaintiff proceeded under the Fifth Amendment's Due Process Clause, which is not to be confused with the Due Process Clause in the 14th Amendment.

Leslie Nielsen: But that's not important right now.

John: Even though it's a Fifth Amendment case, *Carolene Products* set the stage for how the Supreme Court analyzes 14th Amendment claims today -- both Equal Protection and Due Process. In the case, Congress had passed a law that said filled milk, which is basically condensed skim milk with coconut oil, was quote "injurious to the public health, and its sale constitutes a fraud upon the public."

Evan Bernick: It was justified on the grounds that the vitamins that were involved in filled milk were unhealthy and that people might confuse filled milk with whole milk and thus consumers must have been confused. But I think the general scholarly consensus at this point is that all of this was basically pretextual.

John: It was or should have been obvious at the time that filled milk wasn't harmful, and it was only banned because the dairy industry got Congress to do them a favor and eliminate their competition. If anything, the law hurt rather than helped the general public, because filled milk was less expensive than regular milk, and was popular in poorer areas. Even though it was cheaper, it more or less had the same taste and consistency as regular milk.

Evan Bernick: Any rate, the Supreme Court takes this case up and after going through or articulating a standard that you know, at least if the court had consistently adhered to it, it might have resulted in the invalidation of this legislation, says actually it's it's absolutely fine.

John: But that's not why the case is famous. The case is famous because of Footnote 4.

Evan Bernick: But includes in a footnote that has spawned a jurisprudence entirely unto itself that the kind of soft touch review that we're applying in this case isn't going to be appropriate in two broad classes of cases.

John: The Court wanted to make clear that it wasn't just going to presume the government's actions were constitutional in every context. With economic regulations, yes. The court was going to be very deferential. Much more deferential than in the past. But in a footnote, Footnote 4, Justice Harlan Stone wrote that other cases would get quote "more exacting judicial scrutiny."

Evan Bernick: The first class of cases are cases that involve enumerated rights such as those set forth in the first eight amendments and the second class of cases involves either statutes that curtail access to the political process or that target people who we think are particularly likely to get neglected by the political process and to be subject to what might be called majoritarian tyranny.

John: So part of that is like really good. The Court hadn't been protecting civil rights particularly robustly, and in 1938 it says it's going to start taking a harder look at protecting minorities and at laws that prevent people from participating in the political process. That change really begins in earnest in 1954, in *Brown v. Board*, when the Supreme Court finally overruled *Plessy v. Ferguson*. But the idea was at least in the water as early as 1938 in Footnote 4 of *Carolene Products*.

Evan Bernick: So on the one hand is ordinary commercial legislation gets basically no review.

John: That's bad. We don't like that.

Evan: On the other hand, legislation that touches upon enumerated or fundamental rights or curtails the political process or goes after discrete and insular minorities gets a ton of review.

John: And just to be clear, economic liberty cases aren't the only cases where judges didn't look too closely at the government's justification for a law. Sex discrimination also got very deferential treatment. In 1948, in *Goesaert v. Cleary*, the Supreme Court upheld a Michigan law that banned women in some cities from being bartenders unless they were the wife or daughter of the bar owner. The Court said treating male and female bartenders differently did not violate the Equal Protection Clause. That changed in 1976, in *Craig v. Boren*, when the Court carved out, or at least many scholars agree it carved out, a kind of middle tier of scrutiny -- not exactly strict, exacting constitutional review but a more thorough search for the truth of the intent behind a law and its effect than you get with economic liberty cases. In *Craig v. Boren*, the Court held that Oklahoma didn't have a good enough reason to allow beer sales for women at age 18 but not men, who had to wait until they were 21. And that's more or less where things stand today. There are three formal tiers of scrutiny: so-called strict scrutiny for rights that the Supreme Court says are fundamental. Intermediate scrutiny for things like sex discrimination and restrictions on commercial speech. And then there is what's called rational basis review -- the lowest tier of scrutiny. Rational basis review comes from a 1955 decision called *Williamson v. Lee Optical*.

Evan Bernick: *Williamson v. Lee Optical* involved an Oklahoma statute that made it illegal to replace eyeglass lenses, to duplicate eyeglass lenses unless you had a prescription from an ophthalmologist. The statute was justified in terms of promoting optical health but as the lower court was able to determine it didn't really seem well adapted to the end in the following sense.

John: The law made it illegal for people to go to an optician to do the simple task of putting old lenses in new frames without first getting a prescription from an ophthalmologist or optometrist. Ophthalmologists and optometrists are of course doctors, and opticians aren't, but opticians are perfectly capable of replacing broken lenses and refitting glasses without the oversight of an eye doctor.

Evan Bernick: There was no evidence that was provided that fitting or replacing lenses require detailed instructions. Lenses were actually duplicated through a device known as a lensometer that could be operated by any reasonably intelligent person with no expertise whatsoever.

John: A lower court recognized that the law discriminated against opticians' right to earn a living for no good reason and that it violated both the Equal Protection Clause and the Due Process Clause of the 14th Amendment. And it struck the law down. The Supreme Court reversed.

Evan Bernick: But the Supreme Court said look the era in which we carefully looked at economic legislation for hints of protectionism is simply gone.

John: The court held that the Equal Protection Clause only protects against quote "invidious discrimination"

> ***Williamson v. Lee Optical***: The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.

John: Legislators can impose needless and wasteful requirements and it's not the job of judges to second guess them. Under rational basis review as defined by *Williamson v Lee Optical*, if the government says it has a good reason to pass a law, that's enough.

Evan: You can think about this as the conceivable basis test.

John: If judges can conceive of a reason why a law might possibly be justified, it's constitutional -- no matter if there are facts and evidence that show the government is doing something arbitrary or that discriminates against one class of people in favor of another.

Evan: The conceivable basis test courts will bend over backwards to rationalize government actions. They won't look carefully at the evidence. In fact, they'll sometimes say that the evidence is totally irrelevant and so is the government's purpose to the extent that governments have a purpose.

John: If you think that's an exaggeration, it's not. Here's a clip from oral argument in a case called *Alaska Central Express v. United States*. In the case, there's a federal law that says if an airline company wants to deliver mail to rural areas in Alaska, it also has to deliver passengers. Crucially though, the law exempted large airlines from that requirement. Allegedly, the law was

meant to incentivize taking passengers to rural areas, but what it actually did was force small airlines into bankruptcy and leave less competition for big airlines. A pair of small airlines sued and said the law violated equal protection and due process. In the clip, which is from 2005, an attorney from the Justice Department tells a Ninth Circuit panel that under rational basis review judges aren't supposed to look at evidence. They are supposed to defer to the government**.**

> **Judge**: What I'm having trouble with is that these plaintiffs say we have evidence that will convince the judge if he's willing to look at it and the judge says well, I'm sorry, I'm not gonna look at your evidence.
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> **DOJ Attorney**: But that's your honor. That's just the way rational review of economic legislation works.
>
> **Judge:** But if that's right, no plaintiff can ever introduce any evidence in a rational basis test question.
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> **DOJ:** That -- as long as a conceivable basis is apparent -- that's exactly right.

John: A conceivable basis. Judges don't have to do any judging -- they just have to conceive of a scenario where the government is pursuing a legitimate purpose. And if in real life the government is doing something illegitimate, well you have to go to the legislature and not the courts to get the law changed.

Attorney: a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. It's just not the sort of thing that is amenable to the presentation of evidence.

Judge: Can I get at your definition of "conceivable?" To take an outer-boundary sort of example….

DOJ: Sure.

Judge: … not related to this case. Is it conceivable that space aliens are visiting this planet in invisible and undetectable craft?

John: Is it conceivable that space aliens are visiting this planet in invisible and undetectable craft?

Attorney: Is it conceivable?

Judge: That's my question.

Attorney: Yes, it's conceivable.

Judge: And that would be a basis for sustaining Congressional legislation, if Congress--if the person sponsoring the bill said, "Space aliens are visiting us in invisible and undetectable craft, and that's the basis for my legislation," we can't touch it?

Attorney: If Congress made a finding of that sort?

Judge: That's my question.

Attorney: Your Honor, I think if Congress made a finding of that sort, I think, Your Honor, it would not be appropriate for this Court to second guess that.

Judge: Okay, in other words, "conceivable" is "any piece of nonsense is enough."

John: So listening to that, it sounds like the small airlines probably won. But they lost. The government won the case. In like a one-page opinion. And by the way, this episode is mostly about economic regulation, but rational basis is the default standard of review for any 14th Amendment case. For the most part, if you're suing under the 14th Amendment's Due Process Clause or its Equal Protection Clause, as well as the Fifth Amendment's Due Process Clause, you get rational basis review. Anyway, back in 1955 in *Williamson v. Lee Optical* the Court didn't come out and say economic liberty isn't important.

Evan Bernick: They didn't say we don't think this liberty is important. What they did say is that we judges are not particularly institutionally competent to distinguish between restrictions on this liberty that are designed to serve special interests and public-spirited goals.

John: And that's still an argument you hear today. It's what the government's attorney just said in the Alaska case.

Attorney: It's just not the sort of thing that is amenable to the presentation of evidence

Evan Bernick: So it's an institutional competence argument, but it's not a particularly good one given that the Court at this time was prepared to look very carefully at legislation that burdened rights to free speech, that burdened Fourth Amendment rights, and that were otherwise deemed to be fundamentally important.

John: And looking outside of constitutional law, judges routinely tackle enormously complex issues when a case involves patents, or antitrust, or pensions. Judges can do complicated. They are amenable to evidence in all kinds of cases. It’s just kind of weird to pretend they aren’t when it comes to economic regulation and other kinds of equal protection and due process cases. We’re going to take a quick break. When we come back: If rational basis review really requires judges to defer to space aliens and any other piece of nonsense, how come plaintiffs actually do sometimes win rational basis cases? To answer that we’re going to hear from some folks who have won under rational basis review -- African-style hair braiders.

Break 2

John: Welcome back. That was a whole lot of case law. But the bottom line is that today the Equal Protection Clause means that if the government is going to treat one group of people differently than another, then it has to have reason. And in some situations, courts are going to be a lot more demanding about what makes a reason reasonable than in others. Additionally,

the Supreme Court has also ruled that government can violate equal protection by treating two different groups as though they are the same. At the Institute for Justice, we raise equal protection arguments all the time in our cases. Including in our very first case.

Pam Ferrell: I was fired from my job in 1978 because of my braided hairstyle.

John: That's Pamela Ferrell. She runs an African-style hair braiding salon in Washington, D.C.

Pam Ferrell: I was working at a fabric store. I was a fashion designer and I was working at a fabric store. And they told me my hair wasn't appropriate for their clientele. And if I wanted to work there I had to take my hair out of the braided style. And I was really hurt. I mean I was young -- 18 years old. And I decided at that point I was going to braid so many heads that this would never happen to anyone else again.

John: After losing her job, she had to figure out a way to make some income.

Pamela Ferrell: I learned how to braid as a young child probably seven years old. You know the older girls in the neighborhood were braiding hair. We'd sit out on the porch steps and we would braid hair and you would see them doing it and you'd want to do it like them. So I started very young. I mean, it's just something we do in our neighborhood.

John: So she printed up some flyers and started a business. And two years later, she opened a salon, Cornrows and Company, with her husband.

Pamela Ferrell: And we got a phone call one day saying from DCRA, the Department of Consumer Regulatory Affairs, and they called and said we had to close our salon. Because we didn't have a cosmetology license.

John: Officials in Washington, D.C. tried to shut the salon down. Not because of any health and safety violations. But because Pamela didn't have a cosmetology license.

Pamela Ferrell: We weren't doing cosmetology. We were braiding hair.

John: Cosmetology and African-style hair braiding are completely separate skills. Cosmetologists work with chemicals. Braiders don't. African-style hair braiders work with African hair, which is coily and has a different texture and responds to different techniques than white people's hair. It doesn't make sense to force braiders to learn how to do a perm.

Pamela Ferrell: We weren't straightening. We weren't using chemical products like relaxers and colors. We weren't doing roller sets, manicures, pedicures, facials. We weren't doing any of the cosmetology services. We were just offering braiding.

John: Pamela challenged the licensing requirement in court, represented by IJ. We argued that D.C. was violating equal protection by treating two groups -- cosmetologists and hair braiders -- the same. And we lost. The court held that under rational basis review, it didn't matter. Long story short, though, Pamela won in the court of public opinion; D.C. changed its law, and Cornrows and Co. is still open in Washington, D.C.

Pamela Ferrell: It's really important to be able to earn a living doing something you love, doing something that's needed, that's good for the community--you know, this is a cultural practice that you know, I've been doing all my life.

John: Pamela has since trained hundreds of women to braid and earn a living as braiders. And IJ kept representing hair braiders. And we started to win.

Hair Braider montage

JoAnne Cornwell: when Sisterlocks first started it was me my two sisters and our significant others and you know the kitchen table and conversations and none of us have a business background. We knew anybody that was born black and female knows how deep this hair thing goes.

John: That's JoAnne Cornwell. She's an emeritus professor of French and Africana studies at San Diego State University, and the founder of Sisterlocks, which is both her company and also her own special style of African hair braiding. We represented Dr. Cornwell in the 1990s, when the California State Board of Cosmetology and Barbering threatened to shut her salon down. We made the same arguments as in the D.C. case, but this time we won.

JoAnne Cornwell: I had somebody say to me yesterday you know this has changed my life. I've put my two kids through college because I've been able to do this. it's such a part of people's lives and it's not just a skill set. It's something that's affirming at the same time. It's something that people can create a livelihood around and be proud about what they're doing.

John: African-style hair braiding is a centuries old practice.

JoAnne Cornwell: there was a symbolic system of meaning that was always encoded in hairstyling and it wasn't just superficial. It was a language if you will. And so if a woman was wearing her hair in a particular way that would mean that she was eligible for marriage or that she was a married woman or that she had a particular political affiliation or that she was of a particular caste. And so you were always communicating something outwardly and the braiding Traditions developed in Africa for our hair type and they're really elaborate stylings and things like that.

John: But for large parts of American history, doing what was natural for African hair was dangerous. In the era of Jim Crow, it could make you a target.

JoAnne Cornwell: you know people were getting shot and killed and raped and beat up and fired and you know what, I mean, it was a different world. So you couldn’t walk around with picky hair. You couldn’t walk around with afros. You wouldn't live. You wouldn't be accepted right? Women had to cover their hair a lot of times because people didn't want to see it. And so when CJ Walker and the women primarily of that generation came up with ways of making your hair manageable that was a godsend for people. Because they their level of acceptability meant they were safer. It meant their kids wouldn't get spit on, you know. It meant that they could move through society a little bit better.

John: Madam CJ Walker was a pioneer in the black hair care industry in the early 20th century.

JoAnne Cornwell: She established a haircare empire that was based on the application of hair conditioning and hair straightening techniques for women of African descent. She and her collaborators constructed an entire industry.

John: She trained up to 40,000 Walker agents, and they made more than the average white worker at the time. CJ Walker herself became one of the wealthiest female entrepreneurs of the time.

JoAnne Cornwell: Her main focus was hair health within the context of her era. Because it was such a critical issue, you know, there were there's a whole phase in our history as African people or you could even count on being able to wash your hair, you know, let alone wash it with what? There were not soaps and shampoos and things that were appropriate for what your scalp needed things that we take for granted were just not there.

John: But there was a lot of debate about hair straightening in the African-American community.

JoAnne Cornwell: And it was the era during which debates about straight hair versus natural hair got going and if you look in the black press of that era you will notice that the debate was pretty fired up. There were individuals who were staunchly against hair straightening for black people and were more in favor of what we today would call a natural approach. And then on the other side of that there were people who wanted to use hair straightening as an avenue, one avenue, toward acceptability, which was a really deep and dire need — it was not a safe place to be especially for women and so hair straightening was perceived as something that could

make black people black women specifically more acceptable, um more employable and so gained popularity for those reasons.

John: But as Jim Crow faded, the attachment to straight hair remained pretty strong for a lot of people.

JoAnne Cornwell: It evolved however into something where you just wanted that hair straight at all costs. And hair straightening got to be not, you know, just a choice among other things, but it's what you had to do. So people were straightening their hair, you know. As soon as a little girl got to be, you know, five her parents and her mom was straightening her hair. So what's happening then is that the move away from natural hair is getting more and more ingrained in our culture.

John: In the last few decades, the kind of fiery debate over whether to have straight or natural hair has kind of eased.

JoAnne Cornwell: And now it's less of a debate. There still is somewhat of a debate, but it can be much more of a choice or at least perceived as a choice for people today than it was in previous era.

John: As recently as the 1990s that wasn’t the case.

JoAnne Cornwell: when I would walk through my life with sister locks in the early days. And I would be around black women it would almost be like she's letting the cat out of the bag. I can't

you know, I can't be around this because she's telling the world that my hair doesn't really look like this. It really probably looks like that. So this cover-up thing that we have been involved in for so long, even though it has roots in real historical circumstances and our survival strategies for coping with the circumstances and that is something that we should be proud of we should be proud that we figured out how to get straight hair so we could camouflage this stuff and not get killed. When we first started getting Sisterlocks into the world, it was mostly not the black women who would come to me and say wow. That's really something. How do you do that? Can I get it? Right? Everyone's going don't show them naps, right? It was the white people. It was the Asian people. It was the Mexican people, especially younger people. I can't tell you how many adolescent boys would come up to me going hey cool hair. It's just the coolest thing. You know, it's just the coolest thing and so the whole acceptability thing has evolved to something that's you know, I mean we can laugh about it now it’s kind of fun.

John: So this hair braiding stuff, it goes pretty deep.

JoAnne Cornwell: I think the most gratifying thing about being me, the creator of Sisterlocks and having grown this business to the point where it is today is seeing the economic impact that it has on black women. We're a population that is not highly represented in the corporate world. We're not highly represented in the business world in general. And although something like hair care involves a skill set that we are really deeply involved with invested in, it traditionally is a cottage industry and it's not something that you can there's not a lot of upward mobility. So with Sisterlocks, we really have created something that allows women to acquire a skill set that will free them up from having to work for a limited wage let's say, for having to work outside of the home sometimes when they're young mothers, for example. And they come to this quite

organically. We're just kind of smart people who figured out for ourselves what we need and we're doing it.

John: But as recently as 20 years ago, it was illegal in over 40 states to braid African hair unless you first went to cosmetology school and spent a lot of time and money learning how to do white women's hair and no time learning how to do African-style braiding. Invariably, when braiders went to legislators asking not to be treated like cosmetologists, there was a group of people waiting for them in state capitols. Cosmetology schools.

> **Committee chair**: Next item on the agenda is number five exemption from licensure for hair braiding.
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> **Cosmetologist**: I am ... chairperson for the Utah beauty school association for government relations, and I hold a team leader position on a national organization. First thing I'd like to express is we do represent ... over 50 schools within Utah, and I can see we have quite a few with us here today.
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> **Cosmetologist 2**: Braiding has always been included in the cosmetology license … as far as I've ever been involved and I've been involved for years and years and years

John: If you want to earn a living doing hair, you have to go to barber or cosmetology school. And cosmetology schools have been on permanent, full-alert in state legislatures to make sure that doesn't change. Even if you don't do cosmetology. And they say all kinds of ridiculous stuff.

Cosmetologist 3: Mold can grow in the hair.

Cosmetologist 2: Dangers to the scalp, to the skin, allergic reactions

Cosmetologist 4: You may have hair lice.

John: Last year in Tennessee and earlier in Mississippi, cosmetologists claimed unregulated braiding could cause an AIDS epidemic.

Melony Armstrong: If hair braiders were not regulated this could possibly cause a AIDS epidemic breakout. Like really? The AIDS card, they played the AIDS card.

Cosmetologist 1: The average human touches their face once every three minutes. That's 16 times an hour. Also we only wash our hands on an average of six times a day. And germs stay on a doorknob up to 24 hours a day. These are things we learn in school. Someone who is doing hair out of their home must know this information, especially if there's children in the home.

The Simpsons: Think of the children. Won't somebody please think of the children?

John: Today, the number of states that require African-style hair braiders to get cosmetology licenses has dropped from over 40 to 8. And all that stuff you just heard hasn't happened. There have been no outbreaks of skin disease or whatever else. The idea that the only way for braiders to learn basic sanitation is to force them to go to cosmetology school is not reasonable.

And part of the reason for the decrease in regulation was that braiders were able to persuade legislators that it wasn't reasonable. But a big part of it was braiders started winning in court. Judges started demanding that states have a good reason to treat braiders like cosmetologists. In 1999, Dr. Cornwell won her suit. IJ represented her. I spoke with her lawyer Donna Matias, who used to be at IJ back then.

Donna Matias: It was onerous. If you wanted to start a natural hair care or hair braiding business back then, you essentially had to pay thousands of dollars.

John: In California in 1997, it took 22 hours of training to become a security guard with a gun. It took 110 hours to become an EMT and 664 hours to become a police officer. To become an African-style braider it took 1600 hours.

Donna Matias: I think it was at that time five to seven thousand dollars to take about nine months of schooling in cosmetology.

John: And that was only if you wanted to braid hair. If you wanted to teach others how to braid that required a different license.

Donna Matias: And if you wanted to have your own salon that was yet, again, another separate establishment license. So all of those were really really big hurdles tremendous hurdles for someone who wanted to start at what should have been not a restrictive environment and it was a very restrictive environment.

John: Dr. Cornwell sued and in 1999, she won. A federal district court ruled that even though states have quote “undoubted latitude” to regulate in the interest of public health and safety there are quote “limits to what the state may require before its dictates are deemed arbitrary and irrational.” The Court dug into the details of the cosmetology curriculum, the required textbooks, the licensing exam, and found only a tiny portion of it was even minimally relevant to braiders.

> **Cornwell decision**: Plaintiffs do not seek ~~a special “out” or~~ preferential treatment; they seek rationality when trying to pursue a livelihood. Simply put, it is irrational to require Cornwell to comply with the regulatory framework. Even given due deference, the Act and regulations ~~as applied to Cornwell~~ fail to pass constitutional muster as they rest on grounds wholly irrelevant to the achievement of the State’s objectives.”

Donna Matias: It violated the Fourteenth Amendment. It violated the right for these people to earn an honest living these entrepreneurs who were harming no one right and they were creating jobs for other people and they were themselves earning a living and and it was in violation of that fundamental right.

John: But wait a sec: Under *Williamson v. Lee Optical*, aren’t judges supposed to give extreme deference to even needless and wasteful economic regulations?

> **Judge**: Space aliens are visiting this planet and invisible and undetectable craft.

John: So what happened? Well besides a lot of determined advocacy is that every now and again in equal protection and due process cases, the Supreme Court would kind of pull back

from its sweeping language in *Williamson v. Lee Optical* about the need for extreme deference under the rational basis test and demand that state and local governments have a good reason for their laws. In 1974, in *Cleveland Bd. of Education v. LaFleur*, the court ruled that a school board lacked a rational basis for requiring mandatory pregnancy leave. In 1985, in *Metro Life Insurance Company v. Ward*, the Supreme Court invalidated an Alabama law that was designed to protect local insurance companies from out-of-state competition. In *City of Cleburne v. Cleburne Living Center*, also in 1985, the Court struck down a law that required a permit to operate a home for intellectually disabled individuals. And 1996, in *Romer v. Evans*, the Supreme Court struck down a Colorado state constitutional amendment that banned local governments from passing LGBT anti-discrimination measures. Which isn't to say *Williamson v. Lee Optical* space aliens style review is dead. Courts still cite *Williamson* all the time. But taken as a whole, plaintiffs in rational basis cases can and do win in two scenarios: first, when there is no logical connection between the law and a legitimate government interest. And second, when the law is advancing only illegitimate government interests such as private economic protectionism or hostility to the disabled. Today, when you go to court to vindicate your right to equal protection or due process, there's a reasonable chance you'll get actual review just like Dr. Cornwell did. But when courts apply the rational basis test, the government still gets the benefit of the doubt, and the burden is on you to show that a challenged law isn't logically connected to any legitimate government interest. So winning, to say the least, isn't easy.

Conclusion

John: Ultimately, the story of the Equal Protection Clause is a moderately happy one. The Supreme Court kicked it in the teeth, but the Constitution's guarantee of equal protection still

means something. Sometimes. Which, as we've learned, is more than you can say for other parts of the Fourteenth Amendment: If a state government is treating you unequally, the courts might have something to say about it. But what if you need protection from something other than private violence or unequal treatment? What if you need protection from the government itself? Shouldn't there be some rules or some procedures in place before government can confiscate your property or put you in jail? The answer -- which, spoiler alert, is going to be "maybe" again -- next time, on Bound by Oath.

Credits: Bound By Oath is a production of the Institute for Justice’s Center for Judicial Engagement. This project was produced 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 Dick Carpenter, Sam Gedge, Dan Knepper, Bert Gall, Ari Bargil, and Melanie Hildreth.