John: This is Episode 8 of Bound By Oath, the penultimate episode in our story of the 14th Amendment. If this is the first episode you're listening to, you might want to back up and start with Episode 1. Or not; it's your life. I'm not telling you how to live it. On this episode, we'll take a second look at the Due Process of Law.

Due Process Montage

John: On Episode 6, we talked about procedural due process -- the idea that the government must follow fair procedures before taking away someone's life, liberty, or property. Due process requires process; that is not controversial. But that is not all the Supreme Court says that due process requires. It also requires that the government have a good reason to deprive you of life, liberty, or property, and there are some things the government simply cannot do no matter what procedures it follows. That idea is called substantive due process. And it is controversial. At IJ, we make substantive due process claims all the time in our economic liberty cases: on behalf of monks who wanted to sell caskets, on behalf of hair braiders, florists, interior designers, food trucks, and many others who face restrictions on their ability to earn an honest living that don't make sense. On this episode though we're going to talk about substantive due process in a slightly different context. Economic liberty is of course important, but substantive due process extends far beyond that. Far enough, at least, to take us to a homeless encampment in Akron, Ohio.

BBO Montage - Justices saying the oath

Jeff Rowes: The Akron homeless case asks an important constitutional question. Can the government stop our client, Sage Lewis, from using his property to come to the rescue of people who are out on the streets in immediate peril?

John: That's Jeff Rowes. He's a senior attorney at the Institute for Justice.

Jeff Rowes: So here's Sage's story. He owns a commercial property out in Akron, Ohio. And he became friends with homeless people. This was sort of by accident. He had let them work at his auction business during the day, and when they were suddenly ousted from the woods where they had actually been living for a couple of years, they asked Sage if they could pitch their tents in the back of his commercial building in the middle of January. It was frigid. They had nowhere to go. Sage said yes. And from there a community arose.

John: Sage is a cool guy. He marches to the beat of his own drummer.

Sage Lewis: I see the world as my playground and I get that that is an incredibly blessed or fortunate position to be in.

John: He's an entrepreneur, and he is all hustle -- in the best sense of the term. He has an auction business. He has an online marketing business. And he owns a big, old former factory building in Akron Ohio where clay tiles used to be manufactured.

Sage: Most famously it was a hospital -- was Green Cross hospital. That was its biggest claim to fame. And we still have people that come here and say, oh I was born here.

John: The neighborhood is low-income, it's a bit of a hodge podge of different stuff. There's heavy industry behind his building and railroad tracks just beyond that. There are subsidized apartments for senior citizens next door. If you keep walking that way, there's a neighborhood of single family homes. If you walk the other direction, you hit a big road with gas stations and a mattress store.

Sage: I ran for mayor. So I guess that would be like your midlife crisis type of thing.

John: And that's how he became an advocate for the homeless. To get on the ballot to run for mayor, you need to gather signatures, so Sage hit the pavement.

Sage: And I spent hours and hours and days and days on the street. And the people that really -- the only people that really wanted to talk to me were the homeless.

John: Sage was not elected mayor, but the experience did lead him to start interacting with homeless people.

Sage: I started hiring homeless people to do auction work with me. And then in January of 2017 a group of them, a rather large group of them, got notice that their camp that they had lived at for years was going to be closed because we were putting in something called the Freedom Trail.

> **News anchor 1**: Work on the Freedom Trail, a bike and walking path, starts soon. Everybody needs to clear out even sooner. Park rangers have informed those who now live along the route they have to go, but where do the homeless go when they are told to go?

Sage: The name is ironic if you ask me. That they're putting in a Freedom Trail by kicking out people -- homeless people -- that have nothing on January 7th the coldest month of the year completely without compassion or empathy or curiosity of hey, where are they gonna go? No one has an answer to that basic question. You kick somebody out of a camp, and no one has the answer of where are they going to go?

John: In Akron, it's illegal to camp or to sleep on public property. If you're going to sleep on the street, you have to stay out of sight but you're always at risk of being told to move along. So people sleep in the woods and in encampments all over the city.

Jeff Rowes: There are obvious dangers in being outside and being homeless. Number one is violence. The incidents of murder and rape and theft and assault and everything are just vastly higher for homeless people who are living on the street. Then for ordinary people or even homeless people who are in some kind of long term shelter. Working with the homeless people in Sage's community, I have a new appreciation for what it is like to be homeless and the kind of circumstances that have put people in this situation. The common denominator for nearly every homeless person is some kind of trauma. There's no doubt that homeless people make bad decisions, but they're typically coping with the kinds of crises that you and I just can't imagine. For example, one of the residents at a Sage's tent community was this exceptionally intelligent,

successful woman, who was a journalist well into her thirties. And then basically her brain just exploded. She was diagnosed with severe bipolar disorder and a variety of other serious mental illnesses. And even though she remained as intelligent as before, she lost her ability to live like an ordinary person. There was another very young woman who was 19 years old who had run away from home as a teenager because her mother, who was a drug addict, had been selling her to men for years and years, and there's just no amount of resilience can prepare a person for those kinds of experiences.

John: Lots of homeless people have criminal records and simply can’t find someone to rent them an apartment or hire them for a job. And homeless people are constantly being taken to jail for minor things.

Sage: If a police officer sees you they got to ask your name and they got a call you in. You know, it's just it's how you do it. What's your name? And then they call you in and you have a warrant you go to jail. So at any rate they're terrified of the police not because they hate the police but because they don't want to go to jail.

John: The city and various nonprofits do provide some services but it’s limited.

Jeff: There's no official Akron city shelter. There's a church based shelter, and they do excellent work, but you can only stay there five days a month. And their variety of reasons why you might be excluded either based on a criminal past or some other factor.

Sage: Some of those people from that Freedom Trail eviction said, hey, could we spend a couple nights in at your place until we figure out where we're going to go. And where they ended up going was my backyard and that was the beginning of it.

John: That was the beginning of a tent community, which eventually grew to about 50 people who came and pitched tents in Sage's back yard. At first, there were no rules, and things were a bit rowdy.

Sage: It was like a party central. We had a fire pit and we allowed drinking. Worst idea ever.

John: Understandably, the neighbors were not too happy. One of them even sued Sage for creating a public nuisance. But Sage isn't a jerk, so very quickly he realized that some changes were necessary. But rather than just impose a bunch of rules, Sage did something unusual.

Sage: We decided that the homeless would create their own rules, create their own government, create their own structures, create their own security system, and they did. And it had unintended, incredible consequences.

John: They elected leaders called the Tri-Council. They created a code of conduct. The homeless people themselves determined who was allowed to join the community. And everyone had to pitch in and help in the kitchen or laundry room or just taking out the trash.

Sage: And so one of the things that you agreed to were random tent searches. And so every once in a while they would just do sweeps. And they would go through and you -- then they had

rules like one security person had to be there, one person from tri Council had to be there, and the person who owned the tent had to be there. They would find drugs or drug paraphernalia, and you were out. You were just out. It was impressive and that made it better. It made the community better because the people that wanted a drug-free, alcohol-free facility became more attached to it and more committed to it.

Jeff: So what emerged at Sage's was this community, a natural, organic, real community where people felt a sense of belonging.

Sage: One of the things that happens to you when you are homeless is you are completely shunned from society. I'm here to tell you that's what kills human beings is social isolation and a lack of self-worth a lack of dignity. And there were multiple times people would come here with the idea that this this was where they were going to kill themselves. But what happens is what would happen is you would come here you would get a day or two to acclimate. And then you had to contribute an hour a day to the facility. You can turn a person around instantly like that because you instantly become useful and valuable. And then you're there for a week and a new guy off the street walks in completely beat up, completely demoralized and you take care of him. And you go out and help him set up his tent and you go and make sure he has blankets or sleeping bags and food and knows where the how to use the laundry. And now you're important. It's awesome.

Jeff: In belonging and in helping other people, and in having purpose, they reacquired that sense of dignity and independence that's necessary to just being a responsible, participating member

of society. And importantly, that's the thing that became the springboard for their transition from being homeless to being housed again, that they felt like people again.

John: At Sage's people who had lost all hope started to get it back.

> **Robin**: Life shouldn't be this hard. Life shouldn't be. I used to own two pet stores. I used to go to every school in Summit County. Do presentations on reptiles. And I'm homeless.

John: That's Robin. His house burned down after an electrical problem caused a christmas tree to catch fire. His wife died three days later because she inhaled too much of the smoke.

> **Robin**: I say I've lived two different lives. I mean I had money. I had car. I lived in Bath, Ohio right behind LeBron James. Lost it all in 15 minutes. A fire and my wife, and I went to deep depression.

John: After the fire, he moved into the woods.

> **Robin**: Sage found me. I was still wearing clothes that smelled like smoke and I mean it was terrible. I blamed myself for everything that happened which now, I realize it wasn't my fault. I owe Tent City everything.

John: And this is Rebecca, another resident.

Rebecca: I dread to think where I'd be if it wasn't for this place. I don't have any skills as far as surviving in the woods and self-defense kind of thing. What am I going to grab a rock? You don't know what's out there you're terrified and as soon as I got here I said I felt safe. I've never not one time not for a minute being here felt unsafe at all.

John: Not only was there a tent city in the back yard. But in the building, there was a day center with showers and laundry and a food pantry.

Sage: One of the requirements of living here was that you had to constantly move forward. You had to show proof that you were moving forward in your life like going to addiction treatment, going to your mental health doctors, getting on the list for housing. And we would have people, homeless people, run that. So you would have to meet with a person every week or you know, sometimes every two weeks and show that you were moving forward. And if you were not moving forward you had to leave. And what was so great about it was you got all this buy-in from people because they built it. I didn't come up with this idea. Homeless people came up with this idea.

John: And it wasn’t just good for the homeless people themselves. It was good for social service providers, outreach workers, parole officers, families. Anyone who needed to find these folks -- they were in one place; you didn’t have to go search for them in the woods. And once people saw what was going on at Sage’s, volunteers from all walks off life were eager to help.

News anchor 2: Akron’s Tent City is getting a helping hand from a local bagel shop.

> **News anchor 3**: People have started showing up at 15 Broad Street, leaving items, bringing food for the pantry. Neighboring Vulcan Industries has supplied materials as have other Akron firms. Groups of junior high and high school kids from Hoban and Walsh showed up with their parents, asking if they could just clean something.

John: People donated portapotties. They donated food and clothes. And the whole thing was privately run on private property at no cost to taxpayers.

Sage: We created a rehabilitation program for the extremely homeless. And I just think if we had kept going what else could we have learned?

John: We don't know this empirically from a randomized controlled study, but it really does seem like outcomes for homeless people and the community generally were improving because of tent city. The homeless were more successful at transitioning into living indoors, they were safer, they were getting the care they needed. If you want homeless people to commit fewer crimes, it's probably better to have them at Sage's than cycling between jail and the streets. But Akron shut the community down. Tent City is no more. Which is where due process comes in. Sage and the residents got process. There were a bunch of public hearings. Sage and IJ circulated a 1,000 page report with testimony from experts and hundreds of statements from neighbors and supporters. Everyone had a chance to speak at City Hall. City staffers considered various options and made recommendations. And then the city council took a vote. But even after all that procedure, we say that the city is violating the due process of law. And that's because due process guarantees more than just process. The city's actions are not reasonable.

So we're going to take a break, and before we come back to Akron and the lawsuit, we'll talk about the history of substantive due process.

==========

Break 1:

Voice actor (Elisabeth Noone): We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America. The Senators and Representatives and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution.

==========

John: Substantive due process is about the government's reasons. To take away life, liberty, or property, the government has to have an adequate reason.

Prof. Erwin Chemerinsky: Substantive due process says that the government has to give an adequate reason before takes away a person's life liberty or property.

John: That's Erwin Chemerinsky, who is the dean of the law school and a professor of law at the University of California, Berkeley.

Prof. Erwin Chemerinsky: Imagine that the government wants to permanently take children away from a parent. The government has to provide notice to the parent as to why and to hearing. That's procedures.

John: But also …

Prof. Erwin Chemerinsky: The government has to show a compelling need to take children away from parents because the right of parents to custody of children is a fundamental right. That's substantive due process.

John: But just how deferential courts will be to the governments' reasons varies a ton.

Prof. Erwin Chemerinsky: The Court has said there's some places we need to be really suspicious of the government. And it's simply that for certain kinds of discrimination, for infringement fundamental rights, we want to be very protective of people and we're not going to defer to the government.

John: We talked about this a bunch on Episode Five. There are a few things like racial disrimination and speech restrictions where courts are very suspicious of the government's motivations. But for the most part the courts do not scrutinize the governments' reasons too carefully.

Prof. Erwin Chemerinsky: But in most instances the Court says we're going to leave legislating to city council, state legislatures, Congress.

John: And which rights are fundamental -- the ones that get extra scrutiny? For starters, it's the rights spelled out in the Constitution. Free speech is fundamental. But the Court has also said some unenumerated rights -- that are not spelled out in the text -- are fundamental as well. We talked about unenumerated rights on Episode 3, because there is strong historical evidence that the Framers of the 14th Amendment intended for the Privileges or Immunities Clause to do a lot of the heavy lifting protecting unenumerated rights. But since that clause has largely been written out of the Constitution, that work has been left to the Due Process Clause, and also to the Equal Protection Clause.

Prof. Erwin Chemerinsky: Well under substantive due process, the Court has protected many rights that are not in the text of the Constitution from government interference: the right to marry; the right to procreate; the right to custody of one's children; the right to keep the family together; ~~a~~; the right to purchase and use contraceptives; the right to abortion; the right to refuse medical treatment; the right to engage in private consensual same-sex sexual activity. All of these are rights the Court has protected and said the government can interfere with them only if it has an adequate reason.

John: Abortion. Access to contraceptives. You can see why substantive due process is contentious. But there is one substantive due process case that is perhaps even more contentious. It is one of the most widely despised decisions in Supreme Court history, and it's

one that most people on both the left and the right join hands and despise together -- *Lochner v. New York*.

Prof. Erwin Chemerinsky: So Lochner versus New York it's from 1905 and it involved a law that limited the number of hours that a baker could work.

John: If you owned a bakery in New York, and you had your bakers work more than 10 hours a day or more than 60 hours a week, that was illegal. But in 1905, the Supreme Court struck the law down under the 14th Amendment.

Prof. Erwin Chemerinsky: The Court said baker's have the freedom to work as many hours as they want and to take that away interferes with freedom of contract and that therefore violates due process.

John: But then a few years later the New Deal comes along.

Prof. Erwin Chemerinsky: After 1937 the Supreme Court said when it comes to economic regulation, like minimum wage or maximum hour laws, the Court should defer to legislatures.

John: The *Lochner* era may have ended a long time ago. But for judges and policymakers today, *Lochner* is alive and well as a model of what judges should not be doing.

> **Senator Obama**: The basic argument in Lochner was you can't regulate the free market because it is going to constrain people's use of their private property.

John: That's Barack Obama in 2005 when he was a senator.

> **Senator Obama**: If Supreme Court Justices can overturn any economic regulation -- Social Security, minimum wage, basic zoning laws, and so forth -- then they would be usurping the rights of a democratically constituted legislature -- that suddenly they would be elevated to the point where they were in charge as opposed to democracy being in charge.

John: According to scholars, and judges, and policymakers on both the left and the right, the Supreme Court is being activist and unrestrained and elevating itself above the will of the people when it uses substantive due process to strike down democratically enacted laws.

> **Chief Justice Roberts**: Allowing unelected judges to strike down democratically enacted laws based on rights that are not actually written in the Constitution raises obvious concerns about the judicial role.

John: That is Chief Justice John Roberts in 2015, dissenting from the Supreme Court's decision in *Obergefell v. Hodges*, which, by a vote of 5 to 4, held that states must recognize same-sex marriages even if a majority of legislators and voters in those states would prefer not to.

> **Chief Justice Roberts**: Today five lawyers have ordered every State to change its definition of marriage to one that matches a new one that they favor, because those

> lawyers have in their words new insight and a better informed understanding of liberty. Just who do we think we are.
>
> **Chief Justice Roberts**: The deepest problem with the majority's decision today is the disrespect it shows to democratic process. In recent years people around our country have engaged in a serious and thoughtful debate about same-sex marriage. Voters have cast ballots in favor or opposed and sometimes changed their minds. … When decisions like this are reached through democratic means, some people will inevitably be disappointed with the results.

John: And according to Chief Justice Roberts, the majority's reasoning is straight out of *Lochner*.

> **Chief Justice Roberts**: Ultimately only one precedent supports the majority's interpretation of the due process clause, Lochner v. New York. In that case decided in 1905 the Court struck down a State law setting maximum hours for bakery employees. … In the years after Lochner, the Court struck down nearly 200 other similar laws that the Court saw as a "interference with the rights of the individual." Now the Lochner era is now regarded as one of the most unprincipled periods in the Court's history.

John: For skeptics of substantive due process, it's this wishy-washy doctrine that lets judges impose their own policy preferences. These skeptics point out that the right to contract isn't in the text of the Constitution and neither is the right to same-sex marriage. And they argue that judges kind of just made those rights up out of the blue and called them due process when they wanted to strike down the laws they didn't like.

> **Prof. Lino Graglia**: If you want to know where tyranny occurs in this country, it's from judges. Tyranny is exercise of coercive power without accountability, and that's judges.

John: That's Professor Lino Graglia of the University of Texas School of Law.

> **Prof. Lino Graglia**: Why would anyone want to say, yes all laws have to be reasonable and the judges will decide what's reasonable. That's simply a giant transfer of legislative power to judges.

John: Professor Graglia is a conservative, but I promise you, take my word for it: He doesn't like substantive due process even when it would lead to an outcome in a specific case that he and conservatives generally would support.

> **Prof. Lino Graglia**: What is rational or not is usually a matter of judgment -- a policy choice. And policy choices in a democratic system are for legislators not judges.

John: So substantive due process has come under heavy criticism. Today, the Supreme Court subjects a small minority of legislative decisionmaking involving so-called fundamental rights to strict scrutiny while giving legislators very wide latitude in the vast majority of cases. And for some scholars and judges, even that is too much. But these folks are wrong. Due process has always afforded meaningful limits on the substance of government power. Reasonable people can argue about the results in specific cases or about what precise limits due process places on the government, but it is wrong to deride substantive due process as something that judges

made up out the blue. If anything the Supreme Court has been too restrained in using the doctrine to protect unenumerated rights.

Prof. Randy Barnett: The due process of law refers to the concept that no one should be deprived of life liberty or property by an arbitrary Act of government.

John: That's Professor Randy Barnett of Georgetown Law.

Prof. Randy Barnett: Originally it meant you could not be deprived of life liberty or property by an arbitrary act of the Crown. And by arbitrary it meant without sufficient reason. That's what arbitrary means without sufficient reason. Just according to the mere will of the Crown, the mere will of the King.

John: You must do as the King commands because that's what pleases the King. Of course, in England due process only applied to the Crown. It didn't apply to Parliament.

Prof. Randy Barnett: In this country after we adopted the Constitution all three branches of government were subjected to the constraints of the Constitution, including the legislative branch. So we don't have parliamentary supremacy here as they did in England. The legislative branch too is constrained. And therefore they may only exercise power where they are deemed to be competent. That's the word that was always used -- competent to exercise their powers within their limited scope.

John: In America, if you're are going to prohibit people from doing something they would otherwise do or mandate that they do something they would not otherwise do, you have to be pursuing a legitimate purpose. A law cannot just be the mere whim or fancy of whoever is in power.

Prof. Randy Barnett: If you go back and look at many of the old cases, very famous old cases, you'll see that judges and justices distinguish between what they called a law and what they called a mere act of the legislature. And once you are aware of that distinction, you start seeing it everywhere.

John: For instance, in *Calder vs. Bull*, from 1798, Justice Samuel Chase wrote the following, quote:

Prof. Randy Barnett: "An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority."

John: And then in McCulloch v. Maryland which decided in 1819, Chief Justice John Marshall wrote, quote:

Prof. Randy Barnett: "Should Congress under the pretext of executing its powers pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal -- should a case requiring such a decision come before it -- to say that such an act was not the law of the land." So at the end here you see the distinction between act and

law of the land. And what is an act that is not the law of the land? That is a measure passed by Congress that purports to be exercising its enumerated powers, but is really not.

John: Which leads to the obvious question.

Prof. Randy Barnett: Once you realize that a law -- to be a valid law -- a legislative act must be within the competence of a legislature to enact. The next obvious question is well what is within the competence of a legislature to enact.

John: Fast forward to 1868, and after the ratification of the 14th Amendment the federal courts, for the first time, now have broad jurisdiction over state law. And that means they need to develop a theory or doctrine to figure out the limits of state legislative power. And the theory that gets settled on is called the police power, which by the way is not usually about the police.

Prof. Randy Barnett: Immediately upon passage of the Fourteenth Amendment a theory of the police power began to be developed ~~in~~ most prominently by Thomas Cooley who was the Chief Justice of the Michigan Supreme Court as well as the dean of the Michigan law school.

John: Thomas Cooley was one of the most influential legal scholars in the second half of the 19th century. And in 1868, he published a treatise where he tried to articulate a theory of the proper powers of states based on previous state court decisions.

Prof. Randy Barnett: Thomas Cooley in his treatise said that the question confronting judges in any case involving a purported exercise of the police power is as follows quote. “Whether the

state exceeds its just power in dealing with the property and restraining the actions of individuals." So where have we heard this phrase "just powers" before? In the Declaration of Independence.

John: Right at the beginning. We have rights to life, liberty and the pursuit of happiness.

Prof. Randy Barnett: The very next sentence says quote "to secure these rights governments are instituted among men deriving their just powers from the consent of the governed." Not all powers. Not unlimited powers, but their just powers. And Cooley is echoing the Declaration when he refers to just powers. So the police power theory is the theory of what constitutes the just powers of the legislature that they are competent to exercise when restraining individual discretion.

John: And how does Cooley say state courts had been going about defining what their just powers were?

Prof. Randy Barnett: So it's difficult to summarize too succinctly what is actually a major treatise that Cooley presents. But there is one quote in his treatise in which he summarizes what the police power is -- the scope of the police power. And here's what he says: "The police of a state embraces its system of legislation by which it is sought not only to preserve the public order and to prevent offences against the state but also to establish for the Intercourse of Citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights and to ensure each the uninterrupted enjoyment of his own so far as is reasonably consistent with the like enjoyment of the rights of others.

John: What Cooley is saying is that states can obviously outlaw things like theft, murder, and fraud. But also they can regulate people's activities to prevent one person, when they're exercising their freedom, from infringing on the rights of other people.

Prof. Randy Barnett: It's the prevention of a conflict of rights, like for example, you can think of a building code regulation which says how a building should be built or the regulation of a food processing company to see how food can be processed to prevent somebody from eating tainted food or having a building collapse on them. Sure after the fact you might be able to sue for negligence. But an appropriate exercise of the police power according to Cooley involves the prevention of rights violations in advance of them happening.

John: So that's a pretty broad grant of authority to state legislatures. But …

Prof. Randy Barnett: You still have the question of how deferential courts or judges should be to the assessment of the legislature that they are exercising one of their approved powers and they're not exercising some other power that they don't have.

John: And Thomas Cooley in his treatise says listen courts do need to ensure that legislators are are pursuing legitimate ends and are not simply advancing the interests of one group over another. So for instance, taking private property from A and giving it to B. That was an improper end of government and violated due process.

Prof. Randy Barnett: What this all tells us is that one of the things judges or justices should be looking to in assessing whether a legislature is acting within its just powers is to see is whether the legislature is actually asserting its powers in good faith. Whether it is really asserting one of its powers as opposed to merely pretending to do so. How does a court do that? It does not do so by actually examining the real motives of real legislators who have many to motives for doing what they're doing. It does it by asking the legislature? Okay. What is the power you say you're exercising and then it compares the means the legislature enacted to the end it claims it's pursuing and seeing if there's some degree of fit between the means and the ends.

John: And soon after people started challenging state laws in federal court under the 14th Amendment, that's what the Supreme Court starts doing. But, as we talked about in on Episode 5, even if the Court was willing to announce a rule that to comply with due process and equal protection, a law had to be reasonable, the Court did not consistently apply that rule. For every decision where the Court dug in to the particular facts of a case to smoke out pretext, there are a handful of decisions where the Court just deferred to the legislature. The most infamous example of that is *Plessy v. Ferguson* from 1896.

Prof. Randy Barnett: In Plessy, the Court is entirely completely totally deferential to the Louisiana state legislature that passes the first separate but equal law that goes to the Supreme Court and basically segregates railroad cars on private railroads. And why did they do so? What was the legitimate basis? What was the proper police power rationale for doing so? The Court deals with this in a single paragraph in which they essentially say that legislators are free or empowered to protect the health and safety and comfort of the public without any statement about whether there had been a problem whether there is a problem. Not a single realistic

inquiry as to why this legislation was enacted. But we know why this legislation was enacted. It was enacted to reimpose subordination of African Americans.

John: So in a case like Plessy, which everyone now believes was wrongly decided, what was missing was a realistic inquiry about the connection between the law and a problem to be addressed. Which brings us to Lochner, the bakeshop case. Most people believe it was wrongly decided -- but because there *was* an inquiry into the connection between the law and the problem to be addressed. And as Lochner itself demonstrates, using a realistic inquiry to protect rights doesn't -- contrary to the popular narrative -- mean the end of all government regulation or that judges are usurping legislative power.

Prof. Randy Barnett: People say that the Lochner court was a laissez-faire court. This is demonstrably false, and my number one piece of evidence for the fact that it was not a laissez-faire court is the case of -- wait for it - Lochner v. New York. How do we know that? We know that because this one provision of the Bakeshop act the maximum hours law that was at issue in Lochner was part of a much larger comprehensive Bakeshop Act that regulated the health and safety of bakeries. And it was an elaborate health and safety code. It regulated the height of the ceilings and it regulated the what the floors can be made out of and where the washroom facilities would be and what and how the walls would be painted and what animals could be in the vicinity. Cats only, you know, why cats are allowed -- to get the vermin. But nobody else. And when and where workers would sleep and where they would not sleep and what the ventilation would be. Now the terrible evil awful Lochner court that is said to be a laissez-faire court that doesn't believe in any regulation. They had no problem with this whole Bakeshop act. The reason why we know what the Bakeshop act says is because it's in the

Lochner opinion itself when the court said all of these are legitimate health and safety regulations.

John: There absolutely were health and safety issues with bakeshops which were often in the basements of tenements where there wasn't adequate ventilation and the bakers were breathing in flour dust and getting respiratory diseases. And the ovens you couldn't turn them on and off, someone had to be tending them all the time. So at smaller bakeries that didn't have that many employees, bakers did have to work really long shifts and they often slept right near the ovens. It wasn't great. But the Court said that the health and safety issues were going to be addressed by the other parts of the Bakeshop Act.

Prof. Randy Barnett: The only provision they had a problem with was the maximum hours law because they didn't see a adequate connection between maximum hours laws and the health and safety either of the general public and secondarily of the bakeshop workers themselves. They didn't see an adequate connection.

John: Now it's possible that the Court was just wrong about the maximum hours law and there was an adequate connection. Maybe.

Prof. Randy Barnett: They were well aware of the fact that this provision got dropped into the Bakeshop Act by the Bakeshop unions.

John: The bakeries that were going to be affected by the law were small bakeries. The unionized bakeries on the other hand were the big businesses where bakers already worked in shifts of less than 10 hours and thus already complied with the law.

Prof. Randy Barnett: Many of these bake shops were owned by ethnic owners, ethnic bakers -- particularly Germans Italians and Jews. And as the labor movement was picking up steam and the bakeshop union was trying to organize bakeshop workers, these small ethnic bakeshops resisted unionization in a way that the bigger corporate bakeshops did not.

John: And if you want to use the law to hinder your competitors, in this instance, a maximum hours law does the job. And the Court was aware of that.

Prof. Randy Barnett: Now if you're going to come up with a law that's going to target these small ethnic bakeshops that won't unionize, a maximum hours law does the trick. And that is what I think the Supreme Court was skeptical of. They were skeptical in the very same way that the court should have been skeptical in Plessy versus Ferguson about the assertion of a police power to segregate people on railroad cars.

John: So is Lochner really a case in which the Court used substantive due process to destroy the government's ability to regulate? No. During the *Lochner* era, the Supreme Court upheld all kinds of regulations. It upheld zoning laws. It upheld segregation laws. It upheld eugenics. If anything, during the *Lochner* era the Supreme Court court was insufficiently zealous about using due process to protect individual rights.

Prof. Victoria Nourse: The Court upheld far more legislation than it struck down. This was the Progressive Era after all.

John: That's Victoria Nourse, a professor of law at Georgetown University.

Prof. Victoria Nourse: So they upheld the vast amount of laws like consumer protection, regulation of liquor, lotteries, fight films, stolen cars, seditious speech, and birth control.

John: The Court even upheld … maximum hours laws.

Prof. Victoria Nourse: The Court itself appeared actually to undercut *Lochner* almost immediately.

John: In 1908, just three years after *Lochner,* the Supreme Court upheld a maximum hours law for women in a case called *Muller v. Oregon*. The state's arguments about women and their role in society would not be so persuasive today.

Prof. Victoria Nourse: The norm was that women would stay home. The theory was that they wouldn't take care of their children and this would undermine the health of the family

John: And then in 1917, in *Bunting v. Oregon*, the Court upheld a more general maximum hours law for all industrial workers.

Prof. Victoria Nourse: So when we look at the cases that follow -- *Bunting* and *Muller* -- they were better argued, more arguments about the harm to society as a whole.

John: Which suggests that maybe the state of New York could have won the *Lochner* case if they had just made better arguments and presented more evidence to justify the law. Arguments and evidence that later won day in other cases. So given that, where does this idea that the Supreme Court was super anti-regulation come from?

Prof. Victoria Nourse: One of the most interesting episodes in the history of *Lochner* is one that takes place in the public sphere not within a court case or legal doctrine. And that is the indomitable Teddy Roosevelt actually made *Lochner* famous by calling it the Bakeshop Case. Newspapers at the time actually misspelled Lochner quite a bit. They never really used the name.

John: Teddy Roosevelt, the former President, who had been out of office but then decided to run again in 1912. A major theme of his campaign was that the Supreme Court was subverting democracy and the will of the people and imposing their own personal policy preferences.

Prof. Victoria Nourse: So when he was back from his African safari in 1910 Roosevelt delivered a sensational speech to the Colorado legislature attacking the Supreme Court. He specifically cited two decisions. One was *Lochner* and the other was *E.C. Knight*, an antitrust case. The Court had become the refuge, said Roosevelt, for rich men who wish to act against the interest of the community as a whole.

John: Ultimately, Roosevelt did not retake the presidency, but his political narrative about *Lochner* is the dominant one today. Chief Justice John Roberts:

> **Chief Justice Roberts**: Allowing unelected judges to strike down democratically enacted laws …
>
> **Senator Obama**: Suddenly they would be elevated to the point where they were in charge as opposed to democracy being in charge.
>
> **Chief Justice Roberts**: In the years after Lochner the Court struck down nearly 200 other similar laws.

John: That anecdote, that the Court struck down over 200 statutes after *Lochner*, is wrong.

Prof. Victoria Nourse: This is repeated in a variety of casebooks and -- including by various members of the Supreme Court. In fact, there's good empirical evidence that this is overstated.

John: It turns out to be an example of something everybody believes because it’s repeated so much, but that just isn’t true. According to Professor Nourse, the source for this claim is an article written by then-law professor and future Supreme Court Justice Felix Frankfurter. In an appendix he lists 200 cases over a 60 year period from the 1870s to the 1930s where the Supreme Court struck something down.

Prof. Victoria Nourse: This list, which was created by Felix Frankfurter, who was a New Deal liberal, were not what we would today call substantive due process cases. They weren't about fundamental rights. This list included in fact cases that involved everything from how to serve process, jurisdiction, taxes, First Amendment cases, and a lot of utility rate cases.

John: On closer inspection, according to Professor Nourse, only about 30 of the 200 cases on Professor Frankfurter's list are what we'd think of as substantive due process cases. And rather than revealing a general hostility to regulation, what those decisions seem to show is that the Supreme Court was worried about something very specific.

Prof. Victoria Nourse: My own view is that the court had a very deferential view to most regulation, but that it tended to pick out labor laws and setting of rates for labor as something they were particularly worried about.

John: We talked about labor unrest on the last episode.

Victoria Nourse: What the court was really worried about at the time was labor and organized labor. Organized labor at the end of the 19th century was a violent set of folks. I mean there were bombings. People died. There were riots. It was also associated with actual expropriation of property. So giving of property from one party to another, which is the core of what the justices were worried about.

John: So the *Lochner* era wasn't really this golden age of libertarian economic liberty jurisprudence. What really defines the *Lochner* era is an approach to unenumerated rights, rights that aren't spelled out in the Constitution, that has largely been abandoned.

Prof. Victoria Nourse: What's interesting about the history of Lochner is that it is such a different world than contemporary doctrine.

John: As *Plessy* and a bunch of other cases show, the Supreme Court dropped the ball a lot. But when they did apply the police powers doctrine and required a state to put forth a sufficient justification to restrict liberty, the Court wasn't too hung up on exactly what the liberty was and whether it was enumerated in the Constitution or not. They didn't do say ooh sorry there's no right to contract in the Constitution. Or say show me where it says parents have a right to send their kids to private schools. Or where it says the government can't ban schools from teaching foreign languages. It was enough to say that liberty was being restricted, and then the analysis moved on to whether there was a good reason.

Prof. Victoria Nourse: The Court actually thought that to enumerate rights was a very bad idea. Because it undermined the idea of a right. One could not possibly name all of the rights associated with freedom. One could not actually specify them and that if one tried to specify them that would actually undermine the nature of those rights and their expansion.

John: Today, the Court is all about specifying rights.

Prof. Victoria Nourse: It's the opposite in that sense of today where the court tends to define what is a right to privacy? What is a right to life? What is the right to die?

John: It's a really different approach. Ever since a 1938 case called *Carolene Products* -- that we talked about on Episode 5 -- the Court has been in the business of specifying which rights are special and thus deserving of more protection and which rights are not so special. And for years, the Court did not add any new rights to the list of special rights.

Jeff Rowes: For decades after the New Deal, the Supreme Court didn't elevate any new unenumerated rights to fundamental status.

John: That's my colleague Jeff again.

Jeff: But that changed in 1965, in *Griswold v. Connecticut*, when the Supreme Court struck down a state law forbidding using or possessing or selling contraception. And the Court said there that privacy, marital privacy was a fundamental right and that this was a new unenumerated fundamental right that going forward would in effect get strict scrutiny.

John: And then a few years later, *Roe v. Wade*.

Jeff: So the reaction to the line of cases from *Griswold* through *Roe* and other reproductive rights decisions was that conservative justices and legal scholars said: the Supreme Court is reviving *Lochner*. The Supreme Court is overturning the mandates of democratically-elected elected branches, and that has to stop.

John: But of course the Court wasn't reviving *Lochner*. Rather, what was being revived was Theodore Roosevelt's mistaken narrative about *Lochner*. In any event, over time the Court kind of soured on elevating more rights to fundamental status. And in the 90s, the Court, in a unanimous decision, basically closed the door.

Jeff: In 1997, the Supreme Court basically put stake in the heart of a fundamental substantive due process in a case called *Washington v Glucksberg*. And the court ruled unanimously that Washington state's ban on physician assisted suicide didn't violate due process.

John: The Court articulated a test for when a new unenumerated right can be declared fundamental, and it was a test that was essentially impossible to meet.

Jeff: Justice Rehnquist rearticulated the test for fundamental, substantive due process and its two prongs. And basically prong one, you have to define the right with specificity and then prong two, you have to show that this right is deeply and objectively rooted in American history and that justice and ordered liberty wouldn't be possible without it. So in practice, this is basically a carnival game that you can't win no matter how hard you try. Because the Court demands that you articulate the right so specifically that once you have attained the desired level of specificity, you can no longer characterize it as being deeply rooted.

John: For example, in a case called *Abigail Alliance*, a terminally ill college student sued the FDA to get access to potentially life saving drugs.

Jeff: Now maybe Abigail's experimental medicine wouldn't have worked and she would have died anyway, but she wanted to try. And she argued that you have a fundamental substantive due process right -- a fundamental unenumerated substantive due process right -- to defend your own life if you're not hurting anybody else. It has always been true since ancient times, surely in every culture that you can take reasonable steps to save your own life. But the D.C. Circuit applying *Glucksberg* says, no, no, no. The right in question isn't the right to defend your own life by any reasonable means, such as taking even experimental medication. You have to define that right with specificity under *Glucksberg* and the specific right here isn't saving your life. It is the right to access drugs that are in the FDA approval stream and they've passed Phase 2 safety testing, but they haven't gone through Phase 3 efficacy testing. So here's where the carnival game comes in. Once the court makes you define the right in terms of things like various phases in the FDA approval stream, clearly you can't show that that right is historically rooted. And so there was no way for, for her to win. And unfortunately, the Supreme Court didn't take up her case.

John: In a case that Professor Barnett litigated called *Gonzalez v. Raich*, his client asserted that she had a right to preserve her life, but the court said no, that’s not specific enough. You’re asserting a right to preserve your life using medical marijuana, which isn’t deeply rooted. In another case, *Bowers v. Hardwick*, the Supreme Court upheld a law criminalizing same-sex sex and it said the right being asserted was not the right to have private, consensual relations but was in fact the right of quote “homosexuals to engage in sodomy.” But in the years since the Supreme Court has kind of backed off the *Glucksberg* test.

Jeff: And yet six years later, the Supreme court seems to reconsider in *Lawrence v Texas*. This was a case about a Texas statute that criminalized same sex sexual relations. Justice Kennedy wrote the majority opinion, which found that there is a unenumerated due process right to engage in consensual, noncommercial adult sexual relations behind closed doors.

John: And was that right deeply rooted in American history? The Court skipped over that.

Jeff: Justice Kennedy's opinion didn't apply *Glucksberg*. It didn't say whether there's a new fundamental right or not. It just struck down the law.

John: So did the Court create a new fundamental unenumerated right? They didn't say. Was it instead applying the rational basis test, the test that applies to nonfundamental unenumerated rights? The Court didn't say. Was *Glucksberg* overruled and now new fundamental rights were back on the table? The Court didn't say.

Jeff: So the court took up substantive due process again in the gay marriage case in 2015, *Obergefell v. Hodges*. And there, the Court explicitly stated that there was, there is a fundamental and unenumerated substantive due process right to marry. And this is the, the right that was recognized in *Loving v Virginia*, which struck down the ban on interracial marriage. And that unenumerated right applies just as strongly to same sex marriages.

John: So today, the door is no longer shut on the Court elevating new unenumerated rights to fundamental status. But it's not something that happens very often, and it's not always clear in a

given case if it is happening. And there are two new justices on the Court, so who knows how the doctrine will shift next. At IJ, we have a couple ideas.

Jeff: IJ's mission in the area of substantive due process is twofold. First, we want courts to start taking economic liberty and private property rights seriously, and one aspect of that might be elevating them to something resembling fundamental rights status, or even just calling them fundamental rights so that they get heightened judicial review. Or alternatively, if the courts are going to hold onto rational basis review and treat economic liberty and private property rights as non fundamental, then rational basis review has to be a little toothier or a little more meaningful. The plaintiffs should be able to use evidence to refute government justifications for a law, and courts shouldn't take those justifications just at face value. We also want people to understand the principle of judicial engagement that the courts are an equal branch of government and that they have a specific responsibility to ensure that the elected branches comply with the Constitution. And that is not courts elevating themselves above the will of the people that is courts doing what they're supposed to do.

John: So that's a quick history of substantive due process. We're going to take a break. When we come back: substantive due process and Akron's tent city.

==========

Break 2: Musical interlude

==========

John: Last winter, in January 2019, the city of Akron shut down the tent community. But before that, Sage and the residents got plenty of process. Hundreds of people emailed the city council in support of the tent community. Supporters packed public meetings, and everyone got to say their piece.

> **Resident 1**: My wife teaches at a daycare that's right around the corner from the Homeless Charity. My little girl plays in the playground that's just down the street from the Homeless Charity. This place is not dangerous. These people are not scary. What they're doing there is a beautiful thing.

> **Social worker**: When it comes to housing individuals as a case manager, which is my job to help eliminate barriers so that these individuals can find jobs and be sustainable, housing is a very difficult barrier. Luckily, I'm able to call Sage.

> **Resident 2**: You can't just turn these people away and sweep it under the rug because the problem is not going to go away.

John: Remember the neighbor who sued Sage and said tent city was a nuisance? Well, he became a supporter too, and his lawyer testified at a hearing on behalf of tent city. And IJ was at the hearings too.

> **Jeff**: Good afternoon. My name is Jeff Rowes. I'm a senior attorney with the Institute for Justice … whatever public interests the city is advancing by saying no to the conditional use permit … those interests are dwarfed by the harms that will be inflicted.

John: Not that everyone testified in favor. But ultimately after multiple rounds of hearings and expert reports and official visits to tent city, there was no evidence whatsoever that the tent community was causing any real, actual harm. And most of the neighborhood in fact supported the shelter.

Jeff: Sage's neighborhood in Akron is a low income neighborhood. And lots of non-homeless people would come to the day center to get services or to get food or just to contribute and volunteer, help out to be part of the community.

John: Sage tried to negotiate with the City. He told the city council that if it would grant him a permit that he would agree to an array of conditions, on noise and trash, and that if the residents didn't abide by those conditions the tent community would have to close. But ...

> **Montage of city officials**: negative economic impact … not compatible … not harmonious … disturbing to existing or future neighboring uses … disturbing to surrounding uses … an inappropriate land use … this particular residential location is an appropriate place … it is an inappropriate land use … irreversible damage … quality of life of the neighboring properties

John: After months of hearings, the city council voted 8-4 to shut down tent city.

> **Council member Omobien**: Sage I can tell you that I appreciate your passion. … But I tell you that we do have in this community a fairly comprehensive way of trying to address this issue.

John: Akron does not have a fairly comprehensive way of addressing this issue.

> **Mayor**: We will never be okay with people living in tents as a viable option, especially when there is capacity out there to live in permanent shelters and live in housing.

John: That was the Mayor. We're not sure what extra capacity he's talking about.

Jeff: The city's position is that tents just aren't fit for human habitation. And it would be better for everybody who was living in a tent to be housed, which of course is true. But the city is denying an adequate second-best solution in favor of an imaginary first-best option. It's not as though telling people they can't live in a tent Sage's miraculously means they're going to get into permanent housing. Just means they're going to go back into the woods where their lives are much, much more dangerous.

John: Unfortunately, Sage can't let the residents sleep inside his building because it's old and would need to be extensively remodeled with sprinklers and bathrooms and other upgrades to pass inspection. Which is not financially feasible.

Jeff: Most of the folks who lived in tents in Tent City when I got there have moved into housing. And that's great because that's the whole point of Tent City. It's not designed to be permanent. But since it has been shut down there are people who did not get housing and went back to the woods. And then of course, there are just people falling through the cracks and becoming homeless every day who come to Sage, and he doesn't have anywhere to tell them to go. And so if they can't find some kind of shelter, they're out in the woods.

> **Sage**: So I'm taking you to a place called Tweaker Mile. I want you to just experience. So what we're doing here is we're pulling up right by a building supply company.

John: Tweaker Mile is like a two-minute drive from Sage's. You walk between some old factories, and into the woods.

> **Sage**: this used to be a railroad track. Huh, so I'm taking you in a you know, fairly secluded place. I want you to experience what you know, where people live and who they are as human beings. These are not bad people you don't really need to be afraid to be back here.

> **Sage**: Is that ?
>
> **Former Tent City resident**: Of course.
>
> **Sage**: Hi honey, how are you?
>
> **Former Tent City resident**: Good. How are you?

John: She didn't want to talk. She's pregnant in the woods.

Sage: Imagine going to your prenatal and doing all your pregnancy stuff and living in a tent.

Sage: Hey Robin.

Robin: How are you?

Sage: Good, buddy.

John: That's Robin. He's the man we heard from earlier who lost his wife in a house fire.

Sage: Hey, I got a guy he flew in to talk to some people and I was wondering if he'd be willing if you be willing to talk to him?

Robin: Yeah, I'd be glad to.

Sage: Robin's a very interesting--

John: John. Nice to meet you.

Robin: Hey John. Good to see you brother. How's it looking?

Sage: Hey Joyce. This looks beautiful.

Robin: We're really working. We got, you know, we got floor going in down here in the gazebo.

John: Robin is back in the woods. He's there by choice, and it's because he was inspired by the tent community and wanted to recreate it as much as possible for other people.

> **Robin**: To come into our camp all four people have to vote yes. I don't know if I'll be homeless rest my life. But if it helps, you know least one or two people get back on their feet, it's worth it to me. And we get left alone here because we're far enough back where no one hears us. No one sees us which is what the city wants. They don't want to see us. They don't want to hear us. We keep our camp clean. Picked up.

John: The city shut Robin's camp down a few weeks ago.

Jeff: So here's the reality. There are lots of people living in camps, informal camps, tents, all over Akron. And they would be better off if they had permanent housing to go to. But since that's not possible, they would be better off as a kind of second path to be able to go to a place like Sage's. And it's important to understand we're not saying that anywhere in Akron, any residential neighborhood, for example, is an appropriate place to have an emergency tent community for the homeless.

John: But Sage's neighborhood is an appropriate place. So Sage is suing the city, and the argument is that the right to due process protects Sage's right to use his property to save people's lives and also that the residents of tent city have a due process right to be rescued.

Jeff: There's an interesting substantive due process case on point out of the Seventh Circuit. This was a case about a boy who unfortunately drowned in Lake Michigan. When it was reported that he'd gone down and hadn't come up to the surface. There were some people there, including private divers and some police officers who were willing to dive in and try to save this

boy. And somebody from the County showed up. A County sheriff roared up in a boat and prevented anybody from attempting a rescue.

John: The county had a policy that only the fire department could attempt rescues, and the deputy was enforcing that policy.

Jeff: Well of course, if you're drowning and underwater, you can't necessarily wait 10 minutes for the who the government thinks are the right officials to come and save you.

John: So while scuba divers stood by, the boy drowned.

Jeff: His mother brought a challenge and one of her claims was a constitutional claim that the County had interfered with the right of the rescuers and her son to rescue someone in immediate peril. And the Seventh Circuit recognized that indifference to human life is a gross abuse of power and a violation of substantive due process -- that we have an unenumerated right to have the government take our lives seriously. And that translates to our homeless case in Akron. Because the crux of our argument is that the government, in kicking people off of Sage's private property, are denying Sage's property rights, and also Sage's right to rescue these people and the right of those people to be rescued so that they don't have to be back in the woods or under underpasses or in other circumstances that no sane person would want to be in.

John: And we decided to file the lawsuit in state court, rather than federal court.

Jeff: We brought suit in Ohio state court under the Ohio due process clause rather than in federal court under the federal 14th amendment due process clause. And the principles are basically the same. We feel like we would win in federal court, but Ohio has actually interpreted its property rights and due process provisions as being even more protective of liberty than the way the federal courts look at the federal constitution.

John: Which I admit is a weird twist for a podcast about the 14th Amendment. But it goes to show: Different people have different interpretations of what due process means, and that includes people who sit on courts.

Conclusion: Next time on Bound By Oath. The beginning of the end. Of the season. And also the end of the end of the season. It's the last episode, where we'll cover the Excessive Fines Clause of the Eighth Amendment, which the Supreme Court said earlier this year, for the first time in 150 years, was incorporated against the states by way of the Fourteenth Amendment. We'll release that episode in February on the one-year anniversary of that decision. And -- good news! We have officially gotten the green light for a Season 2 of Bound By Oath, where we'll bring you more stories about the Constitution and the people it matters to today. Thank you for listening.

Credits: Bound By Oath is a production of the Institute for Justice's Center for Judicial Engagement. This project was edited by Charles Lipper at Volubility Podcasting. Writing and narration by John Ross. Vision and expert guidance by Sheldon Gilbert. Project management by Rachel Hannabass. With voice work by Elisabeth Noone.