Bound By Oath | Season 3 | Episode 3 - A Lost World

John: Hello and welcome to Episode 3 of Season 3 of Bound By Oath. On this episode, we're going to cover three historic property rights cases that all took place in a lost world: the world before zoning. Today of course, in most places, what you can do with and build on your land is minutely regulated at the local level. On this episode, we'll journey back before any of that to a time when land-use regulations were sparse, and governments were just beginning to tell people where they could and couldn't live and what they could do on property that they owned. Each of the three cases illustrate the adage that property rights are civil rights and that the freedom to do what you want with your own property – within reasonable limits – is a vital safeguard against oppression. Each of the cases also has to do with due process, which – if you'll recall from Season 1 – is the idea that if the government is going to deprive you of your life, liberty, or property it has to have a good reason. The cases range from pretty obscure to downright celebrated – the celebrated one being the Supreme Court's 1917 decision striking down a Louisville, Kentucky residential segregation law that was one of the very rare victories for civil rights during the dark days of Jim Crow. Before that though, we'll start with the first residential segregation case back in 1890, where San Francisco officials ordered all Chinese people to abandon their homes and businesses and either leave the city or relocate to a few blocks that were home to slaughterhouses and other noxious industries. And then finally we'll wind up in Los Angeles with a case about a man who owned a brickyard and who the Supreme Court said was standing in the way of progress. But, as it turned out, his real offense seems to have been that he was standing in the way of a city councilman's personal pursuit of profit. I'm John Ross, thanks for tuning in.

BBO montage

John: In the late nineteenth century, Chinatown in San Francisco was a bustling, thriving place, the cultural hub of about 25,000 Chinese people who lived in and around the city.

Charles McClain: It had a flourishing commercial life with markets and groceries and businesses and people living in lodging houses. As far as one can tell from looking at pictures and reading accounts it was a very busy area.

John: That's Professor Charles McClain of the University of California at Berkeley.

Charles McClain: Chinese merchants were doing something like $15 million a year, which is a huge amount of money.

John: Unlike Chinatowns in other cities, Chinatown in San Francisco was located on prized real estate near the city center – close to wealthy residential neighborhoods and also what would become the city's primary commercial district. And pretty much right since it was built, white residents and city officials wanted to see it relocated to the periphery of the city or eradicated altogether.

Charles McClain: The rhetoric they used was just unbelievable. They referred to it as a moral cancer on the city a vampire sucking on the vital entrails of the city.

John: In 1870, the city's health officer, in a report to the Board of Supervisors, claimed that Chinatown was a source of disease that threatened the entire city – and that the Chinese were quote "moral lepers." In 1878, a member of the nativist Workingman's Party claimed at a public hearing before elected officials that actual leprosy was quote "running wild" in Chinatown and he threatened that if officials didn't force the Chinese out, a mob would instead. In 1880, the mayor

called Chinatown a quote “foul cancer [in] the heart of our otherwise splendid civilization.”

Charles McClain: They were claiming that the Chinese were were criminals. They were perjurers, prone to disease. That they didn't take care of their sick, left them to die on the street. That they were in general a gigantic nuisance.

John: In 1880, the city’s board of health declared Chinatown a nuisance and told residents they had 30 days to leave. Quote: “All the power of the law will be invoked to … empty this great reservoir of moral, social and physical pollution which … threatens to engulf with its filthiness and immorality the fairest portions of our city.”

Charles McClain: The Chinese are accused of virtually every vice under the sun. So these are not sober assessments of a public health condition by a rational body.

John: However, the city backed off after a local lawyer hired by the Chinese consulate pointed out that the board of health hadn’t followed the rules: to declare a property – much less a whole neighborhood – a nuisance there needed to be a judicial proceeding and the gathering and presentation of evidence. Not just a quote “quick visit to certain premises in the area.” Moreover, the lawyer wrote, if the city persisted in trying to evacuate Chinatown, property owners would be quote “privileged to resist with force.”

Charles McClain: A lot of residents lived in crowded quarters, certainly. And there were undoubtedly some unsanitary conditions as there were in many parts of the city.

John: Unsanitary conditions were a normal feature of city life in the nineteenth century, and there’s nothing to suggest that conditions in Chinatown were particularly bad. According to

Professor McClain, the health statistics that are available suggest that if anything residents of Chinatown were less likely to suffer from diseases like cholera and leprosy than other residents elsewhere in the city. Nevertheless, 10 years after the first attempt, in 1890, the city tried to evacuate Chinatown once again. And instead of a city agency, the Board of Health, acting unilaterally, this time the city's elected officials, the Board of Supervisors, passed a law.

Charles McClain: San Francisco Board of Supervisors passed a law saying that all the Chinese in San Francisco, not just in Chinatown but anywhere – quite a few lived outside, should either leave the city or remove to an area of the city that had been set aside for slaughterhouses.

John: The ordinance gave them 60 days to pack up and go. They could leave the city entirely or relocate to a few blocks of the city that had been set aside for noxious industries – in other words, a ghetto – where they would have to accept whatever terms landowners in that area were willing to offer.

Charles McClain: Quite an extraordinary piece of legislation. It wasn't just a prohibition on residence but also on carrying on a business. So you could be, if you were Chinese and living in Oakland but carried on a business in San Francisco, you were affected by this, even though you were residing elsewhere.

John: Soon after, by agreement between the city and the Chinese consulate, a single resident of Chinatown was arrested.

Charles McClain: It was a kind of collusive arrest in that it was was designed to test the validity of the ordinance.

John: The deal was that only one person would be arrested. The arrestee would file a habeas corpus petition seeking their release on the grounds that the ordinance was invalid and in the meantime would be released on bail. But then the supervisor who sponsored the ordinance, and who was apparently unhappy with that arrangement, made a move of his own, securing blank arrest warrants and sending the police out to collar more people – with the press invited along to witness. Officers seized 20 Chinese men at random and, to add to the indignity, tied their queues – the long braids they wore at the back of their heads – together. Supposedly to keep them from escaping. All of which greatly alarmed Chinese diplomats in Washington, D.C.

Charles McClain: The Chinese minister in Washington voiced a protest to Secretary of State Blaine ...

John: … James Blaine, whom we have had occasion to talk about before on this podcast because of his fierce anti-Catholicism ...

Charles McClain: … about this ordinance, and saying that the federal government, under the terms of the treaty with China, was under an obligation to do something about this.

John: Under a treaty with China called the Burlingame Treaty, the federal government had taken on the obligation to protect the Chinese from quote “ill treatment at the hands of any other persons” and to quote “secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed” by U.S. citizens.

Charles McClain: And Blaine's response was you can resort to the courts. That's your remedy. You can go to federal court and challenge the ordinance. We, the federal government don't have any obligation to do anything else. The Chinese, of course, expected more. They wanted at

least a statement, I think from the federal government that this was wrong.

John: So they went to federal court. The case is called *In re Lee Sing*, which, shorn of Latin, means in the matter of Lee Sing. In defense of the ordinance, San Francisco's lawyers made the arguments that we mentioned earlier. That Chinatown was overcrowded and unsanitary and the source of contagion. That Chinese people were themselves are despicable, prone to vice, and that their presence hurt property values in neighboring areas. The Chinese, on the other hand, argued that the ordinance was outrageously illegal.

Charles McClain: They're represented by this rather well known San Francisco lawyer who argues that the ordinance violates the 14th Amendment Equal Protection Clause, violates the Burlingame Treaty between United States and China, And then the Civil Rights Act of 1870 that said that all persons in the United States were entitled to the same rights with regard to giving of evidence, making of contracts, protection of property as were white citizens. So those were the three prongs to the argument, and the court accepts every one of them.

John: The arrests were in May, and the law was struck down in August. Here's the judge's opinion. Quote:

> **Lee Sing opinion**: The discrimination against the Chinese … [is] so manifest upon its face, that I am unable to comprehend how this … can fail to be apparent to the mind of every intelligent person, be he lawyer or layman. … Upon what other people are these requirements, disabilities and punishments imposed? Upon none.

Charles McClain: You can't help but be impressed by the vehemence of the language. He doesn't even give a moment's thought to the idea of this could be a legitimate police power

measure.

John: The judge recognized that protecting health and safety is not what was motivating the San Francisco officials.

> **Lee Sing opinion**: The obvious purpose of this order, is, to forcibly drive out a whole community of twenty-odd thousand people, old and young, male and female, citizens of the United States, born on the soil, and foreigners of the Chinese race, moral and immoral, good, bad, and indifferent.

Charles McClain: It's interesting, in addition to mentioning the equal protection clause of the 14th Amendment, he says it also violates the due process clause of the 14th Amendment, because it's an arbitrary deprivation of property.

John: Unfortunately, we don't have much if any biographical information about Lee Sing himself – or the other men who were arrested. There was a Chinese press, which surely would have written about the case. But it doesn't seem that anything survived the San Francisco fire of 1906. Chinatown itself was destroyed but was quickly rebuilt in the same location, where it remains today. The case of *In re Lee Sing*, meanwhile, remains a bit obscure. It's only a trial court opinion, but …

Charles McClain: It is I think the first case involving the state-sponsored residential segregation.

John: And unfortunately, the case marks the beginning of a surge of residential segregation cases that began in earnest a couple decades later in the 1910s.

David Bernstein: In the 1910s, there was large-scale immigration from the south by African Americans to cities around the United States, especially border states like Kentucky.

John: That's Professor David Bernstein of George Mason University.

David Bernstein: White residents are unhappy about this. But they don't have any good legal means for keeping African Americans from moving into so-called white neighborhoods. So they either prevail upon the legislature or an entrepreneurial politician advocates it, and they pass laws to keep black people out of existing white neighborhoods.

John: As we talked about on Season 1, in this period if government officials wanted to pass a law to discriminate based on race that would be upheld in court, they had to be at least a little bit sneaky. If they passed a law that said explicitly – like in *In re Lee Sing* – that a certain race of people can't live in a certain place or that they can't serve on juries or can't vote, that law would get struck down as a violation of equal protection. Instead, a law had to at least look equal. For instance, in the case of *Plessy v. Ferguson*, the Supreme Court upheld a Louisiana law that banned black passengers riding in train cars reserved for whites but also banned whites from riding in cars reserved for black passengers. Likewise, the Supreme Court had upheld bans on interracial marriage – because it was just as illegal for white people to marry black people as the reverse. So in 1914, when Louisville, Kentucky officials passed a residential segregation law, they followed that blueprint.

David Bernstein: The restrictions albeit aimed at black people are, formally at least, equal. If a majority of the people who live on the block are white, that black people can't buy a property there and vice versa.

John: Black people can't move into white neighborhoods. But white people can't move into black neighborhoods. So that's equal, and there's no violation of the equal protection clause. At least that's what the majority of state courts that heard challenges to laws like Louisville's decided.

David Bernstein: There were a couple of victories early, but some of those were reversed. But basically, the record in the state courts was generally unfavorable to challenges to these laws.

John: In Louisville, the ordinance was challenged by a very young civil rights organization, the NAACP. And it might surprise you to learn that the plaintiff challenging the ordinance was a white man and that the defendant defending the ordinance was a black man. The defendant was William Warley, a prominent figure in the African-American community who had started his own newspaper, the *Louisville Press*. Notably, he led a boycott of a theater that forced African-Americans to sit in the balcony. And somewhat controversially, he used his newspaper to name and shame African-Americans who continued to patronize the theater during the boycott. Also, he served as the first president of the newly formed Louisville chapter of the NAACP. In order to challenge the residential segregation ordinance, Warley reached a carefully crafted agreement to buy a house on a majority-white block from a white real estate agent, Charles Buchanan, who also opposed the ordinance. But then Warley reneged on the deal, and Buchanan sued him for breach of contract. It was Buchanan, the realtor, who was represented by the NAACP. Warley, on the other hand, asked the Louisville city attorney to represent him. And the city attorney agreed, knowing full well that the lawsuit was collusive, a test case designed to challenge the ordinance. The suit was likely designed in this way because back then it was harder to bring what today we call pre-enforcement challenges – which allow people to challenge a law without first violating the law, and being arrested and jailed. In any case, the

city attorney played along, presumably because he wanted to ensure the law was upheld. And, at first, it was – in a Kentucky state trial court and then appeals court, which both upheld it as a reasonable measure to, to quote the ordinance itself, "prevent conflict and ill-feeling between the white and colored races." Here's the Kentucky Court of Appeals:

> **KY Court of Appeals**: This state is fully committed to the … separation of the races … not as a measure imposing stigma … but .. in a spirit of mutual helpfulness and racial friendship, each race may attain those heights of human development which are its to be won, and may aid in bringing to this State and nation of ours all that the undreamed future has in store for us.

John: The court reasoned that segregation on trains and in public schools had been upheld – and also the U.S. Supreme Court had recently upheld a Kentucky law that banned even private schools from being integrated – over a dissent from Justice Harlan, who said that the ban was an arbitrary restriction on property rights. In any case, the court of appeals wrote that if the state could prohibit people from contracting privately to provide education, it could surely prohibit contracting to buy and sell housing. And in 1916, *Buchanan v Warley*, arrived at the U.S. Supreme Court, which somewhat unusually held two oral arguments. At the first argument, the president of the NAACP, Moorfield Storey, a white civil rights activist from Boston, argued that not only were mixed-race relationships and mixed-race children not a bad thing, but in fact they were a positively good thing that the government should be encouraging if it wanted to promote racial harmony.

David Bernstein: This was sufficiently radical and unusual at the time, that the state of Kentucky responded to that argument by asking the Supreme Court, which gave its permission, to respond with with briefs about how terrible interracial marriage is. And they wound up having

a new oral argument, before which they filed hundreds and hundreds of pages based on the extant anthropological, sociological, and scientific literature about the dangers of interracial marriage.

John: Anyhow, given that the ordinance at least nominally treated the races equally, one of the other claims that the NAACP brought was a due process claim, that the ordinance was an arbitrary deprivation of property rights without a sufficiently strong connection to protecting public health and safety.

David Bernstein: So in this residential segregation litigation, the government had to explain why we're taking away property rights. So the government has to come up with a rationale under this police power, under these inherent powers of the states.

John: And what were Louisville's reasons for why public health and safety demanded this particular restriction on property rights? Like in *In re Lee Sing*, the city argued that black people were likely to spread disease.

David Bernstein: They argued that since African Americans are poorer and tend to be less healthy, that in crowded urban areas, having black people living near you might contribute to the spread of disease.

John: And just as San Francisco officials argued in *In re Lee Sing*, that when Chinese people moved into a neighborhood, property values fell, Louisville argued the same was true of African Americans.

David Bernstein: And the state had an interest in protecting the property values of existing

property owners.

John: And of course, the city argued that it had an interest in preventing interracial relationships, which, given that the Supreme Court had upheld bans on interracial marriage, must have seemed like a strong argument. If banning interracial marriage was within the police power, residential segregation seems like it would help further that goal.

David Bernstein: But perhaps the one that was potentially most persuasive was that this would prevent interracial violence. Preventing violence is clearly within the police power. That's why you're allowed to arrest people when they commit violence and pass laws banning murder, and armed robbery, and so forth.

John: According to the city's briefs, quote: "The daily papers furnish frequent illustrations of [racial antipathy] from one end of the country to the other."

David Bernstein: And underlying all this was what we now consider a pretty idiosyncratic theological beliefs that the races were destined by God to be separate.

John: In Louisville's briefs to the Supreme Court, the city spent quite a few pages arguing that segregation was ordained by God. But in 1917, the Supreme Court struck down the law.

David Bernstein: The Supreme Court, to the surprise of almost everybody, not only invalidated the law, but did so nine to zero.

John: Initially, Justice Oliver Wendell Holmes drafted a dissent, in which he objected that the lawsuit was collusive – Warley and Buchanan were in fact on the same side and so, according

to Holmes, there was no real dispute and the Court didn't have jurisdiction to hear the case. And doctrinally, he argued that the outcome was determined by the Court's decision upholding segregation on train cars, *Plessy v. Ferguson*. Nevertheless, perhaps because he could not get a second vote, he never delivered the dissent.

David Bernstein: So it wound up being a unanimous opinion written by Justice William Day.

John: Justice Day went through all of Louisville's rationales and rejected each of them.

David Bernstein: He said that with regard to property values that, well, some black people may be obnoxious neighbors and reduce property values, but lots of people may be obnoxious neighbors, and we can't single out people based on race for that purpose.

John: On the issue of racial violence, the Court was perfunctory, dismissing that concern in one sentence, writing that as desirable as preventing violence is, quote: "this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."

David Bernstein: He said that it's true that interracial marriage is a concern for the police power, that we have upheld laws banning interracial marriage. But this law in a variety of ways doesn't actually prevent interracial mixing. And of course, those are more intimate relationships than just having a neighbor and more likely to lead to interracial mixing. The Court also rejected the idea that you could just say as a blanket matter that African Americans carry disease.

John: Interestingly, and perhaps disappointingly, the Court did not cite *In re Lee Sing*, though it did make an appearance in one the briefs filed by the NAACP. According to Professor McClain,

perhaps that's because the San Francisco ordinance was so much more extreme – removing people from their homes rather than preventing them from moving in – and therefore not of much use to the analysis. In any case, at a time when millions of African-Americans were leaving the South in search of freedom and dignity that was being denied to them and therefore were in need of new homes, the NAACP found a way to get a big win – one of the vanishingly few civil rights claims to succeed at the Supreme Court for decades before or after. And while it certainly didn't put a stop to Jim Crow, it did prevent, according to Professor Bernstein, South African-style apartheid from becoming the rule in the United States.

David Bernstein: Residential segregation laws had spread through the south and border states very quickly, and they were poised to spread even further. Chicago was just waiting to see the ruling. The city council was poised to adopt residential segregation if the case came out favorably to the state. There was a general intellectual milieu in the English-speaking world that racial segregation by law was the way to go. And *Buchanan versus Warley* largely stopped that in its tracks.

John: Which isn't to say that cities stopped passing residential segregation laws. For decades after *Buchanan v. Warley*, cities did just that, each time tinkering just a bit with the mechanics to see if something would pass muster. For instance, in 1924, New Orleans passed a law saying blacks couldn't live in majority white neighborhoods and vice versa – unless a majority of their opposite-race, would-be neighbors consented. The Supreme Court struck the law down. A few years later, Richmond, Virginia passed an ordinance that said you couldn't move into a certain area if you were forbidden to marry a majority of the people in that area. And again, the Supreme Court summarily struck that down. Still …

David Bernstein: There were some localities that passed these laws and no one ever bothered

challenging them. So *Buchanan versus Warley* didn't 100 percent get rid of residential segregation by law. But it did result in the invalidation or lack of enforcement of dozens of law throughout the United States, and more important even prevented this from becoming public policy basically everywhere.

John: Which brings us the final case we'll discuss on this episode. It's not about where you could live, but what you could do with your property. And it was decided by the Supreme Court in 1915, two years before *Buchanan v. Warley*. The lawyers for the City of Louisville cited the decision repeatedly and favorably in their briefs for the idea that courts should defer to the judgment of local officials. The case is *Hadacheck v. Sebastian*.

Robert Thomas: Joseph Hadacheck owned a brickyard in what is now the heart of Los Angeles. It's not in downtown LA but it's fairly close. This is a place where clay is dug up, dried in kilns – produces smoke, noise….

John: That is Professor Robert Thomas of William & Mary law school, who we spoke to last episode. Professor Thomas is also a litigator at the Pacific Legal Foundation.

Robert Thomas: Nobody wants to live next to a brickyard, but at that time, nobody was.

John: When Hadacheck bought his eight-acre property in 1902, it was outside of the city limits, and there were no houses nearby so the noise, smoke, and soot from making bricks wasn't bothering anybody. And crucially, the property sat on just the right kind of clay.

Robert Thomas: Who knew that it was important what type of clay you had, and this area was particularly known for a certain type of clay. I found a book that actually discusses the 26 types

of clay found in the Los Angeles basin. They were supplying the bricks that were building the houses and the things like that. We didn't have building codes saying you couldn't use bricks in California yet.

John: But Los Angeles was growing. Homes were starting to be built nearby, and in 1909 officials annexed the land, placing it inside city limits. And then the following year, the city council adopted an ordinance prohibiting brickyards in a 3-mile area of the city that included Hadacheck's brickyard – and two other brickyards.

Robert Thomas: And it was a criminal law. So it had criminal penalties. If you fail to adhere to this, you as a brickyard operator could be subject to imprisonment.

John: The ordinance gave the brickyards 30 days to cease operations. And the mayor vetoed it for that reason, saying that 30 days was quote "entirely too short." Nevertheless, the city council overrode the veto.

Robert Thomas: Hadacheck ended up getting charged and imprisoned for a very short time by the sheriff of Los Angeles, eventually bringing a habeas corpus case. And the case makes its way to the California Supreme Court, which said, No, this is a reasonable exercise of the government's police power to protect the public health, safety, welfare and morals and therefore no problem.

John: Hadacheck argued that the ban was outside the police power and an arbitrary deprivation of his property rights. He argued that his business wasn't actually a nuisance, and that even if it was, the city should have considered other measures short of shutting him down that could balanced his right to use his property with the rights of his late-coming neighbors. And he said

that the location of the ban was arbitrary. It banned his brickyard and two others, but there were many other brickyards in much more densely inhabited places in the city, which remained perfectly legal. But the California Supreme Court said that was matter for the city council to decide, not the courts. Quote:

> **California Supreme Court**: Whether or not this trade, however strictly the manner of its conduct may be regulated, can be pursued at all in a residential district without causing undue annoyance to persons living in the district, is certainly a question upon which reasonable minds may differ. …The courts will not substitute their judgment upon this issue for that of the legislative body.

John: From there the case went to the U.S Supreme Court, which, in 1915, in a unanimous opinion written by Justice McKenna upheld the law. Quote:

> **U.S. Supreme Court**: There must be progress, and if in its march private interests are in the way they must yield to the good of the community.

John: Hadacheck claimed that his property was worth $800,000 dollars as a brickyard and only $60,000 dollars if he had to use it for something else. And notably, the Court did not dispute his accounting. It said, even if that's true and your property is now worth less than a tenth of what it was, there's no due process violation.

Robert Thomas: They said yes, this does reduce the value of your property quite substantially. But there are other things you could do with it and so: affirmed.

John: Hadacheck did not raise what we now call a regulatory takings claim, where if the

government is going to devalue your property so much they have to compensate you. Perhaps because he did not want compensation. Perhaps he just wanted to operate his brickyard. In any case, you may be asking yourself, wait a minute wasn't Hadacheck there first? Shouldn't that have mattered to the analysis?

Robert Thomas: It's a classic case of coming to the nuisance under nuisance law.

John: In the common law, dating back to Blackstone's Commentaries, if you wanted to sue your neighbor for creating a nuisance, like spewing smoke and soot all over your property, you would lose if you were the one who was quote unquote coming to the nuisance. That is, if you built your house next to a factory, you did not get to sue the factory for making noise. But the Court said that did not matter – it may have been the rule when neighbors sued one another, but it was separate from a city's police powers. Today, a residential neighborhood sits where the brickyard once did.

Robert Thomas: Today it looks like a typical mostly residential somewhat mixed use. There's a couple of auto shops and a few storefronts – completely and totally nondescript.

John: And as for Hadacheck himself …

Robert Thomas: The record sort of draws down about what happened to him.

John: But in a cemetery about half a mile from where the brickyard used to be …

Robert Thomas: There is a grave for Joseph Hadacheck who dies right after the Supreme Court opinion is issued, and is about the right age. I have no actual confirmation that the Joseph

Hadacheck in that grave is the Joseph Hadacheck who owned the brickyard a half a mile away. But if that's the case then he gave up the ghost.

John: And there's one more piece to the story. It's one that's not in the briefs or in the court opinions, but it is in newspaper articles from the time. It turns out that just a couple blocks away from Hadacheck's lot, real estate investors were selling lots in what was then a fancy new development. Here's an advertisement in the Los Angeles Times printed in 1911.

> **Ad in L.A. Times**: FOR SALE: The finest residence property in Los Angeles. Victoria Park is located in the ultra-fashionable southwest district on the very crown of West Adams Hill. The highest skill of the landscape gardener's art has been employed to make ….

Robert Thomas: And if you take a left and drive down about a minute you turn into a neighborhood called Victoria Park. And well it turns out that this was the residential subdivision that the Los Angeles City Council was concerned with, because on one hand it was two blocks or so from Hadacheck's brickyard, and it was literally across the street from one of the other brickyards that was subject to this ordinance. I think the homes there today when you drive around must have been the homes that were built then because they have that period look to them. Arts-and-crafts type of houses. Really kind of nice. One and two story houses with lawns and substantial lots. And of this being Los Angeles, there's a ring of palm trees.

John: Victoria Park was being developed by a consortium of real-estate investors.

Robert Thomas: Well, it turns out that one of the leaders of that consortium was a fella called Josiah Andrews.

John: Josiah Andrews was a Los Angeles City Councilman, and one of the very first things he did after getting elected was to introduce the brickyard ban – not a ban in the whole city but just in the area that just so happened to be next to his investments in Victoria Park.

Robert Thomas: The story, when you piece it all together by looking outside the opinion, looks like one where it's pretty clearly self dealing on the part of Councilman Andrews. Why that does not make it into the record. Why that does not make it into the opinion. We don't know.

John: In fairness, the city did get around to banning brickyards elsewhere in the city within a few years. But in 1910, the only ones they banned were the ones that threatened Josiah Andrews' pocketbook. The *Hadacheck* decision remains good law, and looking back it today it appears to be a harbinger of things to come. Namely, the Supreme Court's unwillingness to find that land-use regulations violate the due process of law – even when they seem arbitrary and even if someone's ox is very definitely getting gored. And while you might think that invoking the police power as a pretext for a government official's private pursuit of profit would be something of a no-no, well, stay tuned on that. We'll come back to pretextual confiscations later in the season. Today, of course, Mr. Hadacheck's case might be litigated differently. He probably would raise a regulatory taking claim, for instance, but as we talked about last episode the likelihood that he would achieve a more favorable result is not great.

Conclusion

John: And that brings us to the end of this episode. When we come back next time, we'll explore the most famous land-use case of all time *Village of Euclid v. Ambler Realty Co*, decided in 1926.

Credits

Bound By Oath is a production of the Institute for Justice's Center for Judicial Engagement. This project was edited by Kais Ali and Charles Lipper at Volubility Podcasting. This episode was produced by John Ross. With voice work by Sam Gedge, Bert Gall, Paul Sherman, and Anthony Sanders. The theme music is by Patrick Jaicomo.