ShortCircuit369

Mon, Mar 31, 2025 8:30AM 47:43

SUMMARY KEYWORDS

substantive due process, 11th Circuit, Little John vs School Board, parental rights, executive action, legislative action, shocks the conscience, unenumerated rights, fundamental rights, judicial opinions, gender identity, school policy, constitutional law, judicial engagement, Institute for Justice

SPEAKERS

Anthony Sanders, Diana Simpson, Andrew Ward

00:00

A **Anthony Sanders** 00:10

Hello and welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Monday, March 24, 2025. I have a couple of my Institute for Justice colleagues here, and each will present a judicial opinion. In fact, I'm even going to talk about a judicial opinion. So you might think, "Oh, that sounds like just a normal Short Circuit episode, okay, fine." Well, the twist is we're all talking about the same case. A couple of weeks ago, a case from the 11th Circuit came out with a normal three-judge panel, but it had an abnormal four opinions and covered so much ground, checking so many IJ boxes, that we decided, "You know what? We just have to do the whole thing." The combined opinions are 169 pages, which is a lot for one ruling- well, one ruling, four opinions. We weren't going to cover that and then some other case this week or three, like we sometimes do. Instead, it's going to be all about the one case, which is all about substantive due process. So, if you ever wanted a show all about substantive due process, this is the right week for you. We'll get to my colleagues in a moment. First, a very quick announcement. This episode will go out Friday, March 28, 2025, which means it will be the last episode before our anniversary show on Thursday, April 3, 2025, in Washington, DC. If you're a DC-area resident and have been putting off registering for the show, it might be too late. We're probably almost in waitlist territory now. I'm recording this on Monday, so by Friday, we might be way past that. But if you're one of those last-minute people, like we've all been there, and still want to come, go find the link. I'm not putting it in the show notes, but you can find it in an old episode. Go find the link, RSVP- you can probably still come. We always have a few no-shows, so even if we are in waitlist territory, you might still get in. Don't let that discourage you, but it is getting pretty full. We're excited to see those of you who will be coming, and those of you who won't be coming, who aren't lucky enough to live in the DC area, will still hear the live Short Circuit recording that

night. Okay, but for today, substantive due process. I have two experts in the area of substantive due process and many other things with me today: Andrew Ward and Diana Simpson. So, are you folks ready to due process?

D **Diana Simpson** 03:20

Let's do it!

A **Anthony Sanders** 03:21

Are we going to substantively do it, or is it just going to be a process kind of thing?

D **Diana Simpson** 03:26

You know what- It's all included.

A **Anthony Sanders** 03:31

Andrew, why aren't you laughing? He's kind of chuckling.

A **Andrew Ward** 03:37

I just didn't know we were coming in with humor. I wasn't prepared for that.

D **Diana Simpson** 03:42

We always come with humor

A **Anthony Sanders** 03:43

I'll let all of you know, Andrew was on mute, which we have taken out, but he was actually laughing at one point. But only after I asked him, "Why aren't you laughing?"

A **Andrew Ward** 03:52

Post editing, there's no evidence of that or that I thought Anthony was funny

A **Anthony Sanders** 03:56

It's kind of a "Please clap" type of situation, and unfortunately, I'm the first one going here, so you can all just clap for me. But I'm going to set the stage for this case: Little John v. School

you can all just clap for me. But I'm going to set the stage for this case: Little John v. School Board of Leon County, Florida. The case is about a highly controversial subject, and we're not really getting into that. Just to warn everybody, if you're looking for some controversy, we're not really going into the actual merits of the case or the facts. But I will lay them out. Some of you may have heard about it in the news because it was a big deal when it came out. I'll lay out the facts and then set up the ruling of the majority opinion, which isn't as interesting as the two concurring opinions and the dissenting opinion, but it sets the stage. And again, it's all about substantive due process, something some of our listeners are probably familiar with from past shows and elsewhere. Okay, so this is about the family of the Little Johns and their child, who, at the time of the events of this case, was 13 years old. Here's what happened: Their child was born a girl, and I'm not sure how they knew this- I'm not even sure if it was a former school and now they went to a new one, or if it was the same school, but that's not in the facts of the case. It doesn't really matter, but their child started identifying as a "they/them" instead of a girl and wanted to go by the nickname "J," which I assume was portrayed as a male nickname. The parents had the child in counseling, so the family was dealing with this situation. Whatever other people may think, the family knew about it and were handling it. So, the child then started attending school. I'm not sure if this is part of the story, but you can imagine it might be in the background: This is the fall of 2020, and lots of crazy things were happening everywhere because of the pandemic. This is Florida, so I assume the schools were open and the child was physically going to school. At the school, the parents told the school, "Our child is going through this gender situation. We want you to identify our child as a girl, even if our child tells you otherwise." The school had a policy, though, with the background of a very understandable history of how LGBTQ+ kids have been treated when they come out to their families. The policy acknowledged that many homeless kids are LGBTQ+ because they don't have a home to go back to after coming out. It also stated it's best not to inform parents if a child is trying to come out.

D Diana Simpson 07:02

And this is a guide that the school board created. So, this isn't just a one off FAQ. This is created by the board.

A Anthony Sanders 07:03

Adopted by the Board, as I understand it. So that's the school's policy. And it seems like the counselors and staff at the school implement that policy, even though the parents have told them, "We want you to do this." So then the child at school says, "Okay, I don't care what my parents said. I want you to call me they/them," although they did let the child use the "J" nickname, this of this nickname. So it goes forward, and the child is identifying as another gender at school. Eventually, the parents learn about this, and they are not happy. They correspond with the school and one of the counselors, and they basically say, "Well, we know you told us not to do that, but we did it anyway because of something about civil rights laws," and the parents ask, "Can you name the law?" Eventually, it gets back that they can't really name the law, and it turns out it isn't legally compelled. It's just that this is how they do things, and they have this policy, too.

A Andrew Ward 08:17

Eventually, by the way, means like, three-ish weeks to the extent you think that facts drive the

Eventually, by the way, means like, three ish weeks to the extent you think that facts drive the outcomes of opinions, the actual harm inflicted on this was like

A Anthony Sanders 08:28

So I missed that?

A Andrew Ward 08:29

Yeah, no. It's at the beginning of the year that the meeting happens, and then the complaint says, like by mid September the parents found out about it. So just throwing that out there, that actual damages might have been, like, $100.

A Anthony Sanders 08:46

Yeah, we never get to the damages in this case, and I'm guessing they wouldn't be very much given those facts. I mean, you can imagine a different situation. Another thing that doesn't come up in this case- just to preface before I get into a tiny bit of the legal stuff and turn it over to Andrew- is that we've talked about a few other variations of this situation, which has happened many times across the country in the last few years, about schools not telling parents that their kids have transitioned to another gender as they appear at school. The court doesn't discuss the child's interest versus the parents'. What rights do parents have to direct the upbringing of their children? Of course, a child, especially an older one, has some kind of rights too, but none of that is apparent in the case. And of course, that would be something you'd want to think about if you actually got into that. Skipping over a lot here, we get to how the court addresses the claim that the parents' rights to guide the upbringing of their child were violated by the school. What did they base that on? Well, there's an old precedent, over 100 years old now, that we've talked about many times on Short Circuit, the right of parents to guide the upbringing of their children and have some kind of familial privacy. Meyer v. Nebraska is the first case in this line from 1923. Those old cases were reaffirmed in recent years, and I think the most notable case in recent years was a 2000 case where the grandparent visitation statute was at issue, and the court reaffirmed that there’s a fundamental right of parents to guide the upbringing of their children. Now, the trouble is, substantive due process in the 14th Amendment protects unenumerated rights like this, the right to guide the upbringing of your child, which is not actually listed in the Bill of Rights or the 14th Amendment. These rights are special and are considered "fundamental rights" and therefore receive really high scrutiny. If the state intrudes on them, it needs a really good reason and solid facts. Everything else, including what we often fight about at IJ, like economic liberty, gets almost no protection under rational basis. So, which category you fall into matters a lot. But there's another part of substantive due process we haven't discussed as much on Short Circuit, which is the difference between legislative and executive action. Legislative refers to statutes you're challenging, which is usually what constitutional law cases are about. Executive refers to when government officials, like a governor, mayor, or police officer, or in this case, school staff, act. Executive actions are only unconstitutional if they "shock the conscience," though the meaning of that is unclear and hard to prove, much like rational basis. The question here is whether the actions were executive or legislative. The school staff just implemented the policy, but the school board adopted it, making it seem more legislative. The court ultimately says it's executive, despite convoluted precedent, especially a long footnote in a 1990s Supreme Court

case, Sacramento v. Lewis, about a high-speed chase. The bottom line is that the court finds the actions don’t shock the conscience, even though it involves a fundamental right, because they cite cases where even bad actions by schools, including a child's death, might not shock the conscience. So, the family loses easily, and two judges in the majority agree on that, although they don’t agree on much else. That's where Andrew Ward comes in.

A Andrew Ward 14:08

Well, hang on, because you said it was uninteresting how they get to executive, but this is crucial, right? Because if it's executive action, it's the "shock the conscience" test, which, as we know, is hard to meet. But if it had been legislative, it would need to go through strict scrutiny, which would make the decision much more complicated. You'd have to decide whether a policy about gender identity in schools violates parental rights. Does the right go that far? Are there compelling reasons to have it? Does it even apply in public schools? And one thing they point out is that there was this guidebook, a policy enacted by the school board, but it’s not legislative because the plaintiffs waived their challenge to it being legislative. I was once a clerk in a federal court, and if you go and look at where the purported waiver is, it doesn't sound like a waiver of that argument. While the case was going on, the school board passed a new policy and got rid of the old one. There was an argument that the case was moot, but the plaintiffs responded that the defendants' approval of a new guidance document doesn’t absolve them of the consequences of violating the plaintiffs' rights in 2020 and 2021. Plaintiffs aren't seeking prospective relief; they're seeking a declaration that their constitutional rights were violated. The defendants acted in accordance with the 2018 guidance when they violated the plaintiffs’ rights, but it’s the defendants' course of conduct, not the content of the 2018 guide, that’s the focus of the plaintiffs’ action. That’s not a waiver, and they're contrasting it with the new policy to say the case isn't moot. That’s extremely important to the disposition of this opinion, and it hinges on one sentence. I just wanted to throw that out there, but now I’ll hand it over to talk about substantive due process, and I’ve led us well off course.

A Anthony Sanders 17:10

Side note to that. I think, yes, the court is manufacturing a waiver, it sounds like. And probably all of us on this podcast have been through similar cases where the court manufactures a waiver, where there wasn't a waiver. But I don't fault these attorneys at all. I really don't. But if you're being absolute belt and suspenders as a practitioner, is that a place where you'd have a footnote and say, "this does not waive our blah, blah, blah, blah, blah."

D Diana Simpson 17:42

Well yeah, because it's happened to you before. Who knows? Maybe these attorneys hadn't been like, bludgeoned on the side of the head by a clerk trying to find the easy way out.

A Anthony Sanders 17:54

I mean, if it wasn't for that, it might have been something else.

D Diana Simpson 17:57

That fact is an interesting one, especially regarding the mootness. The three-week window was the issue, and the mootness is also really interesting because in 2021, Florida enacted the Parents' Bill of Rights, which basically said, "You can't get in the way of parents in the upbringing of their kids." In response, the school board updated its guide, stating that school personnel cannot intentionally withhold information from parents unless a reasonable person would think that disclosure would result in abuse or neglect. So this situation can't happen again in the same way. To the extent that a judge is a human and is looking at this case, they might say, "Okay, well, this problem could arise again," and approach the case on the narrow island of its own fact

A Andrew Ward 18:45

I mean, cases are live if, like $1 is in play. But again, if you think that facts influence how cases get decided, this might not have been the case for like 21 Amicus states, plus the Manhattan Institute. But anyway, I'm here to talk about substantive due process. So what's going on with that? The background is that Judge Newsom, who's on this panel, doesn't like substantive due process. I actually think more broadly, he just doesn't like unenumerated rights. It's not entirely clear, but he hates substantive due process. He thinks it's made up. He correctly points out that substantive process is an oxymoron, originally meant to be pejorative. He's had like three long concurrences in various 11th Circuit opinions arguing that substantive due process is terrible. Judge Rosenbaum, on the other hand, thinks it's finally time to respond, and she has a cool footnote saying she actually had a chance before, but she was busy explaining why the majority was wrong, so she couldn't do it then. So, this is her opportunity. It's like an ode to substantive due process. It's Judge Rosenbaum's 70- or 80-page defense of substantive due process. She goes through and says a lot of stuff that aligns with IJ's perspective. I think she gets a couple of particulars wrong, but overall, it's a great tribute to unenumerated rights. She argues that of course these rights exist- that's what the Ninth Amendment says. We've always recognized them, even from common law England, as soon as the Constitution was enacted. We've said there are things the government can't do, even if not listed in the Bill of Rights. She points to Calder v. Bull as an example- property can't be taken from A just to give it to B, even if that's not directly in the public use clause. She emphasizes that there's a long history of this understanding. Ultimately, she argues that we're not really fighting about much, because Judge Newsom's preferred approach would house rights in the 14th Amendment's privileges or immunities clause (long neglected since the Slaughterhouse Cases), not the due process clause. She says there's really not much difference between the two, and unenumerated rights have always existed. She argues that Judge Newsom is wrong. There's a note that may not get mentioned (since the opinion is 169 pages long) that the privileges or immunities clause applies to citizens, while the due process clause applies to everybody, which might lead to some difference down the line. Rosenbaum continues by saying that modern tiers of scrutiny essentially match this historical understanding, and that how we deal with unenumerated rights now fits well with the common law tradition. However, she's a bit too casual about the rational basis test, which essentially means plaintiffs almost never win, unless you're IJ. She says it's a low bar that still counts as a test, but...

D Diana Simpson 22:18

If it were the test of Cleburne, then I think, yeah, I'd agree with her. But if it's the test of FCC v.

If it were the test of Cleburne, then I think, yeah, I'd agree with her. But if it's the test of FCC v. Beach, then I don't agree with her. Well, she cites both, as if they were the same thing.

A Anthony Sanders 22:28

She also has some not nice things to say about economic liberty.

A Andrew Ward 22:31

That's definitely the weakest part of the opinion, where she goes on to argue that some of the criticisms of substantive due process, like Dred Scott or Lochner, shouldn't discredit the entire doctrine. She's right that Dred Scott has little to do with substantive due process, but her defense of Lochner and its place in substantive due process history is problematic, especially regarding economic rights. Economic rights, unlike personal privacy rights, are not subject to the same risks of abuse, as IJ's entire existence shows. But, overall, I think Rosenbaum is more right than wrong. She's especially correct about unenumerated rights- there's a clear tradition, the Ninth Amendment protects them, and the distinction between substantive due process and unenumerated rights isn't as significant as Judge Newsom argues. There's some originalist debate about whether the due process clause can ground substantive rights, but Rosenbaum is spot on that unenumerated rights are real, important, and should be recognized, whether you frame them as part of substantive due process or not. Judge Newsom, on the other hand, seems to deny the very existence of unenumerated rights, which is a much bigger issue. His stance on substantive due process may be more debatable, but Rosenbaum wins this concurrence hands down. The real winner, though, might be Orin Kerr, who argues that such discussions should belong in law reviews, not in judicial concurrences- but, well, that's for another time.

A Anthony Sanders 24:46

We couldn't do a podcast about 'em all.

A Andrew Ward 24:49

We could not.

A Anthony Sanders 24:51

Are we gonna start doing that?

D Diana Simpson 24:54

There's an infinite limit in podcasts, right?

A Andrew Ward 24:57

So our audience, could go down to single digits.

D Diana Simpson 25:02

I don't know if my mom would listen to that one.

A Andrew Ward 25:05

Anyway. It's a good concurrence. She's right about enumerated rights. She got some things wrong about economic liberty and the rational basis test, but more good than bad. And yeah, that's what Judge Rosenbaum thinks.

A Anthony Sanders 25:19

Diana, do you have thoughts about Judge Rosenbaum before we move?

D Diana Simpson 25:23

I mean look to the extent that substantive due process is the world in which we live, then, okay, let's have it. I'm a little more optimistic about privileges or immunities, and I think that it is likelier that would be a more protective test. But it's not so.

A Andrew Ward 25:41

I mean, it's not like where we see these differences- It's not making a difference, right? Like the Second Amendment seems to have maybe been incorporated under the privileges or immunities clause instead of the due process clause. It's not mattering too much these days.

D Diana Simpson 25:57

The Second Amendment is one of the most robust pieces of the Bill of Rights right now. The First Amendment had its hay day and it's still strong- I'm not suggesting otherwise, but the Second Amendment is getting, bolstered, and is stronger.

A Andrew Ward 26:13

That is definitely factually true, but I think it's a coincidence.

A Anthony Sanders 26:15

Andrew’s point is that it’s not because one of the five votes in McDonald incorporated it under the privileges or immunities clause, as Justice Thomas argued. This has not changed subsequent Second Amendment case law.

A Andrew Ward 26:33

Of course, that's an enumerated right. So I really don't think PRI versus due process is going to make a difference for the enumerated rights, but maybe it would, overturn Slaughterhouse, for the unenumerated ones.

A Anthony Sanders 26:47

Judge Newsom’s law review article from 2000, written when he was a young associate just out of law school and still in private practice, focuses on incorporation. He argues that the Slaughterhouse cases were acceptable because they allowed for incorporation, but that economic liberty wouldn’t be protected under the privileges or immunities clause, which the dissent in Slaughterhouse pointed out. This view is shared by others, like Kurt Lash, who believe Slaughterhouse was fine because it left room for incorporation. Later, in Cruisin, the Court clarified that the privileges or immunities clause has no meaningful application.

A Andrew Ward 27:36

And Judge Newsom's criticisms clearly imply he doesn't believe in anything on enumerated rights. Like, if it's not in the text-

A Anthony Sanders 27:44

I don't know. Has he done a concurrence about the Ninth Amendment? You know, maybe he'd think differently with that.

A Andrew Ward 27:50

He should come on this podcast and let us know what he thinks.

A Anthony Sanders 27:53

We'll see if we hear more from him. I have some criticisms of Judge Rosenbaum's stance on anti-economic liberty, but I’ll save those for later. There’s an interesting argument from an originalist perspective regarding the due process clause. As you discussed earlier, the clause should be understood in its historical context- how people would have understood it when the 14th or Fifth Amendments were adopted, rather than reading it with today’s interpretation. If we’re being true originalists, there’s a solid argument that the term “due process” actually did protect substantive rights at that time, at least to some extent. Ryan Williams’ piece, The One and Only Substantive Due Process Clause, which Judge Rosenbaum cites, makes this argument

for the 14th Amendment. However, Williams argues that the same doesn’t apply to the Fifth Amendment. Judge Newsom has addressed this in some of his older concurrences. While I don’t want to give everything away, I will say that if we’re being strict originalists, there’s no protection for unenumerated rights under the due process clause. That said, this view is not authoritative.

A Andrew Ward 29:22

While we're here, isn't Dobbs, just like a huge argument in favor of substantive due process. Because really, everybody's problem with substantive due process is that it led to Roe. But now it didn't lead to Roe anymore; which means the best argument against it went away.

A Anthony Sanders 29:38

You could make that argument

A Andrew Ward 29:40

Well if you take the argument that your problem with unenumerative rights is that they lead to Roe- Well, now in 2025 they don't, so your best counter argument is gone.

D Diana Simpson 29:52

Okay, but there's other kind of controversial (to some) cases of the Supreme Court resting on substantive due process.

A Andrew Ward 29:59

True but that was the most controversial.

A Anthony Sanders 30:02

-like, raising your children.

A Andrew Ward 30:04

Yeah. And teaching them German.

A Anthony Sanders 30:09

Well, not everyone agrees with Judge Rosenbaum, and so we're gonna skip all the way down to the descents now. Which Diana will enlighten us on.

D Diana Simpson 30:21

Yeah, so Judge Tjoflat has a dissent, and he is on fire. Just as a point of order, Judge Tjoflat is a Ford appointee.

A Anthony Sanders 30:40

He was put on the Fifth Circuit by Ford '75 and then when they rejiggered and then got moved to the 11th Circuit.

A Andrew Ward 30:47

Is he the only living judge that has transferred circuits by way of a circuit like giving birth to another. Like circuit mitosis.

A Anthony Sanders 30:57

Well, it would only be other 11th Circuit judges. Well, let me look up senior judges. Judge R. Lanier Anderson III was on the Fifth Circuit before it was split in '79. But, yeah, just those two.

D Diana Simpson 31:15

So, Judge Tjoflat's whole point here is that he completely rejects the distinction between executive and legislative action and the different standards they impose. Essentially, if it's legislative, you get the full substantive due process test, with strict scrutiny if a fundamental right is involved, which requires the government to do a lot of work. But if it's executive action, you just get the "shocks the conscience" standard, which, according to the majority opinion, only applies if a school official deliberately harms a child. For instance, they cite a case where a child's eye was damaged by intentional harm, not a case where something like neglect led to a child's death. This is how the 11th Circuit interprets the "shocks the conscience" standard. Judge Tjoflat doesn't buy that distinction. He argues that the case law doesn't support such a difference between executive and legislative actions, and that the same fundamental rights test should apply across the board. He points out that everyone agrees there's a fundamental right for parents to direct the upbringing of their children. Once that right is established, the government has to meet a higher standard, which is where the substantive due process test comes into play. Tjoflat references multiple Supreme Court cases, such as Salerno, to support his argument. Tjoflat also takes issue with the majority's treatment of the substantive due process test. There's a big fight over whether to use the word "or" or "and" in the test, and Tjoflat argues that this small linguistic debate shouldn't be the crux of the case. In his view, the real issue is the framing of the test itself. The majority's approach, which requires proving that executive action "shocks the conscience," is practically impossible to meet unless a government official does something as extreme as physically harming someone. So, for Judge Tjoflat, whether it's a small issue like the choice of words or a footnote, it reveals a deeper problem in how the case is being framed, and that's where he spends a lot of his dissent.

A Anthony Sanders 34:38

Yeah, I agree that the majority likely has the stronger precedent-based reading, but Judge Tjoflat’s perspective is compelling from a broader, conceptual standpoint. His point is that it shouldn’t matter whether the government violates constitutional rights through executive or legislative action, because both should be unconstitutional. His argument about the “shocks the conscience” test- especially its origin in police chase cases like Sacramento v. Lewis- is strong. He makes a good case that the test is really only applicable in high-stakes, split-second decision situations, like a police chase. The analogy to qualified immunity is fitting, where courts have considered split-second decisions as a defense. But in the context of school officials, who have time and opportunity to make decisions over a longer period, it doesn't seem appropriate to apply the same harsh standard. The decision-making context is different, and the rights at stake are just as fundamental. Tjoflat’s point is that applying the shock-the-conscience test here is a poor fit for the facts and doesn’t align with broader principles of substantive due process.

A Andrew Ward 35:46

I think that's right. Although some of the stuff he cites in support of that point is like "a case cannot decide anything beyond its facts ever." Which is maybe a little extreme, we might need to up the size of the federal judiciary a little bit, if that's true.

D Diana Simpson 35:59

A very formalist approach to dicta.

A Anthony Sanders 36:02

Yeah, it does. I like how one of the headings within the opinion is orbital dicta. You usually don't have someone use that entire phrase when you're talking about dicta.

D Diana Simpson 36:14

I mean, but that's what the fight is, right? I'm surprised there's not a section heading in "disjunctive framing." I all of these cases, you have split-second decision-making, where the cops are chasing after a motorcycle and they're going 100 miles an hour in a residential zone. That was the Sacramento case. And then you've got the origin of the shocks-the-conscience phrase, which is from a case where the government forcibly pumped a defendant's stomach to search for drugs, and then used the materials to convict him of crimes related to those drugs. And so that's a case called Rochin from 1952. So you have this series of how long it takes to make a decision. Then you've got a guidebook published by the school board. And so presumably, they spent a lot of man-hours figuring out what the right way to address this

guidebook was, and a lot of attorney time. And so there's no automatic decision-making, no tough decision-making in close quarters where you have to worry about whether you're going to get shot or killed or run over an innocent person or something like that.

A Andrew Ward 37:21

And then there's a Newsom concurrence.

A Anthony Sanders 37:26

So Diana is that the lay of the land?

D Diana Simpson 37:29

Yeah. I mean, he basically just goes through the history of the shocks the conscience standard. Where it came from, where it kind of cropped up, and that he doesn't think it was meant to be a separate test. He doesn't think it's meant to be this whole other universe where plaintiffs always lose, unless there's intentional infliction of substantial harm. And then he goes through and says, "all of this other stuff you guys have from the Supreme Court is wrong." And then he looks at the 11th Circuit decision Maddox, that is binding precedent on future panels, unless they go en banc. And he says that it doesn't apply in the same fashion. I'll be curious to see if there's an en banc petition filed and nothing has happened on the docket since the opinion was issued.

A Anthony Sanders 38:17

Yes, as of the day we're recording this.

D Diana Simpson 38:20

As of about half an hour before the we started recording.

A Anthony Sanders 38:24

I wouldn't be surprised if this is a case where a judge asks for a poll for rehearing, which they can do without anyone filing anything. This brings us to concurrence number two, Judge Newsom's latest concurrence on substantive due process. Andrew has already covered an overview of his past ones, which are mostly about why using it to protect unenumerated rights is bad, and we at IJ mostly disagree with those. But in this one, I gotta say, he has some really good points. He outlines this bifurcation between legislative and executive action. We can dispose of his concurrence pretty quickly here, because he says it’s kind of weird that if you have this right, and it’s a legislative restriction, and it's an unenumerated fundamental right, like the right to raise your children, you get strict scrutiny (so you probably win), but if it’s executive, which can have a gray area between the two, you’re probably going to lose because

shocks the conscience is hard. He lays that all out, and then says it makes no sense. And he's absolutely right- it makes no sense to treat government action in one respect subject to a totally different standard than another, when you're talking about the same right and the same government. He points out that the Fifth Amendment is written passively, so it's about all government action, and the Fourth Amendment just says no state right, it's all branches of state government. Very good point. He lays it all out, and he's bound by precedent, which we understand. Would the current Supreme Court reconsider this in the future? Probably not the current court, because they don't seem too excited about substantive due process, but he makes very good points nonetheless. I want to circle back to Judge Rosenbaum's concurrence and something she discussed when she starts going off about Lochner being bad. She cites a book that came out just a few years ago called Constructing Basic Liberties: A Defense of Substantive Due Process, by Boston University law professor James Fleming. I haven't read the entire book, but I've read a lot of it, and he's a very passionate defender of protecting unenumerated rights through substantive due process. There's a lot I agree with in the book, but it also encapsulates the gymnastics modern legal academia and much of the modern judiciary have gone through in the last few decades to try to protect rights they like, and not protect unenumerated rights they're not so into, like economic liberty and property rights. We've discussed in past episodes how the Supreme Court has said over the years that there are non-fundamental liberties, like economic liberty, that aren't protected the same way fundamental rights like raising your children, procreation, and the right to travel are. The distinction between these is often hazy, and every defense I see for it doesn't make a lot of sense. Anyway, Professor Fleming tries to address this issue, and I hand it to him. In the chapter where he does, he takes these arguments to their logical conclusion, and you can see how they really don't have much support. He says, yes, those are actually fundamental rights. Your right to economic liberty is a fundamental right. How can you have a fulfilling life in America if you don't have the right to engage in economic transactions or choose your profession? So, if you're an IJ-type person, you'd read this and think, "Yeah, exactly." Then he says that these fundamental rights don't need protection through substantive due process because they're protected through the political process.

D **Diana Simpson** 43:26

-which is to say, not protected at all.

A **Anthony Sanders** 43:29

Of course. And he doesn't say anything about public choice theory, or, concentrated benefits and dispersed costs, or cartels or lobbying the legislature. It's like nothing's changed since Carolene Products in 1938.

A **Andrew Ward** 43:49

You know, it's people. Frankfurter asked judges, right? They often talk about how judges don't have the expertise to figure out which economic regulations are so unwise as to be irrational. But I'll tell you what judges really don't have the expertise to do- figure out which people are actually protected in the political process.

A Anthony Sanders 44:10

It seems- because he doesn't go very deep into this- but then he says, you know what? Someone's going to bring up a counterexample to everything I'm saying right now (remember, this is a book defending substantive due process), and that counterexample is the Kelo case. He actually says, Kelo, ;where they took that lady's home, and it was really bad. And he agrees- it was bad. But then he says, "You know what? The political process fixed that, because all these states changed their laws." So that, to him, proves his point that we don't need substantive due process protection. Of course, we don't need to go into all the reasons why that doesn't prove his point. Plenty of people are still hurt by eminent domain, even in states that changed their laws. Many are still needlessly harmed, and that reform only happened because places like IJ made it happen, and had a communications team to get public support. But yeah- that's the argument. So after reading that, if you've ever wondered, "Is there something I'm missing here about why economic liberty is supposedly different from other personal liberties? Maybe these judges have a point?"- no. There is no point. Reading that convinced me of the bankruptcy of that argument. And I still haven't read anything that convinces me otherwise.

D Diana Simpson 45:26

My lesson from all that is never put your faith in politicians at all. That's been my kind of guiding principle for a while.

A Anthony Sanders 45:34

So anyway, I think that's kind of what's going on in that part of Judge Rosenbaum's concurrence. And, it just has the one citation to Professor Fleming's book, but there are other citations to similar scholarship and cases that have made the same kind of points. And so if you're out there wondering, "Is there actually a meaningful difference between economic liberties and other personal liberties that makes sense under the Constitution?"- no, there is not. And you should check out why that is. That brings us to the end of this four-opinion case. Is it an opinion? It's four opinions in a ruling. And we'll see what happens. But as we said, it might go en banc from here, or maybe even to the Supreme Court because of the subject matter. But I do not see the Supreme Court second-guessing this substantive due process distinction anytime soon.

A Andrew Ward 46:40

Although, I believe there is a circuit split on these. So who knows.

D Diana Simpson 46:46

Yeah, they got into that in the majority opinion. The first circuit would have come out quite differently than the 11th circuit.

A Anthony Sanders 46:51

Yeah. Well, thank you guys for coming on. This is a new format we have here on Short Circuit. Maybe the next time, we have 169 page set of opinions that checks a lot of IJ boxes, we'll have you back and try to do it again.

D Diana Simpson 47:08

Thank you, Anthony.

A Andrew Ward 47:09

Yeah, I'd love to come back,

A Anthony Sanders 47:10

But until next time, please be sure to follow Short Circuit on YouTube, Apple Podcast, Spotify and all other podcast platforms. And remember to get engaged.