Bound By Oath | Season 3 | Episode 2 - Groping in a Fog

John: Hello and welcome to Episode 2 of Season 3 of Bound By Oath. I'm John Ross, and on this episode, like the last episode, we're going to take a look at a property rights doctrine that made its first appearance at the Supreme Court just over 100 years ago in a momentous decision written by Justice Oliver Wendell Holmes. But unlike with the open fields doctrine, the topic of our last episode, this time the Court ruled in favor of property owners. In a case called *Pennsylvania Coal v. Mahon*, the Court announced the doctrine of regulatory takings.

Robert Thomas: In takings litigation, invariably the first case cited in every brief on both sides is going to be *Pennsylvania Coal against Mahon*.

William Fischel: This is the paradigmatic regulatory takings case. It's not really the first one, but it's certainly the most famous one.

John: The Takings Clause of the Fifth Amendment reads: "nor shall private property be taken for public use, without just compensation." And later this season, we will have a lot more to say about the requirement that a taking be for a public use. The doctrine of regulatory takings, however, is all about the Fifth Amendment's other requirement: just compensation. In the typical takings case, the government physically takes land or some other kind of property. With a regulatory taking, however, the government doesn't take possession of any property; rather, it imposes a regulation that goes so far and limits an owner's use or enjoyment of their property so much that it might as well have taken the property.

> **Lawyer 1 (Keystone Bituminous)**: This Court held in *Pennsylvania Coal v. Mahon* that regulation that goes too far amounts to an unconstitutional taking.

Lawyer 2: Regulation, if it goes too far, can amount to a taking.

John Roberts (Tahoe-Sierra): The best that Justice Holmes could do was say that when it goes too far it becomes a taking. And I may not be able to do much better.

Justice Kennedy (Murr v. Wisconsin): This Court has explained that a regulation that goes too far constitutes a taking.

John: And when a regulation goes too far, just compensation is due – or it's an unconstitutional taking. Importantly, nothing about the doctrine says the government can't take a given property or impose a given regulation. It merely tells the government that it has to pay – sometimes. On this episode, we will examine not only the doctrine but also the story behind *Pennsylvania Coal*. We'll uncover some things that, even if you know all about regulatory takings, will be new and fresh. There will even be … an unsolved murder. And then after that, we'll proceed to the next important regulatory takings case, which was decided by the U.S. Supreme Court in 1978: *Penn Central Transportation Company v. New York City*. Where the Court endeavored to explain how and when a regulation might go too far.

Justice Brennan: Grand Central Terminal in New York City … was designated a landmark by the Landmarks Preservation Commission.

John: According to the Supreme Court, its decision in *Penn Central* is the polestar[1] of its regulatory takings jurisprudence. But unfortunately, it's an opinion that leaves property owners, litigators, and judges with more questions than answers.

Gideon Kanner: As far as lawyers are concerned, what's in the opinion is far more important than the outcome. And what was in this opinion was weird.

[1] First in a concurrence by Justice O'Connor but later cited approvingly in majority opinions

John: Members of the property rights bar will recognize that last clip as the voice of Prof. Gideon Kanner, a scholar, litigator, friend, and mentor to many, who passed away last month at the age of 93. He wrote the seminal article on the *Penn Central* case, and we are honored to have been able to sit down with him earlier this year to talk about his article and the opinion.

Gideon Kanner: We all looked at each other and said, what the hell does it mean? All it did was confuse the law. The Court was groping in a fog.

John: A lot has happened since *Penn Central* was decided in 1978; and we'll conclude the episode with some of the highlights that illustrate the state of regulatory takings today. But ultimately we'll wind up in a bit of a fog.

BBO Montage

Robert Thomas: *Pennsylvania Coal* is seen as the fount of the Court's current doctrine on regulatory takings. Which is when does an exercise other than the government's power of eminent domain result in an obligation to pay compensation as if the property were indeed taken by eminent domain? And it's a challenging question, no question.

John: That is Professor Robert Thomas of William & Mary Law School. He's also a litigator at the Pacific Legal Foundation.

Robert Thomas: This one I call the granddaddy of all regulatory takings cases – not because as it has I think been wrongly identified as the start of the regulatory takings doctrine – was certainly the Supreme Court of the United States' first big pronouncement on it.

John: In the decision, the Supreme Court said that government could regulate property in all kinds of ways, but at some point regulation could go too far and it would become a taking. But how far is too far?

Robert Thomas: And for the last literally 100 years we've been trying to figure out exactly what that means.

John: The case involved a law that Pennsylvania legislators passed to do something about a big problem. Coal mine cave ins that were causing deadly subsidences. Here is the Governor of Pennsylvania in 1921.

> **Governor Sproul**: I regard the enactment of this mine cave legislation as a great progressive step. For half a century thoughtful people have realized that something must ultimately be done to prevent the complete desolation of the anthracite region.[2]

John: Cities like Scranton were built on top of anthracite coal fields in northeast Pennsylvania. Decades of mining had hollowed out the earth underneath. And properties at the surface where about a million people lived[3] were caving in.

> **Governor Sproul**: Lives have been lost, homes, churches, and schools, destroyed, and an ever present peril has threatened the morale of the entire community.

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[2] From City of Scranton's brief to SCOTUS, page 8
[3] Per Supreme Court of Pennsylvania ruling: https://case-law.vlex.com/vid/mahon-v-pa-coal-884816274

Robert Thomas: There's a famous brief by the City of Scranton that used photographs to demonstrate the problem of sinkholes and buildings collapsing caused by mining of coal, which withdrew geologically the support for the surface.

John: When the case got to the Supreme Court, the City of Scranton filed a brief with some photos attached that are very alarming. There's a school that partially collapsed a week before the school year started. A theater that collapsed just after a show had ended and the audience had left. And a cemetery where hundreds of bodies had collapsed into a mine below. And the language in Scranton's brief is practically apocalyptic, comparing Scranton to Verdun, the ruined town that's synonymous with the carnage of World War I. Quote:

> **Scranton brief**: Scranton bid fair to become a second Verdun, her buildings razed to the ground by shots from below. … Our once level streets are in humps and sags, our gas mains have broken, … our buildings have collapsed under their occupants or fallen into the streets, our people have been swallowed up in suddenly yawning chasms, blown up by gas explosions, or asphyxiated in their sleep.

John: The mine cave ins or subsidences had been a problem for years, and finally after about a decade of false starts and legislation that either wasn't effective or didn't pass, or did get passed but then got struck down, the Pennsylvania Legislature unanimously approved a bill called the Kohler Act, spelled K-O-H-L-E-R and after the representative who sponsored the bill. According to the coal industry, the Kohler Act required them to leave hundreds of millions of dollars worth of coal in the ground – in 1922 dollars. Scranton, on the other hand, argued that that wasn't really true because the law said that mining was only prohibited in such a way as to cause cave ins. You can still mine, just don't collapse the surface – or there will be what newspapers at the

time[4] called stiff penalties: up to one year in jail and a $5,000 fine for coal company owners and operators. Ultimately, the issue of exactly how much coal would have to remain in the ground was not resolved, but in any case it was a lot. And four days after the law went into effect, the Pennsylvania Coal Company, which was one of the several major coal companies in the area, sent this letter to Harold and Margaret Mahon, who lived in Pittston, Pennsylvania, about 10 miles south of Scranton. Quote:

> **Letter**: Dear sir and madam, You are hereby notified that the mining operations of the Pennsylvania Coal Company beneath your premises will, [in two weeks time], have reached a point which will then or shortly thereafter cause subsidence and disturbance to the surface of your lot.

John: The Mahon's had inherited their house from Margaret's father, Alexander Craig, who had originally bought the lot from the Pennsylvania Coal Company.

> **Letter**: Although in the deed to Alexander Craig, under which you hold, we expressly reserved the right to remove the coal under your lot without liability for damages which might be caused thereby, we desire to notify you of the situation so as to enable you to take the proper steps for the protection of your dwelling and the safety of yourselves and members of your household during the period when the disturbance will continue.

John: In other words get out, and don't come back until its safe, which it may never be. Pennsylvania Coal owned the right to mine underneath the house, including the right to collapse the surface without any legal liability whatsoever. And it was written right into the deed. Which was common in the anthracite region, where cities like Pittston and Scranton had been built

[4] Pittston Gazette, May 28, 1921

from scratch right on top of the coal fields. Coal companies were happy to sell the properties at the surface so that their workers would have places to live, but they wanted to be able to take out the coal underneath without any restrictions. Now why would someone buy such a property? One reason is that caves ins were less of a problem in the late 1800s when the deeds were recorded than they would later become. Also, scholars have pointed out that hundreds of workers were killed in the mines every year and so by comparison perhaps the risk of cave ins at the surface seemed acceptable … until it didn't.

Robert Thomas: So they get the letter from the coal company. And so they run down to the local equity court, county judge and seek an injunction saying stop because it is illegal under the Kohler Act.

John: When the Mahons got their letter from Pennsylvania Coal, they sued and said, no matter what's in our deed, the Kohler Act now supersedes that. But the judge ruled against them.

Robert Thomas: The judge agrees with the coal company and says to apply this would be a taking of the company's private property in their contract rights in language that I think is quite charming.

John: The judge didn't dig too deep, pun intended. He wrote that he was going to quote "abstain, in no spirit of indolent or cowardly evasion, from discussing the general constitutionality of the statute," end quote – so that his decision could be appealed without delay.

Robert Thomas: The judge says essentially this is above my paygrade. He says undoubtedly, “the Supreme Court on appeal from our decision” can figure out “without our poor assistance this momentous matter.” I'm just just a little old county judge here in Luzerne County.

John: In addition to the Mahons and the Pennsylvania Coal Company, some other parties intervened in the lawsuit, most importantly the City of Scranton, whose city solicitor was in fact the author of the Kohler Act. And for the appeal at the Pennsylvania Supreme Court, Scranton brought in a hotshot lawyer from Philadelphia to argue on their behalf: Owen J. Roberts. The very same Owen J. Roberts who went on to become an Associate Justice on the U.S. Supreme Court and who famously changed his vote after President Roosevelt threatened to pack the Court – the switch in time that saved nine.

Robert Thomas: He switches his vote after the court packing proposal and changes his mind and joins the others in upholding New Deal legislation.

John: Here’s a quote from future Justice Roberts arguing at the Pennsylvania Supreme Court:

> **Owen J. Roberts**: The public interest which the act seeks to subserve is so enormous, the legislature was so strongly convinced of the necessity of the legislation and the property interests which may be affected are so large, that it is of great importance that the community should know at the earliest moment whether this law is to stand approved by this court or to be condemned by it.[5]

John: The Pennsylvania Supreme Court reversed the county court and upheld the statute.

[5] Times-Tribune, Apr 18, 1922

Robert Thomas: Very simply, it just said this is a valid exercise of the police power, therefore no compensation, even if it does take private property and contract rights.

John: We talked about the police power way back on Season 1. It refers to the proper and just powers that state governments have to protect public health and safety. In *Pennsylvania Coal*, the Pennsylvania Supreme Court said as long as a regulation had a quote “real or substantial” connection to health and safety, it would be upheld. And preventing cities from falling into the earth satisfied the test.

Robert Thomas: You hold your property subject to the ability of the government and the power of the government to regulate nuisances and in the public interest.

John: But in 1922, by a vote of 8 to 1, the U.S. Supreme Court reversed and declared the statute unconstitutional – a taking of private property without just compensation – in a five-page opinion written by Justice Oliver Wendell Holmes.

Robert Thomas:The most famous part of this very short opinion, by Justice Holmes is this.

John: Quote:

Robert Thomas: “The general rule at least is that while property may be regulated to a certain extent, if a regulation goes too far, it will be recognized as a taking.”

John: Justice Holmes did not cite to any precedent for that language. And today scholars are divided on whether regulatory takings is indeed deeply rooted in common law or whether

instead the Court created a new doctrine out of thin air in 1922. As recently as 2021, Justice Clarence Thomas has called for a thorough reexamination of that question.

Robert Thomas: At the same time, the opinion lays out the other major thread that we see playing out in takings today. And that's the idea that not every restriction or regulation of the use or value of property is a taking.

John: Quote:

Robert Thomas: “Government could hardly go on, if to some extent, values incident to property could not be diminished without paying for every such change in the general law.” So there we have laid out in this very, very short opinion, the two major threads in takings litigation today. On one hand, valid exercises of the police power, almost all of them will impact the use and value of property in some way. But then if they go – that magic language – too far, they will be recognized as de facto takings requiring compensation. But how do we know when a regulation goes too far?

John: The Supreme Court did not say. The only thing we know for sure is that the Kohler Act went too far. So that’s what students learn about the case in law school: There’s some outer limit where if the government wants to do something to improve the public condition, it has to pay for it. In a few minutes we’re going to fast forward to 1978, to the Court’s next big regulatory takings decision. But first, you may be asking yourself: What happened to the Mahons? Did their house fall into the earth? And what happened to Scranton? Wasn’t it supposed to be falling into the earth? Did Pennsylvania pay the coal companies to keep their coal in the ground? Well, I’m happy to say that we have some answers.

Joe Musto: There's no subsidence. This house hasn't moved …

Biagio Musto: … in over 100 years. And you see how well it's standing after being – it was built like in the late 1800s.

John: That's Joseph Musto, who lived in the Mahon's house from 1970 to 2006. Joe is a lawyer and a former judge on the Luzerne County Court of Common Pleas.

Joe Musto: I got appointed in 93, ran and lost an election. Got appointed again in 2008. Ran and lost an election.

John: If you visit Pittston, and you go to the small park on Main Street, you will find a memorial to Joe's father, James Musto, who dropped out school in the third grade to work as breaker boy in the mines, and then later went on to become a long-serving member of the Pennsylvania House of Representatives.

Biagio Musto: And you see how well it's standing after being – it was built like in the late 1800s.

John: And that's Biagio Musto, Joe's nephew, who is also a lawyer and who currently lives in the Mahon's house with his family. Last year, on the 100th anniversary of the Supreme Court's decision, Prof. Thomas and I visited Pittston. And we got a tour of the Mahon house.

Biagio Musto: Well, Attorney Mahon would have done all his work here. I believe that's where he probably wrote all of his documents for this.

John: That's right. Harold Mahon was a lawyer and a prominent citizen in Pittston. A few years before the Supreme Court case, he ran unsuccessfully for Congress with the support of the local newspaper, the *Pittston Gazette*.

> **Pittston Gazette**: Without the least hesitancy, the Gazette sets the seal of its approval on Harold J. Mahon, a citizen of our own city, as a man who measures up in every way to our ideal of what a candidate for Congress should be.[6]

John: And not only was Attorney Mahon the plaintiff in the case, but he was also his own lawyer. He didn't argue at the Supreme Court, but his name was on all of the briefs.

> **Biagio Musto**: This is the office that I use, which I think was the office of Mahon because if you look here to see the built in legal type of bookcases, fireplace, there was a bookcase over here. I think this was probably his office. Yeah, that's an original 100-some year old bookcase there. It's all original, the crown moldings, the ceiling. These things, these medallions, that's all plaster 125 - 130 years old, more. Mahon passed away, they said sitting in front of the fire at his house in his office. I think he died right here. 1943. So he was here, the man who was intricately involved in that case, working in here and sitting here.
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> **Robert Thomas**: And he represented himself.
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> **Biagio**: Yeah.
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> **Robert Thomas**: So there's where he wrote the briefs.

John: As we said earlier, the Mahons inherited the house from Margaret's father, Alexander Craig, who bought the land at the surface from Pennsylvania Coal.

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[6] Pittston Gazette, May 18, 1918

Biagio Musto: Well, the mining engineer built it, Craig. So he built it right.

John: And, as it turns out, Alexander Craig worked for Pennsylvania Coal for 30 years, retiring as the superintendent of all its mining operations.[7]

Joe Musto: Pennsylvania Coal Company had – I mean, this whole area was Pennsylvania Coal.

Biagio Musto: This family was so involved in that. Craig was the chief engineer of all of the mines. So I think they had people who knew this family. They had to.

John: Alexander Craig died in 1910, over a decade before the Kohler Act, but is it really likely that the coal company would collapse his house, the house where his daughter and son-in-law lived? In fact, there's good reason to think the Mahon's house is the only house in the neighborhood that wasn't actually in any danger.

Joe Musto: The house. It's a pretty big structure and there was no settling.

Biagio Musto: Which is not the way it is here. Almost everything here has some kind of – dropped in a bit.

John: Neighbors?

Biagio Musto: Oh, yeah. Yeah. Yeah, most of the properties in this whole city have settled some way or another from that. I mean, it was so much anthracite under here.

John: Settling can mean everything from the earth moving a few feet to a major sinkhole. But there's been no settling under the Mahon's house, and it seems that when Harold and Margaret

[7] Pittston Gazette, Nov 6, 1896

received their letter from Pennsylvania Coal in 1921 saying that the company might soon collapse their house, possibly what was really going on was the coal company was ensuring that a friendly party would be the one bringing suit to enforce the Kohler Act.

> **Joe Musto**: Well, the interesting thing is a coal company never really told people they were mining which was unusual that they advised the Mahons.

John: The person who most wanted to be in court defending the Kohler Act was the city solicitor of Scranton, Phillip Mattes, the man who wrote the law. In newspaper articles and in the briefing, Mattes and other folks in Scranton complained that the Mahon's were the party defending the law. The fact that it was the Mahons and not Scranton trying to enforce the law meant that the case was first heard in Luzerne County, where Pittston is located, rather than one county to the north, Lackawanna County, where Scranton is located and where presumably a judge would have been more sympathetic to the city.

Robert Thomas: Venue is everything right in many cases – or judge selection.

John: But not in this case. Ultimately, the fact that the Mahon's were probably friendly plaintiffs does not seem to have affected the final outcome. Scranton participated fully in the case. And if you read Harold Mahon and his co-counsel's briefs, they didn't by any means do a bad job of making the argument that the Kohler Act was within the police power, that is, within power of a state to protect public health and safety.

Robert Thomas: I would characterize the Mahon's principle brief in the Supreme Court as very workmanlike. It certainly didn't have the stridency or the flair of the city of Scranton's intervener brief.

John: The Mahon's house is still there. And so are the neighbors' houses, even though the occasional sinkhole damages some property. The coal industry won the case, and there was no further impediment to mining as much as they wanted. And yet, Scranton and the other cities of the anthracite region did not fall into the earth. So what happened?

William Fischel: So I'm talking about this case in my Vermont Law School class sometime in the I think it was early 90s, maybe late 80s. And I sort of wondered, well, what happened afterwards?

John: That is William Fischel, professor emeritus of economics and legal studies at Dartmouth College. And who also taught a few classes at Vermont Law School back in the day.

William Fischel: Was Scranton in the hole, literally, from this, or did they make a transaction?

John: Did Scranton buy the right of support from the coal companies?

William Fischel: Did they say, well, we'll raise our taxes or we'll get donations so the city won't go in the hole. I knew there was still a city there. So something must have happened. And a student at Vermont Law School in my class said, I'm from Scranton. And Scranton's okay. It's still standing there. But he knew somebody named Stuart Milner, who was the keeper of all of the records of the Pennsylvania Coal Company.

John: Which was a happy coincidence because Professor Fischel was writing a book on regulatory takings called, as it happens, Regulatory Takings.

William Fischel: So I said, Okay, well, that's kind of intriguing. This is a guy maybe I got to talk to. So I have some correspondence with Mr. Milner and go to Scranton. And he has this dingy old office, although quite spacious. And he has all the records. And so he shows these enormous linen maps of coal and things like this in his office. So that's my introduction to unraveling what the mystery was.

John: For starters, even knowing what we know about mine cave ins, why would Scranton want a law that practically banned coal mining?

William Fischel: Everybody is connected with coal. Coal is really the reason Scranton is there. It's their lifeblood. Scranton's a place that doesn't want the coal companies to go away.

John: And why did the Pennsylvania legislature pass the bill to cripple one of the state's major industries – let alone pass it unanimously.

William Fischel: And and so my view was why are they trying to shoot themselves in the foot? They weren't. They were smart enough, and Philip Mattes was the city solicitor, he wrote the laws, two laws. One was the Kohler Act, stop causing subsidence. The other was the Fowler Act parallel to this.

John: If you read the Supreme Court's opinion, you would never know that the Kohler Act was passed in conjunction with another law, the Fowler Act, that also regulated anthracite mining and was signed into law on the very same day. And what did the Fowler Act do? It said, coal companies need to pay a tax, the revenues from which will then be used to repair mine cave ins. But the tax is voluntary, and if the coal companies don't want to pay the tax that's fine, but

then the Kohler Act with its prohibitions and criminal penalties for causing a subsidence would kick in.

William Fischel: You can buy exceptions if you pay a quote, voluntary tax. It's an exaction scheme. You're trying to use your regulatory authority to get some money out of the parties that you regulate.

John: It was an exaction scheme, pay the tax or we're going to do something you don't like. But it's an awfully complicated scheme. Why not just pass the tax by itself?

William Fischel: This was my first question, and I teach public finance. Why don't they just adopt the tax on coal and use the proceeds to fix stuff up or literally buy some of the rights that you need because you don't want your downtown falling into the pits.

John: And the answer is, that had already been tried.

William Fischel: They had first adopted a tax on anthracite coal, which is pretty much a tax on coal under Scranton and nearby places. And its tax revenue was earmarked for repair or purchasing the right of support. So they passed it several years before. And lo and behold, the Pennsylvania Supreme Court struck it down as unconstitutional.

John: The Pennsylvania legislature passed a tax on anthracite coal. But the tax did not apply to bituminous coal. And the Pennsylvania Supreme Court struck it down on that basis.

William Fischel: Pennsylvania has in its constitution something about taxation that says taxation has to be uniform. And the Pennsylvania Supreme Court says, you're violating the Pennsylvania Constitution by making a classification like this.

John: So what is the difference between anthracite and bituminous? And why tax one and not the other?

William Fischel: Anthracite is very dense, highly carbonated, formed under great pressure. And it's pushed out most of the annoying gases, the annoying chemicals.

John: Anthracite is hard coal. It’s older. It’s been under pressure for a longer time, and it burns relatively cleanly.

William Fischel: It's very valuable for home heating and just general urban heating because it did not pollute.

John: Relative to bituminous coal, which is soft coal and which would be extremely unpleasant to use for home heating.

William Fischel: And so there were laws actually passed in Philadelphia, New York and other large cities that banned the burning of other types of coal, bituminous coal, which was used in the steel industry. You didn't have that London fog, smoky pall, that you've got in other cities.

John: So why tax anthracite and not bituminous?

William Fischel: Scranton had a monopoly – or eastern Pennsylvania had – a local monopoly on anthracite.

John: The only anthracite coal that you could efficiently ship to the major cities on the east coast came from eastern Pennsylvania. Producers there had a monopoly, and if you taxed them, they could pass on the tax to consumers. Not so with bituminous. If you tried to tax bituminous, people would simply get it from out of state.

William Fischel: Coal miners in Pennsylvania would simply go to West Virginia and Ohio and Kentucky and get their bituminous coal. In Scranton, there was no such option. And so they wanted to exploit the inelastic demand, the great need for coal in the big cities, with just a tax on anthracite, not on bituminous. Pittsburgh would oppose a tax on bituminous. So the only way you can get through the legislature is just taxing anthracite, making this fine distinction.

John: But the Pennsylvania Supreme Court said no.

William Fischel: So this passes, and the Pennsylvania Supreme Court, I think not without reason, says no. You can't do that. You have to have a uniform tax.

John: So city leaders in Scranton went back to the drawing board. They tried the obvious things, like asking for the legislature to pay for repairs out of the state's general fund, rather than from a tax on coal companies. But that didn't get any traction.

William Fischel: So that's how they come up with this kind of cockamamie idea of let's pass a regulation and then finance what we actually want to accomplish by selling back exceptions to the regulation.

John: So they proposed the Kohler Act, banning coal companies from mining anthracite, and then the Fowler Act, which said, go ahead and mine but you have to pay a tax.

William Fischel: They don't really want to stop coal mining. They just want the money from this tax, which had been struck down before. So this is an end run around the Pennsylvania Supreme Court's previous decision that taxes have to be uniform. Oh, it's not a tax, it's voluntary. So if you just say it that way, it sounds like it's just opportunistic extortion. But if you understand what's going on in Scranton, and if you look beyond that, or look underneath that, you find out that people making these regulations are not evil bureaucrats. They're actually working in some kind of plan that balanced of the interests of their community. In this case, Scranton has an interest in not being damaged, and repairing damage that already occurred. At the same time, it doesn't want to drive out the coal companies. It's balancing things.

John: And even though Scranton lost the case, interestingly, the city pretty much got what it wanted.

William Fischel: The more profound story that I came up with, or at least a story that made me think about something other than regulatory takings, was the discovery that the coal companies they're behaving almost, not quite, as if they'd lost the case.

John: After winning at the Supreme Court, the coal companies surprisingly behaved as if they'd lost.

William Fischel: The coal companies, including the Pennsylvania Coal Company, if they caused any subsidence if they caused any damage to a house, they'd go up, figuratively and maybe literally, and repair the house free, as if that's what the Court had told them to do.

John: And it turns out, that's what they had always done.

William Fischel: This was a widespread practice. All coal companies had done this in the Scranton area, they assumed the liability without conceding that they had the obligation.

John: They didn't want to get dragged into court and they didn't want to have legal obligations to fix things up, but they weren't outrageously indifferent to the risk of subsidence.

William Fischel: So they didn't want to face injunctions, but they were happy to fix things up.

John: When Professor Fischel went to Scranton, he talked to a bunch of locals, including some who had no reason to love the coal companies, and they said, indeed, that's how it worked. But what about the yawning chasms in the photos and the apocalyptic language from Scranton's brief to the Supreme Court?

William Fischel: So why why did this case come up? It came up because of a rogue coal company named the People's Coal Company. It's a bunch of guys who get a lease for a mine. And People's Coal goes and takes out pillars. Taking out the pillars is like taking out the supports for your house. It's called pillar robbing.

John: Typically, coal companies left about a third of the coal in the ground to support a mine so it didn't collapse on their workers and on the surface. But by the 19-teens, coal companies were leasing out their old mines to subcontractors who were taking out those pillars.

William Fischel: The pillars of coal that had been left in the ground from mining ages ago. Now pillars, don't think of Greek temples and little delicate pillars. This is a lot of coal. So it's worth mining it.

John: It was possible to mine pillars responsibly. One technique that companies used as early as the 1890s was called flushing.

William Fischel: Flushing was a technique. The way they would do this was take materials that had been taken out of the mine before and then put it back.

John: Coal byproduct was sitting around on the surface in huge piles and if you crushed it up, and then combined it with water, and sluiced it back into the mine, it would find its way into empty spaces.

William Fischel: Then the water would drain off and the heavy material would would be left in place. And it would act as if there was still coal there.

John: And then you could mine other pillars of coal in adjacent rooms. Alternatively, you could also replace the pillars with wooden beams, which because of the acidity in the mine actually could provide support for a long time. But the People's Coal Company wasn't doing any flushing or putting in any wooden beams.

William Fischel: They get their men to skedaddle out before it collapses on them. And they were causing some serious damage. Probably the most famous serious damage was a school house was destroyed early in the morning, like a week before school starts. So nobody was hurt. And they do an investigation. It's a big scandal. And People's Coal Company is found to be the rogue here. And it turns out, they're judgment proof. They don't have any assets. They're just mining coal. The people who are responsible, two of the three officers of the People's Coal Company are convicted. Two go to jail and one leaves the country and is never found again.

John: According to Professor Fischel, nearly all of truly catastrophic damage was caused not by the coal industry generally, but by this one bad actor. So in their brief to the Supreme Court, Scranton's city solicitor Phillip Mattes kind of pulled a fast one.

William Fischel: I think Mattes had to exaggerate. Had to make it sound much more general. I don't think he lied. But I think he made it sound like: This is just happening all the time. We're stuck here.

John: In any case, after the Supreme Court's decision, surprisingly, the mine subsidence problem faded.

William Fischel: I read accounts in Scranton, where a lot of the people including, Phillip Mattes, the author of the Fowler Act, the Kohler Act in his biography says actually things got a lot better afterwards. And he ascribed it to a lot of the owners of the coal company, are part of the community and they go to church, their kids go to school, they swim at the Y whatever, with the people in town. They don't want to be hated by them.

John: According to Prof. Fischel, after a decade of unfriendly legislation and litigation, the coal companies got the message and they started leasing to subcontractors who were more likely to be local and therefore more responsible with mining pillars. In the volume upon volume of historical and scholarly accounts of the coal industry in the area in the 1920s, nearly all of the focus is on labor strikes, coal shortages, the poor working conditions, and things like black lung disease. The issue of mine cave ins is barely mentioned. Which isn't to say the problem went away entirely. Most prominently, in 1957, subcontractors who were leasing a mine from the Pennsylvania Coal Company in Pittston mined too close to the surface and underneath of the the Susquehanna River, which poured into the mine and killed 12 workers.

> **Local TV news story**: Management told miners to keep digging even when they were just six feet away from the riverbed. It took three days to plug the hole using rail cars and mine cars.

William Fischel: Stuart Milner explained this to me, rather defensively. He showed on the map here, he said: I drew this red line. There's a red line and says do not mine beyond this point. And obviously, somebody mined beyond that point.

John: And when all was said and done, every mine downstream of the accident – since they were all connected – was shut down for good. Not too far from the Mahon's house.

> **Joe Musto**: The Susquehanna River, I don't know if you know about this. They had workers, they went too close and the river went in and wiped out the entire mining industry in this valley. So that's about a mile, mile and a half south from here.

John: Joe's dad, the state representative, was part of the committee that investigated the accident.

> **Joe Musto**: My dad, he was in the House of Representatives and I don't know if he chaired the committee. I know he was on the committee doing an investigation of the whole – how that all happened.

John: Today, subsidence is still a risk in the area. And it's a risk that can be minimized using the technique that we talked about before: flushing.

> **Joe Musto**: There have been subsidences – lately it's not too bad. Every so often you get a sinkhole.
>
> **John**: So they have done a lot of flushing around here?
>
> **Joe and Biagio**: Oh yeah, lots. Lots of flushing.
>
> **Joe Musto**: Yeah there would be big sinkholes.

John: Here's a local news report from 2013.

> **Reporter**: [00:50] There have been more than 150 subsidences in Pittston over the past decade, including this one in 2007 under Mary Lou Callaio's home.
>
> **Homeowner**: We heard a sound in the cellar and my husband went down and there was no cellar there. It was a 40-foot hole.
>
> **State employee**: What we're hoping to do is minimize the risk of subsidence and hopefully these people can feel better living above abandoned coal mines.
>
> **Reporter**: News Watch 16. Pittston.

John: And that brings us to one final piece of business before we take a break. The murder.

> **Joe Musto**: Mrs. Mahon was found in the back stairway in the bottom in the kitchen. She was murdered. …
>
> **Robert Thomas**: You knew that already. Right?
>
> **Joe Musto**: I found out when I moved – the day we closed.
>
> **Robert Thomas**: After?
>
> **Joe Musto**: Here I am, myself and my wife, are laying in bed. In fact, the bedroom was right there. We're expecting to be visited by Mrs. Mahon.

John: In 1950, decades after *Pennsylvania Coal v. Mahon* and years after Harold Mahon had passed away, Margaret Mahon was murdered in her home, the house at the center of the Supreme Court case.

> **Joe Musto**: There was a big investigation. They never solved the murder. They found her in the …
>
> **Biagio Musto**: service staircase.
>
> **Joe Musto**: Yeah, in the kitchen. At the bottom of the staircase.

> **Sunday Dispatch**: State police, county detectives, and Pittston police completed nine exhausting days of dogged investigation on Saturday and reportedly had no positive clues as to who entered the home of Mrs. Margaret Mahon on April 20th at 9 p.m. and strangled her to death.[8]

[8] Sunday Dispatch, April 30, 1950

John: After the body was discovered, the family doctor was notified. The family's lawyer was notified. The coroner was summoned, and he took the body away. The family's caretaker cleaned up the crime scene. And then, after all that, the police were finally notified.

> **Sunday Dispatch**: Sore spot in the case is still the failure of the doctor, the attorney, and the deputy coroner to notify the police until after the body had been removed and the surroundings cleaned of any possible clues.

John: Police questioned everybody. They chased down a bunch of rumors, and they came up with no leads. The murder remains unsolved. So that's the story of *Pennsylvania Coal*. It gave us the doctrine of regulatory takings and constitutionalized the idea that the government owes you just compensation when it takes some but not all of your property rights. As Professor Fischel argues, the ruling didn't really much affect how the parties to the dispute behaved going forward. So it remains a bit of a curious case. We're going to take a break, and when we come back, we'll return to another unsolved mystery. How do we know when a regulation goes too far?

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Break

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John: And we're back. And we're going to talk about the Supreme Court's next big regulatory takings case.

Chief Justice Burger: We will hear arguments first this morning in Penn Central Transportation Company against the City of New York.

John: According to the Supreme Court, *Penn Central versus the City of New York*, decided in 1978, is the polestar of its regulatory takings doctrine. A polestar, just so we're all on the same page, means a guiding principle or literally a light that shows the way. But the *Penn Central* decision doesn't really shed much light.

Justice Brennan: Grand Central Terminal in New York City … was designated a landmark by the Landmarks Preservation Commission.

John: The case involved an office building that the Penn Central Transportation Company wanted to build on top of a railroad station, Grand Central Terminal, that it owned in New York City. The terminal had first opened in 1913. It was and is an enormous Beaux Art building with vaulted ceilings and all manner of architecturally significant details. Here's Anthony Robins and Sam Roberts for Architectural Digest:

Historian 1: When you look at the decorations on the walls of Grand Central, you'll see acorns. The Vanderbilts adopted the acorn as the family symbol. From little acorns mighty oaks like the Vanderbilts grow.

Historian 2: The general layout of this space is meant to look like a Greek temple.

Historian 1: a replica of a Florentine palazzo.

Historian 2: a Roman renaissance ceiling.

Historian 1: This is one of the great public spaces, one of the great landmarks, of New York.

John: Initially, in 1913, the plan was to build a tower on top of the terminal that would either be offices or a hotel. That didn't happen, but even so, underneath its glorious marble facade, the terminal is built out of steel that can support a tower. But by the 1960s, the terminal had fallen on hard times. Railroad companies all over the country were losing passengers to the new interstate highway system and to airplanes. And Penn Central was bankrupt and could not afford to maintain the terminal, which was badly in need of restoration. It asked for permission from the landmark commission to demolish the terminal entirely and build a skyscraper in its place. Unsurprisingly, the commission, which had been created just a few years earlier after the demolition of the other magnificent train station in midtown Manhattan, Penn Station, said no. So the company asked for permission to build an office tower on top of the station as was originally was envisioned in 1913 – except larger, more modern, and less Beaux Art.

> **Justice Brennan**: It was to be a 55-story office building …. Because of the terminal's landmark designation, however, the structure could not be built with the permission of the Landmarks Preservation Commission.

John: It would bring in millions of dollars of rental income and set the bankrupt company back on the right foot. But the commission said no.

Gideon Kanner: But being a railroad, which is like a regulated utility, they couldn't stop operating even though they were losing something like $1 or $2 million a year.

John: That's Gideon Kanner, who was a professor emeritus at the Loyola Law School in Los Angeles and a veteran property rights litigator.

Gideon Kanner: Penn Central said, Look, we're broke, we can't do anything unless you let us build the high rise. They said no.

John: Which was strange, because while New York City's Historic Preservation Law imposed a duty on the owners of designated landmarks to maintain them at their own expense, the law also said that owners were entitled to a reasonable return on their property.

Gideon Kanner: And the law defined return as an excess of income over expenditures. And Penn Central said we don't have an excess, we have a loss.

John: But, ignoring that part of the law, the commission rejected Penn Central's plans on purely aesthetic grounds. Quote: "[T]o balance a 55-story office tower above a flamboyant Beaux-Art facade would seem nothing more than an aesthetic joke. … The 'addition' would be four times as high as the existing structure and reduce the Landmark to the status of a curiosity."[9] End quote. In my personal opinion, the proposed office tower was not particularly aesthetically pleasing. But that doesn't mean it would have been out of place. Grand Central Terminal is surrounded on all sides by skyscrapers.

Gideon Kanner: So they filed a lawsuit. And the trial judge listened to it and said, I find it's a taking.

John: There was a bench trial. Penn Central presented its accounting, and the judge found that not only was the company losing money but also the terminal was quote: "deteriorating at a substantial rate." Which didn't mean the historic preservation law itself was unconstitutional. It

[9] From SCOTUS' Penn Central decision

just meant that if the city was going to prevent Penn Central from building, the city would have to pay just compensation.

Gideon Kanner: Here comes the weird part. The city of New York, their lawyers, they understood the law, and they knew that they had a loser on their hands. So they wanted to settle. But then outside forces intervened. The outside forces consisted of how shall I describe them? The elite, art preservation folks, wealthy people from the Upper East Side. And they prevailed on the mayor to prevail on the city attorney to appeal.

John: Most notably, former First Lady Jackie Onassis joined the chorus of voices calling for the preservation of the terminal.

> **Jackie Onassis**: I think if we don't care about our past, we can't have very much hope for our future. And we've all heard that it's too late or that it has to happen or that it's inevitable. But I don't think that's true.

John: The city's lawyers appealed.

Gideon Kanner: They appealed to the Appellate Division. The Appellate Division said, yeah, we approve of your theory.

John: Penn Central's theory.

Gideon Kanner: But you used the wrong evidence. You demonstrated that you're losing money. But for you to win, you have to demonstrate that no matter what you could do reasonably would still result in a loss.

John: The appeals court, in a divided opinion, reversed. The majority said Penn Central was inflating its losses by including not only the losses from running the terminal but also its losses from it's actual railroads. The dissent, meanwhile, said even if you do the accounting that way, Penn Central was still losing over a million dollars a year and there is still a taking. In any case, the disagreement was about accounting and not law.

Gideon Kanner: Ordinarily, when there's a problem with the evidence, a court sends the case back for a retrial. Not here. They dismissed it. They ordered it dismissed. At this point, weird got weirder. The railroad appealed to the highest court in New York, which over there is called the Court of Appeals. And this is where intellectually speaking, all hell broke loose. The Chief Judge of New York was a man named Charles Breitel. And he wrote the opinion. His opinion had absolutely nothing to do with what the lower courts had decided.

John: The opinion leaned heavily on a theory by the 19th century political economist Henry George.

Gideon Kanner: Henry George, who was frankly, between you and me a bit of a wacko. He had some weird ideas. But Breitel bought into it, and wrote an opinion which said that, yes, Penn Central is entitled to a return on the value. But there are two kinds of value, he said. Value which is contributed by the private investment and enterprise and the value that has contributed by the public influences.

John: The state's high court said that part of the value of any property is created through the effort and initiative of the property owner. But then there's another part, quote: "created not so

much by the efforts of the property owner, but instead by the accumulated indirect social and direct governmental investment in the physical property, its functions, and its surroundings."

Gideon Kanner: And here, he said, all you demonstrated is value due to your activity, and you didn't consider the public influences.

Gideon Kanner: Just by the way, this is all without any precedent, except in some of George's writing.

John: The historic preservation law did not say anything about public and private ingredients. Nor did any prior case make such a distinction. The court just made it up.

Gideon Kanner: So they ruled against Penn Central. But it was a rather strange ruling that, as they said, we will give you the opportunity to go back and demonstrate this fancy new theory that we've articulated.

John: The court said the case could go back to the trial court. But.

Gideon Kanner: It was really pretty cynical, in my opinion, because Breitel admitted in the opinion that these two factors, the public and private contribution to value, were quote, inseparably joined, unquote.

John: How would anyone go about calculating how much of a property's value is created privately versus publicly? It's an impossible task. And the court did not give any hint of the how to conduct the appraisal it had ordered. Later, at a conference, Judge Breitel admitted as much.

Gideon Kanner: And later on in extrajudicial speech, Breitel said that he sent Penn Central off on a search for the Holy Grail as he put it. In other words, he gave them an opportunity to go and lose again.

John: So Penn Central asked the U.S. Supreme Court to take the case.

Gideon Kanner: At this point, weird followed weird. Penn Central filed a petition in the U.S. Supreme Court, in which they conceded that they were getting a reasonable return on the property.

John: Which contradicted the whole theory of their case. They were losing money and the historic preservation law was not supposed to force property owners into losing money. Why on earth would they now make a concession that was fatal to their case?

Gideon Kanner: I'm baffled. To be quite frank, when I first read it, I said, Gee, these guys screwed up. But I have reconsidered that because they may have been aware of things that I'm not aware of.

John: One thing we do know and that might serve as explanation – although not a particularly satisfying one – is this: Both Penn Central's lawyers and New York City's lawyers didn't know what to make of the Court of Appeals opinion.

Gideon Kanner: All the lawyers, I know this, were ready to throw themselves in front of a truck in order to avoid having to unravel Judge Breitel's New York opinion. That's the best answer I can provide. Neither side – neither Penn Central nor the city – wanted to deal with Breitel's vaporings. And believe me, it's an odd opinion. To make sure you understand that it isn't me –

that everybody considered it weird – the city attorney of New York wrote a letter to Judge Breitel apologizing for not defending his opinion in the U.S. Supreme Court.

John: Indeed, neither New York City, nor the many interested parties who filed briefs in support of New York City at the U.S. Supreme, defended the opinion. Here's Justice Stewart talking to Penn Central's lawyer at oral argument.

> **Justice Stewart**: As I read over the briefs filed by your brothers and sisters on the other side, it is my impression than none of them tried to defend the basic reasoning of the – of that part of the reasoning …
> **Lawyer**: That is the way I read those briefs. They all back away to some degree.

John: In any event, having abandoned their theory of the case, Penn Central had to come up with a new one.

Gideon Kanner: For the first time, they argued that the regulation took the air rights above Penn Central. Which would have been a respectable theory, but they never raised it below. It is a fundamental principle of appellate law that a higher court will not consider arguments that hadn't been made below that the lower courts had no opportunity to pass on. But guess what? The U.S. Supreme Court took the case.

John: And so *Penn Central versus New York City* became a case about air rights and about whether making the air above Grand Central unavailable for use was a taking.

Gideon Kanner: So finally the Supreme Court issued the opinion, and they ruled in favor of the city. But as far as lawyers are concerned, what's in the opinion is far more important than the

outcome. And what was in this opinion was weird. Because the Supreme Court started out by saying, quote, this Court has been simply unable, unquote, to state the elements of a regulatory taking action. Which, so wait a minute, you got to stop and let this rattle around your head. The high and the mighty, the brightest minds in the country, all nine of them can't do it?

John: The Court said, there would be quote “no settled formula” for determining when a taking requiring just compensation had occurred. But there are three factors to consider. It didn’t say how much weight courts are supposed to give each factor or what evidence litigants could use to satisfy them.

Gideon Kanner: So it was another one of these impossible-to-meet criteria. There were three factors. There's no rule, but three factors, such as the impact on the owner, the nature of the government activity. So we all looked at each other: What the hell does that mean? All it did was confuse the law. The Court was groping in a fog.

John: One factor: the economic impact of the regulation on the property owner. In other words, if a regulation took part of the value of a property, how much was still left?

Gideon Kanner: They came up with stuff that nobody ever heard before. No precedent, no reasoning, they just said that a taking of a part of the property is not compensable. And if the city only took the air rights that was not a compensable taking. Well, with all due respect to all the personages involved, this was errant nonsense. Because it is a fundamental principle of eminent domain law that in partial takings, the government has to pay for what it took. And it also has to pay for any diminution in value of the remaining lands that remains in the owner's hands.

John: In a physical takings case, if the government takes part of your yard, it still has to pay you just compensation, even if there is still property left over. But here, the Court said that a partial taking won't trigger the requirement for just compensation. It said even if Penn Central couldn't build the tower, they still had some other ways to use their property to try and mitigate their losses. Another factor courts are expected to consider: the character of the government's action.

Gideon Kanner: The nature of the government activity.

John: Meaning, is the regulation closer to a physical taking, like eminent domain, and that requires compensation or, at the other extreme, is the regulation just something that incidentally affects a property's value, like forbidding a property owner from creating a nuisance, like a sound ordinance, that does not require compensation. In his book on regulatory takings, Prof. Fischel writes that this factor is unhelpful because there is quote, "an ocean of regulation between these two extremes" and the Supreme Court didn't provide much guidance on the gray areas in between.

Gideon Kanner: I have to digress a little bit. When the Supreme Court has a really difficult case, which there's controversy internally, and they can't agree, they keep debating it. And it doesn't get filed until the very end of the term. So the final opinion, typically, in those cases, is written by clerks as all nighters to beat the deadline.

John: And that's what happened in this case, as a clerk who worked on the opinion related to Prof. Kanner. *Penn Central* was written by Justice Brennan's clerks in a series of all nighters over a three-day weekend.

Gideon Kanner: Because when the Supreme Court recesses for the summer everything that's been argued has to be filed. The thing about these kids is, as bright as they are, they rarely if ever take courses in land use. So it was a case of the blind leading the blind.

John: The third factor was put into the draft opinion by a law clerk.

Gideon Kanner: The third one said, interference with investment-backed expectations of the owner. They didn't elaborate. They didn't cite authority. They just – the clerk put it in the opinion.

John: That factor – that there might be a taking if the regulation interfered with the reasonable, investment-backed expectations of the owner – was picked straight out of a law review article by the Harvard professor Frank Michelman.

Gideon Kanner: Brennan's clerk, read when he was in law school, read and had been influenced by a law review article by Harvard professor named Michelman. And Michelman wrote a frankly philosophical article, and this clerk plucked one phrase out of it.

John: The Court didn’t say what it meant by an investment backed expectation. Would that mean that a wealthy developer who invests a lot of money in a project would have more of a right to just compensation than someone else whose investment was smaller? Or who waited longer to build? Or built less intensively?

Gideon Kanner: [19:02] So what happened then? What happens to Grand Central now? By then it was a mess. It was used as sleeping quarters and a urinal by the homeless. Terrible. Penn Central didn't have the money to do anything about that. Remember, they were in bankruptcy. So the city of New York, its transit authority, took it over and restored Grand Central.

So it was restored with government money, which could have been done to begin with, and this whole monstrous Tower of Babel was completely unnecessary.

John: Today, there is a very common notion out there that the Supreme Court saved the terminal from demolition.

> **Historian 1**: The entranceway here is dedicated to Jacqueline Onassis, and that is a fitting tribute because she helped save the terminal.
>
> **Historian 2**: The preservation battle to keep it standing was extremely important in the history of historic preservation generally. It was a Supreme Court decision that upholding New York City's Landmarks Preservation Law kept the terminal standing.

John: And it's true that the case was the Supreme Court's first look at historic preservation laws. But as we said earlier, the question before the Court was not whether or not historic preservation laws are unconstitutional. It was: who pays? If it's in the public interest to preserve historic properties, shouldn't the public pay?

Gideon Kanner: If you want to preserve the great artifacts of civilization, you have to take care of them. You can't fob that off on a bankrupt company.

John: But in terms of the regulatory takings doctrine, the true legacy of the *Penn Central* decision is that just when it seemed like the Supreme Court would finally give some guidance on what it means for a regulation to go too far, they delivered the opposite. No one can really say for sure if a specific regulation goes too far unless and until the Supreme Court pronounces on that exact regulation. For instance, *Pennsylvania Coal* remains good law, so you would think that a regulation that says you have to keep coal in the ground when you own the right to

collapse the surface goes too far. And as it happens, it 1986, the Supreme Court decided a case on exactly that issue. Except instead of anthracite coal, this time it was bituminous. Here is Prof. Thomas of William & Mary again.

Robert Thomas: No doubt aware of the result in *Pennsylvania Coal against Mahon*, the Pennsylvania legislature adopts a very similar measure requiring bituminous coal companies to leave it in the ground as a support for the surface.

John: Like the Kohler Act of 1921, the new law transferred the right of support from the coal companies to owners at the surface, again, without compensation. Here's the coal association's lawyer arguing at the Supreme Court.

> **Coal association lawyer**: There is very simply no meaningful distinction between the statute at issue today and the Kohler Act. Indeed the parallels between the two statutes are remarkable.

Robert Thomas: If I'm one of the bituminous coal coal association's lawyers and I'm rubbing my hands and say, Bring it on, and I think I'm gonna wipe the floor with you on this one. Because the the acts were similar. The requirements were similar of what it did and what it prohibited.

John: Nevertheless, in *Keystone Bituminous Coal Association v. DeBenedictis*, the Supreme Court held that there was no taking.

Robert Thomas: Well, maybe this is an example of how unpredictable the Supreme Court's takings doctrine, and the difficulty with Justice Holmes' formulation, the too-far formulation, was. In something you might have predicted would have come out with the same result as

Pennsylvania Coal, the Supreme Court came out exactly the opposite and said this is not a taking. Courts and legal scholars have danced on the head of a pin, trying to figure out the actual differences between *Keystone Bituminous* and *Pennsylvania Coal*. Mostly unsuccessfully, in my view.

John: There have been developments in the doctrine since then. Most importantly, in 1992, in *Lucas v. South Carolina Coastal Council*, the Supreme Court ruled that if a property owner can show that a regulation destroys all economically beneficial uses – 100 percent – then there is a taking. But since then, property owners who have tried to rely on *Lucas* have almost never succeeded. According to one study, of the over 1,700 cases brought over a 25-year period where property owners claimed that a regulation wiped all economically viable use of the property, they prevailed only 27 times – 1.6 percent of cases.

Robert Thomas: The Supreme Court expressly said that most cases, takings cases, are ad hoc factual determinations meaning one would think you could get to the jury on most of these questions. And yet, that has not been the experience. The experience is that the courts filter them out primarily at the pleading stages. You don't get out of the gate as a property owner. And you tend to lose as a matter of law because of failure to allege the right thing.

John: One way forward, if the Court is not ready to revise *Penn Central* and give us a new test, is simply to let more of these cases advance past the pleading stages and go to a jury. And recently, the Supreme Court had a chance to weigh in on a case that did go to a jury – that did find a taking – but where the property owner nevertheless lost the case. *Bridge Aina L'ea, LLC v. Hawaii Land Use Commission*.

Robert Thomas: Bridge Aina L'ea involved agriculturally zoned property, residential and agriculturally zoned property on the western side of the Big Island of Hawaii.

John: The property is a 1,000-acre field of lava.

Robert Thomas: Even though it was designated as agricultural property, it was hardly suited for agriculture. I mean it looked like a parking lot, because it was the type of lava that flows down and hardens into hard, black basalt.

John: The property owners, Bridge Aina L'ea, wanted to build houses on the site, and they spent $20 million dollars on the project, securing approvals and preparing the site. But officials changed zoning so that the property could only be used for agriculture. So Bridge sued and said this was a taking under two theories – both *Penn Central's* three-factor test and under *Lucas* because all economically viable use of the property had been wiped out.

Robert Thomas: A federal jury found on both theories after a 15-minute deliberation – by the way that 15 minutes included lunch – that the owners had indeed suffered a taking, and we're entitled to compensation.

John: But then a curveball: The trial court judge awarded Bridge Aina L'ea just $1 dollar in damages. So the case went up on appeal to the Ninth Circuit.

Robert Thomas: Usually jury verdicts are very difficult to overturn on appeal. But the Ninth Circuit in that case reverses the judgment in its entirety, says even the dollar is too much.

John: Among other things, the court ruled that even if the regulation reduced the value of property by a lot, it hadn't reduced the value of the property to zero. So there was no taking.

Robert Thomas: The Ninth Circuit concluded that there were still some remaining uses of property that looks to me for all intents and purposes like a parking lot. What those uses are the court speculated, and I'm not sure where the court got that from because there wasn't that much in the record about it, but there it is. And so the owners then petition the United States Supreme Court for review, saying takings law is a mess.

John: Quote: "This Court has created a 'rule' that provides no guidance to those who either have to live with it or apply it. There has been enough litigation of this sort during the last four decades for the law to have developed meaningful guidelines. And, yet, we have none." But in 2021, the Supreme Court declined to hear the case.

Robert Thomas: One of the main goals of the law, at least as I understand it, is to provide some regularity, some predictability. Well if that's the measure, takings law fails. Because right now the only thing you can really predict with any certainty, looking at a situation is that unless you can get it to the Supreme Court, you're not going to get a definitive answer on whether a regulation goes too far in restricting the use or value of property such that it requires compensation.

Conclusion

John: Today, does the takings clause protect property owners when the government doesn't outright confiscate their property? Yes and no. But mostly no. Though we should add that there are some nooks and crannies to the doctrine that we didn't discuss where property owners can have a better shot. One is what's called an "exaction," where the government essentially extorts

an owner into giving something up – like an easement or even money – in exchange for a permit. Those, however, are outliers. When the government says its trying to protect health or safety – even when there's good reason to suspect something more nefarious is the real motivation – the courts cut it a lot of slack. But as we learned last episode when we talked about the Fourth Amendment, there's a lot more to property rights than just just compensation. There's due process, equal protection, and unenumerated rights, all of which will be on table next time on Bound By Oath as we begin a multi-episode journey into the biggest property rights issue of today: zoning. I'm John Ross. Thanks for listening.

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