ShortCircuit365

Sun, Mar 02, 2025 4:58PM 1:01:38

SUMMARY KEYWORDS

property rights, Eighth Circuit, feedlot case, Minnesota Pollution Control Agency, Supreme Court preview, North Carolina Supreme Court, law of the land clause, Magna Carta, takings clause, procedural due process, retaliation claim, agricultural regulation, inverse condemnation, qualified immunity, constitutional law.

SPEAKERS

Justin Pearson, Anthony Sanders, Robert Thomas

A Anthony Sanders 00:10

They were the less restful cows that were stalled, while those that would stand still of their own will were milked in the middle of the yard, where many of the better-behaved ones stood waiting- all prime milkers, such as were seldom seen outside this valley and not always within it, nourished by the succulent feed the watermead supplied at this prime season of the year. Those spotted with white reflected the sunshine with dazzling brilliance, and the polished brass knobs of their horns glittered with something of military display. Well, those bucolic words from Thomas Hardy's Tess of the d'Urbervilles are probably what you picture when you think of a cattle pasture. That is not what the Minnesota Pollution Control Agency thought of a certain cattle pasture- what we call a feedlot- and so they fined that farmer several hundred thousand dollars. That case went to the Eighth Circuit, which is something we'll talk about today, along with the return of an old property rights friend here on 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 Wednesday, February 26, 2025, and, as I hinted, a property rights special guest is featured on today's show-someone who has been on Short Circuit in the past, and it's been way too long since we've asked him to come back. We'll get to him in a moment, but also joining us to discuss this feedlot case from the Eighth Circuit is IJ's very own Justin Pearson. Justin is the managing attorney of our Florida office, is in charge of our nationwide food truck litigation, and, as many listeners will know, is part of our Supreme Court preview every fall. But he has some additional previews in the works that he'd like to tell you about.

J Justin Pearson 02:16

That's exactly right, Anthony. Yeah, so I am fortunate to oversee IJ's Supreme Court term preview series that we do at law schools every fall. It's a lot of fun. I'm joined by other IJ attorneys and professors. We did it at six law schools this past fall, Harvard, Chicago, UVA, Duke UNC and Wake Forest. And it looks like this upcoming fall, we're going to do it at eight or

nine law schools, and so if anyone out there is at one of our nation's top law schools and would like to be added to the list, I can't promise you that we'll be able to fit you in, because it is getting pretty busy, but feel free to reach out to me directly. My contact information is on IJ's website, but my email address is Jpearson@ij.org. And it's really this cool event, and it's been so much fun to see it grow. I know, Anthony, you've participated in years past, and now the idea that we're closing in on 10 law schools is pretty neat.

A Anthony Sanders 03:09

Yeah that's crazy. All started with humble beginnings at the University of North Carolina, and now it's all over the place. So if you're interested, contact Justin. And now for our special guest, Robert Thomas. Now, Robert wears many hats. He is director of property rights litigation with our friends at the Pacific legal foundation. He's a long time property rights lawyer. He blogs at inverse condemnation blog, which, if you are at all interested in property rights, and you've never been to it you are really missing out. We will put a link in the show notes to it. He is also the Joseph T Waldo visiting chair in property rights at William and Mary Law School. He is a contributor to the Bound By Oath podcast, where he was an interviewee earlier in this season, and even accompanied John Ross, our colleague, on a trip to Pennsylvania to look at its coal mines. I'll let him maybe talk about that in a moment. And he was on Short Circuit way back in the day when you had to come into our studio in Arlington, Virginia, which he did. And I think that was back in like 2019. So Robert, it's great to have you back.

R Robert Thomas 04:31

Well, it's great to be here. Thank you. And thank you for that introduction. I forget sometimes which hat I'm wearing and and, speaking of that trip, I call it John and Roberts Excellent Adventure, if that gives you any hint about what we were doing traipsing around in the snow on the 100th anniversary of our favorite case, Pennsylvania Coal Company v. Mahon. John even uncovered a murder mystery that came through in the Bound By Oath podcast. So it was an interesting nerd filled two days that only certain ones of us could be talked into it. And John said, "Well, let me think about Robert."So that was quite fun. So thank you, and thank you for having on a, let's call it a friendly competitor, for some cases and issues. But, in all seriousness we're all pulling in the same direction, maybe from slightly different angles, but we're all going in the same way, and we celebrate each other's successes.

A Anthony Sanders 05:40

Well, thank you. And we, of course, are very supportive of many of the efforts at PLF. And we have you guys on here from time to time. So we asked Robert to come back and present whatever case he wanted. And interestingly, for Short Circuit, one of the cases he picked was from a state case, which we do occasionally, the North Carolina Supreme Court, has an interesting recent property rights case. And I should add, we have had a few North Carolina Supreme Court cases we've talked about in the last couple years, because IJ has been litigating there, Justin actually has a case in the lower courts there. Our friend Josh Windham had a victory there a few months ago. But then there's this case on property rights issues that has a lot going on. So we'll have Robert present that in just a moment. First a couple very quick announcements. A few months or a couple months ago, I was touting that I'm going to be at

the the Tavern Debate that IJ does jointly with the Federal Society every year at the Western Chapters Conference. So on the West Coast, in Westlake Village, outside of LA. It was unfortunately delayed because of the LA fires. It was going to be at the end of January. It has now been rescheduled, though, for March 28 so I will put a link in the show notes. If you would like to join us, meet a few IJ attorneys and participate in this really fun event- you can you can sign up for Friday, March 28. And of course, we have upcoming the 10th anniversary of Short Circuit on April 3 in Washington, DC. So we are going to be coast to coast within just a few days. We have had a number of RSVPs. We are not quite at the sellout point yet, but it is getting closer. So if you want to come to that event, please, RSVP sooner rather than later.

R **Robert Thomas** 07:36

Short Circuit is like the law and order of the podcast world. Did you see that bit in I forget which self congratulatory award ceremony they had and the one of the actors from Law and Order said, "who in the audience here has been on law and order," and like three quarters the audience raised their hand. You've got to ask that question of your audience at your event. And I bet you, you're gonna get a big return on that. But, yeah, you guys are the law and order of the legal podcasting world.

A **Anthony Sanders** 08:11

Great point. We will be sure to ask that of the audience. So we'll turn now to North Carolina, and there's a lot going on in this case, and kind of almost the least interesting part of it is the merits.

R **Robert Thomas** 08:26

Yeah, exactly. Our brethren across the Atlantic often give us American lawyers heat, saying, "You guys care more about this Magna Carta thing than we ever did." And maybe they should. It took the American Bar Association, as I remind them, to go fix up that monument at Runnymede and put it in. To them, it was just an open grassy field down by the river that they paid no mind to. But if you go there today, there's a plaque and a commemoration site where you can say, "Here was the spot where the barons forced John to affix his seal to this thing that said he would, at least in principle, respect their rights." We all know that didn't last 90 days. The ink wasn't even dry before John said, "The heck with this thing," and threw it out. But over time, successive kings affirmed and reaffirmed it until Parliament finally adopted it. It's had more life in American legal memory than with our British counterparts. They rely on things like the Bill of Rights and other documents. Anyway, anybody who reads property rights decisions from the U.S. Supreme Court these days knows that Magna Carta is being relied on more frequently. It's right there on the courthouse door when you walk in. There's actually one state in the country that has an almost direct copy of Magna Carta language- translated from Latin into English- in its state constitution. One of the things I discuss with my students is: What if we didn't have the public use clause or takings clause in the U.S. Constitution? Does that mean the government could just take your property for any use and not compensate you? Is it the takings clause that stands between us and land grabs? Eventually, they come around to realizing that just doesn't seem fair. I tell them, we have one example- one state south, North Carolina, which does not have a due process clause, takings clause, or public use clause in its state

constitution. And yet, the North Carolina Department of Transportation still pays compensation and considers whether takings are for public use. That's because the North Carolina Constitution has a "law of the land" clause, which the North Carolina Supreme Court has interpreted over the years to function similarly to due process and takings protections in other state and federal constitutions. The language, if you check it out, almost mirrors Magna Carta: "No person shall be taken, imprisoned, or disseised"- us old dirt lawyers love that word- "of his freehold, liberties, or privileges, or outlawed or exiled or in any manner deprived of his life, liberty, or property but by the law of the land." The North Carolina Supreme Court has said this encompasses procedural protections like due process, substantive limits on arbitrary government action like substantive due process, and protections against ex post facto laws, takings, and public use violations. A few years ago, North Carolina passed a law reopening tort claims that had previously expired under the statute of limitations, allowing plaintiffs to bring cases that were otherwise time-barred. Naturally, this raised a big legal question- can they do that? That was the issue in McKinney v. Goins, decided in January 2025. It's a fascinating case with great legal principles at play. The expired claims being reopened? They were child abuse cases- serious, bad stuff. So it's not a situation that's going to garner much sympathy for the people challenging the law, who might say, "Hey, I thought I was in the clear because of the statute of limitations." Still, it raises a fundamental question: Is it fair to go back and reopen these claims? In another jurisdiction, we might analyze this under a due process theory. And while ex post facto laws apply only to criminal cases, this has a similar feel- retroactively imposing liability on someone who thought they were safe from prosecution. But in this case, the challenge was based on North Carolina's law of the land clause, arguing that the legislature's action violated that principle. Essentially, once a statute of limitations has expired, claims are gone; reopening them is like taking property without due process. What makes the case even more interesting is that the North Carolina Supreme Court unanimously upheld the law, but justices disagreed on how to interpret the law of the land clause. The majority focused on the text, which makes sense- it's the Constitution, after all. But that led to a bigger interpretive debate. When I talk to my British colleagues about constitutional interpretation, I ask them, "You love your constitution, right?" They say, "Of course!" Then I say, "Show me." Americans can pull out pocket constitutions, or even pocket state constitutions, but the British can't. They say, "Our constitution lives in our hearts." And I think, okay, great- history and tradition, there you go.

A Anthony Sanders 17:36

And I will interrupt to refer the listeners show we did a couple years ago on the British Constitution by a couple of British constitutionalists that are very proud of their kind of unwritten constitution. But I think on balance, having it written down in one place, it's kind of a good idea.

R Robert Thomas 17:55

That's exactly the question, right? Up until then, no constitution, up until ours—our U.S. Constitution and our state constitutions preceded that; no one had written it down, and in the time since we wrote it down, no new constitution hasn't been written down. And what does that tell you? So the question was, is this consistent with North Carolina's law of the land clause, and the courts unanimously said yes, the legislature can do this. And the real divergence was in how to get to that result. They all agreed that the first place you start looking is at the text of

the North Carolina constitution, but then the question is, what do you do with that? And the majority came up with a rather detailed, rigorous step-by-step plan to: look there, then if that doesn't help you, look to the context at the time, look to our decisions, and start the decisions that were recent to the adoption and work your way forward. Well, the dissenting justice wasn't having much of that, and she argued that approach "fixes the North Carolina constitution in amber." Remember, we've got a little bit of uncomfortable history in our constitutional history in North Carolina- you know, at one point, we thought we were seceding from the Union and other things. And of course, she pointed out that "law of the land" might have protected the ability to keep other human beings in chattel slavery. But the debate between the majority and the dissenting justice was very interesting for us who are witnessing that same debate going on, both in the halls of legal academia and in courts. And also at the same time, the U.S. Supreme Court majority, when it comes to property cases especially, is saying, "Look at history and tradition," right? All of a sudden, constitutional lawyers, property rights lawyers have to go back and dust off Blackstone- you know, all the things we maybe left behind a little too much from law school. But Chief Justice Roberts, when he writes his opinions, will really emphasize things like "Let's start with Magna Carta and move forward." So I think this case is a great reminder to do so. So I really recommend the case to the listeners, even if you don't at all follow what goes on in the judicial politics of the North Carolina Supreme Court. And I understand from my local colleagues there that a lot has been going on in terms of the changes as new justices get elected or decide to run. But the interesting thing to me about this case, the thing that gave me a little pause- I don't know how to interpret the North Carolina constitution, and beyond the borders of North Carolina, that debate doesn't resonate all that much, except that every state is doing this with their own constitutions, or it serves as a model for how the U.S. Supreme Court might do the same thing. But the part that gave me pause was this: what I thought was a very strange analysis, the way the majority got there. They say, "Well, you didn't have a property right in the running of a statute of limitations." Okay, what do you mean by that? On one hand, it sounds good, right? A statute of limitations is a government benefit to some degree- it's legislative gravy, or the legislature simply determining an arbitrary point in time after which you cannot bring a claim. And the court said, "Well, you know, hey, the government gives, the government takes away. What's the big deal?" Okay. But these guys say you don't vest into a no-liability situation simply because the statute of limitations is running- again, triggering my old dirt law thinking about vested rights. Oh, you don't have a vested right in a statute of limitations? Well, all right, okay, I'll put that down. But here's what stuck out to me. They said, "The statute of limitations simply says you can't use the courts. It doesn't say anything about the underlying claim." So, hey, defendants- even though the statute of limitations ran on you, or claimants who might have been tort defendants in one of these cases- you were still subject to liability, so therefore you haven't really lost or gained anything by what the legislature has done; it's only opened up an avenue in court. And that's what really got me thinking about how before this adoption, there was no legal remedy to pursue a tortfeasor. Now there is, again for a limited period of time. Is the court really saying that the claim, even though the statute of limitations passed, was still good? And I ask you guys this- what good is a claim if you can't seek a legal remedy, right? And I think the court was playing a little slight of law, or maybe a little slight of policy, because, it's logical, and it works out- "Oh, you have no property interest in a statute of limitations because the statute of limitations merely cuts you off from going to court, but you have all your other remedies, and you are still there, you are still subject to a claim." And I'm like, what claim? You know, meet me at the courthouse square at 12 noon and we'll shoot it out and have a trial by ordeal? I mean, what remedy might a plaintiff have once a statute of limitations expires? I don't know. And so I ask you guys that, and it just cuts back to me as a property lawyer, the question of self-executing rights. On one hand, we have the Nevada Supreme Court in a recent case saying, "Every right under our state constitution is self-executing- there's a damages remedy for that no matter

what." The legislature doesn't have to hand these things out and say, "Yes, we agree that the Nevada state and its instrumentalities can get sued for money if they've allegedly violated your rights." It's self-executing across the board. And the U.S. Supreme Court, on down, has said with respect to takings and property, the right is self-executing. The North Carolina Supreme Court itself has argued and is awaiting a decision on a case involving what self-executing remedies exist, if any, for a failed condemnation in which the condemnor, even after being told by the court, "This taking isn't for public use," goes ahead and takes it anyway. So who knows? But I would be fascinated to hear your thoughts. A client walks in your door and says, "I think I have a claim against B." Oh really? The first question we ask: When did this happen? "Well, about 50 years ago." Oh yeah, I'll take that case, because the North Carolina Supreme Court says that even though the statute expired and we can't go to court, we can do other things. Well, maybe I'm looking at it too much through the lens of a lawyer, where everything's resolved in court.

A Anthony Sanders 26:50

Justin, do you have the answer for us?

J Justin Pearson 26:53

Well, the short answer is, I don't think I'd take that case. But what I do want to say is, Robert, I'm so happy you chose this case because this disagreement between the justices- over whether precedent closer to the time of ratification is more valuable when determining the original public meaning than subsequent precedent- is something I'd actually been independently mulling over because of a talk I saw recently. I attended a speech by Florida Supreme Court Justice John Couriel, hosted by the Broward County Bar Association and the Federalist Society, which was open to the public. I believe he has probably expressed these views elsewhere as well, but this particular talk focused on textualism and original public meaning. One of his big points was that when determining the original public meaning of a constitutional provision, the first precedent to apply that provision might actually be a better indicator than later precedent. I know that idea might make lawyers uncomfortable because it challenges how we're traditionally taught to view precedent- typically, we assume subsequent precedent either overrules or carries more weight than earlier precedent. But after reflecting on it, I've come to the conclusion that there are definitely times when, from an original public meaning perspective, the earlier precedent has more value than the later one. This isn't to say that subsequent precedent lacks any weight- it depends on the context and how it engages with textual analysis- but I do think Justice Coryell, along with the majority in this North Carolina Supreme Court case, has a valid point. It's kind of wild to rethink precedent this way, but I believe it's correct.

R Robert Thomas 28:40

Yeah, and we see that a lot of times, implicitly in the US Supreme Courts and other courts. I mean, you cite something by Chief Justice Marshall, right? It's sort of super precedent. There's a little asterisk by the precedent- Hey, this was John Marshall, that guy, right? Or you might see it from in terms of persuasive logic and not so much the text, but from certain other justices

throughout the history. But particularly when it comes to textual interpretations and what words meant- Chief Justice Marshall's opinion seemed to be held a little bit above; because, hey, man, he was there, right?

A Anthony Sanders 29:28

What I will give as a counter example to what you guys are just saying- not necessarily disagreeing with you. Is a case that was close in time to constitutional text being adopted was the slaughterhouse cases, which, as we all agree, "slaughtered" the meaning of the 14th Amendment only five years after it was adopted so

J Justin Pearson 29:53

And clearly wrongly decided. So, that's a great counter point.

A Anthony Sanders 30:01

I want to address your point, Robert, about the property right and remedy angle, but first, there was a really interesting back-and-forth between the concurrence and the majority opinion on what I think the concurring justice called "reverse originalism" which I found fascinating. The debate centers on the North Carolina Constitution, which was first adopted in 1776, followed by a Reconstruction-era constitution, and then a revamped version in 1971. The majority argued that the 1971 revisions were mostly stylistic- rearranging words and cutting excess language without significantly altering meaning- so th- ey prioritized interpreting the text as it was understood in 1776. The concurring justice pushed back, pointing out that North Carolina has effectively adopted two new constitutions since then, raising the question of why the 1971 wording shouldn't carry more weight. Many states that have been around since 1776 have adopted multiple constitutions, so this issue extends beyond North Carolina. Neither side fully explored this, but it opens a huge Pandora's box- one I've discussed in my podcast and writing before- relating to what some scholars call "interconstitutionalism." This concept deals with how a constitution that readopts text from an earlier version should be interpreted: should the original meaning control, or does re-adoption create a new interpretive moment? North Carolina seems to be leaning heavily into originalism, particularly since the recent judicial shift in 2022-2023, and they are still figuring out their approach. A useful comparison is Georgia, where the state Supreme Court has addressed this issue by establishing a presumption that if constitutional text remains unchanged across versions, its original meaning carries forward- a particularly relevant approach given that Georgia has had, quite literally, ten constitutions.

J Justin Pearson 32:29

Which isn't unusual, by the way. Just so our listeners know it's not unusual for a state to have many state constitutions throughout the course of its history.

A Anthony Sanders 32:33

Yeah. Florida has had four or five constitutions. So, they say you go to the earliest constitution

Yeah, Florida has had four or five constitutions. So, they say you go to the earliest constitution with the same text, but it's just a presumption. You could argue that when people readopt a constitution, a different citizenry is interpreting the words based on their contemporary understanding. Are they simply reaffirming the original meaning, or are they adapting it to their own time? Were people even thinking in originalist terms in 1971 when they readopted certain provisions? There are so many questions here, and they don't really get into that in this case, but it's something to keep in mind when considering remedies. I think this case is right in that there isn't a property right to avoiding the consequences for molesting children. However, it does raise questions, because at IJ, we always say that for every right, there must be a remedy. If a right is in the Constitution, you should be able to enforce it against government actors, even if the legislature hasn't created a cause of action. Remedy is closely tied to rights. This might be different, though, because in that case we're talking about a constitutional right, whereas here, we're dealing with common law tort law. So maybe there's a distinction there. I'm not totally sold one way or the other, but it's an important question.

R **Robert Thomas** 34:09

And I agree on that distinction. In fact, that's the only way I can sort of resolve this in my mind. Because, like you, I have been arguing not only in that other case pending before the North Carolina Supreme Court, but also that the public use clause was self-executing, not just the just compensation clause. Once a court says this isn't for public use and you take it anyway, my only remedy isn't just compensation. Like the town in that case said, "Well, now you can sue us for inverse after we just took it anyway." And in that case, the property owner was like, "No, I want you to stop. How about that?" The lower court said the only way to do that is to sue in trespass. You can't do that in the course of an eminent domain case. You know, you've had your licks- you win, you're right, it's not for a public use, but they took it anyway. Go sue them in trespass. And the plaintiff in that case- or the property owner- was a lawyer, and she said, "I think it's part of my self-executing right to have you guys live by the public use clause." So maybe that's a good distinction, or the way I end up writing this case off. I lump it in with those other cases we often see out of the U.S. Court of Appeals for the Federal Circuit- that essentially say, you're a chump, to use the language of Chief Justice Roberts, if you think you have a property interest in legislation. Shame on you. The government can always change- If you've set up your business and your life around certain statutory schemes, and then that goes away, then you're the fool and that's not a property right.

J **Justin Pearson** 36:09

It's almost the opposite of one of the cases you won at the Seventh Circuit, right? When it came to taxi deregulation and allowing transportation network companies to compete, the taxi companies said that this was a taking and that they're entitled to- roughly a bajillion dollars for allowing competition. And you successfully argued on behalf of drivers that their permits allowed them to operate, but it didn't allow them to keep out competition. And so in many ways, I see an analogy there.

A **Anthony Sanders** 36:36

I got a whole two minutes to argue that before Judge Posner. Whereas the corporation of the city of Chicago's Llwyer got about 18 minutes. So we both won, we intervened on the same side

as the city. Unusual case for IJ, but that was good.

R Robert Thomas 36:54

That must have been an interesting board of trustees meeting for you guys to get that case.

A Anthony Sanders 37:05

Once we did a few of those, I think they got used to it, but it was probably a little jarring at the beginning. One last thing I will say about this case is the court in its methodology, where it lays out all this originalism stuff, the majority used this darn phrase that we presume a law is constitutional unless you can "prove it beyond a reasonable doubt," and then they never say what reasonable doubt means, and that is very common in state constitutional cases. And it's not public yet, but I am working on something in this area. I think it's a ridiculous standard. And other people have written about how it's ridiculous too. And so I hope to join that course soon, but I'll just to kind of put a preview there for those who are interested.

J Justin Pearson 38:01

Well, Godspeed Anthony, this probably won't surprise you to hear, but I'm a big fan of Professor Barnett's presumption of liberty.

A Anthony Sanders 38:09

Well that would be great, but even if you can't get there, just have it beyond a reasonable doubt. Like, what does that even mean? Which they never even dig into. But yes, presumption the liberty would be much better. But people are not waiting for me to talk about that. They are waiting for Justin to discuss feedlots and fines involved in the cattle industry. If you've ever been on a dairy farm you know that sometimes they can smell, and the powers that be sometimes aren't fans of that smell. And so there's a lot of regulation that goes into it, and sometimes that can end up in federal court.

J Justin Pearson 38:55

Well, thank you, Anthony. As soon as I saw this, I knew I needed to talk about it because an issue that is near and dear to my heart- and that is the correlation between overregulation and the chilling of speech. Honestly, the reason this came to my attention over the years- I've been at IJ for over a dozen years now- is because I do so much food truck work. Oftentimes, I'll be contacted by craft breweries, right? There’s an amazing symbiotic relationship between craft breweries and food trucks. The breweries typically don't have kitchens, so they want food trucks to show up. When towns or cities ban food trucks, it's often the craft breweries who contact me. But they'll say, "I want you to sue this town, but you can't say you heard it from me. I can't be involved in any way. I can't speak out publicly." And the reason they say this is because breweries are so overregulated, including at the local level, and require so many variances just to operate that they feel like they have this perpetual sword of Damocles

hanging over their heads. If they say the wrong thing, it could destroy their business. And, you know, there's no documented retaliation- but just this overregulation reasonably leads people to keep their mouths shut when they otherwise wouldn't. It really bothers me. So when I saw this case, even though in this case there probably was actual retaliation and not just the chilling of speech from overregulation, I really wanted to talk about it. As you point out, Anthony, it involves feedlots. I should say this is a recent Eighth Circuit case- Wagner v. Shire- and the panel for this case included Judges Shepard, Kelly, and Stras. It deals with the difference between feedlots and pastures. For people who don't know, I've had the pleasure of litigating agricultural issues a few different times, and the regulation is always the same between food and feed. Food is something for human consumption; feed is something for animal consumption. As soon as you hear "feed," you know we're talking about food for animals, not people. In Minnesota they regulate feedlots differently than pastures. A feedlot is an area that's usually confined, maybe a building or at least a space with an overhang, where the cattle gather in a concentrated way and the farmer or rancher brings out feed for them. A pasture, on the other hand, is a wide-open area where you're not actively feeding the animals- they just graze on whatever grass they find. From an environmental perspective, you can see why there would be different regulations for feedlots and pastures. This brings us to the farmer, Wagner, who had repeated fights with state authorities over whether one of his operations was a feedlot or a pasture. I was able to find pictures online- it's kind of an enclosed space but straddles the line between what you think of as a feedlot and what you think of as a pasture. Not surprisingly, he thought it was a pasture. Not surprisingly, the state government thought it was a feedlot. They fought over this issue repeatedly. There was a state court case years ago that resulted in a settlement. To make a long story short, at one point, for one of his entities, Wagner wanted to amend its use and expand it, but the government denied his permit. He ended up going to court, and after an 18-month delay, the government agreed to grant the permit. After that, in 2019, he went to the state legislature and convinced them to change the law so that his farm now met the definition of a pasture instead of a feedlot. Apparently, this didn't make the regulators very happy. They attempted to impose a fine of over $150,000 on him. Unfortunately, the opinion doesn't explain how- maybe it was from a FOIA request- but he obtained internal documents from the regulatory agency where they discussed how this was the guy who got the law passed in a way they didn't like. Of course, that doesn't necessarily mean that's why they tried to impose the largest fine in Minnesota.

A Anthony Sanders 43:21

They might have just been identifying, it's hard to say.

J Justin Pearson 43:24

Sure, they might have just been pointing that out- like FYI , this guy we're imposing the largest fine in history against is that same guy. Could be total coincidence. I doubt it, but you never know. So, the farmer brings a federal lawsuit in a couple of different ways. He brings a procedural due process claim for the 18-month delay in issuing his permit. He also brings a retaliation claim, both for the permit delay and for the six-figure fine- this historically large fine- that they attempted to impose on him after, perhaps coincidentally or not, talking about how he was the guy who got the law changed in a way they didn't like. It gets dismissed, goes up to the Eighth Circuit, and the court rules against him on the procedural due process claim, finding he didn't have a property interest in the change in his permitting. Not my favorite part of the

opinion, but I get where they're coming from. What really interests me is the retaliation part. The court talks about how he hadn't alleged enough of a causal connection between the 18-month delay and the retaliation. So that part, they affirmed the dismissal, but they reversed the district court's dismissal of his retaliation claim for the six-figure fine. The court found that he had alleged enough of a causal connection to survive a motion to dismiss. It emphasized that all you need is a but-for connection- you don't need it to be the sole reason for the action you're alleging is retaliatory- and he had done enough to allege that. The court also said something I really appreciated, talking about how hard it is to prove these cases and how, even when retaliation exists, it's hard to find the evidence to prove it. That's true, and I wish more courts would realize it, because in the past- one of my pet peeves has been how judges are sometimes naive about retaliation, about the relationship between retaliation and overregulation, about the chilling effect of government's actions in a way that really affects precedent. What this panel correctly pointed out that it can be hard to prove retaliation even when it's there. But this farmer's allegations were enough to survive a motion to dismiss, and he should get to go forward, which I think is the correct approach. So I think the retaliation aspect of this opinion was really well done. So kudos to the panel.

A Anthony Sanders 43:24

Robert, your thoughts?

R Robert Thomas 46:01

Well, I gotta go back and focus on the property, the due process. It all goes back to these things as new property, right? You don't have a property interest for due process purposes because you didn't have a legitimate claim of entitlement. You couldn't force them to do it. So everything discretionary, even if it's being done through the adjudicatory administrative process- you're not entitled to anything because you don't have property. Well, I prefer the old property, and I wish courts would get out of that new property mode, because invariably, it leads them to conclude that anytime the government has some discretion, you got nothing. I would hope, from the farmer standpoint he's saying, "What do you mean? I got no property. I own this land, and this is affecting my land, and I'm entitled to due process when I'm asking the government to do something."

J Justin Pearson 47:15

And for the violations, he would have received this. That should be all you need. I am right there with you Robert.

R Robert Thomas 47:21

Yeah, I'm an old property guy, so that part of the opinion stuck out to me. And thank you for explaining the good parts. But I fixated on that and maybe my pet peeve, is I like old property. I like new property too, but I wish the courts wouldn't view due process property differently than

they do takings clause private property- sticks in a bundle, land ownership is one of those things that should just mean, "yeah, you got property. Now the question is, how much are you due in this thing."

A Anthony Sanders 48:00

So this is very timely for Short Circuit listeners for because just a couple weeks ago we had a case where- the facts aren't really important- but there was a concurrence by a judge who said that the law used to be that you had property, so old property, and it was circumscribed, but it was vigorously enforced. Now we have lots more property- such as permits or whatever, if you want to call that property interest- but if we vigorously enforced all of that you'd shut everything down. So we have this watered down kind of balancing test to protect that property and those protections then go back and infect how we think about the old property. Would you agree with that analysis? Because in some ways, I'd say even some of us limited government types kind of like, having, say, a permit, be property, because they're really important in our modern era, so you might as well call them property. But is it that the system just wouldn't work if we had vigorous protection for all of that, and so it's kind of pick your poison, it almost seems.

R Robert Thomas 49:17

For me, the more property, the better. Let 100 flowers of thought bloom- I think that's what the Little Red Book said about certain things. But I think that about property. But I like turning that one around and saying, yeah, it's one thing in what we think of as classic new property- government benefits, whether it's a government job, entitlements, those types of things. But the problem is, over time, there's been a lot of mission creep as that has extended into old property and things that really shouldn't be considered an entitlement or a government benefit. Like, can I use my land this way? Oh, well, that's a permit, and we don't have to give it to you- it's discretionary. Therefore, you're entitled to no due process, procedurally or under any anti-arbitrary and capricious principle. We can do whatever we want- it's discretion. That's the part that triggers me. So, yeah, here, it should have been enough to say he has property because he owns land. That's this classic vision of property. Could he have a separate property interest in something? I mean, the classic example is one of vested rights. You get a property interest separately- you get awarded a new stick. Let's say you get your last discretionary permit in the land use approval process, you get it, and all you need to do is build your house at that point. Then, for whatever reason, they try to take it away or change the zoning. In that case, I think you've got two property interests. You've got your right to build, which is encapsulated or embodied in the permit- that permit crystallizes into a second stick. But you also have your land, and if you can't use your land, they may have a problem there too. They may have deprived you of property because this is the only way to make use of your land. So, I'm a "more the merrier" kind of guy on this one. You just have to distinguish this situation from classic new property-type cases, like entitlements and my non-tenure job at I think that was Roth, right? A non-tenured job at a state university?

A Anthony Sanders 52:08

I have a final piece of not so good news for this farmer, because I believe- and Justin you can you looked at the case more deeply than than me- but this is a motion to dismiss. He's suing

these officials actually individually for damages. That's why he can ask for damages, even though it's really the state that he's suing. He's suing them in their individual capacities. But qualified immunity has not come up yet, and I'm guessing on remand that's probably going to.

J Justin Pearson 52:38

You would think. But you would also think that they would have asserted that in their motion dismissed, right? This is an appeal from a granted motion dismissed. So why did they not assert that? Maybe they're going to wait and assert it as an affirmative defense. But you're right that he will likely have to encounter it. I don't know why he hasn't yet, though.

A Anthony Sanders 52:54

I think often because attorneys such as those at the Minnesota Attorney General's office like to serially throw roadblocks in the way of citizens claims, and this may be one of those situations. But maybe there's more to the story that we don't know.

J Justin Pearson 53:10

You're not wrong. I think we all probably share this pet peeve that maybe the public doesn't know about, which is that many, like 99% of government lawyers, view their job in litigation not as winning on the merits, but as preventing the merits from ever being reached. And so your theory might be right, Anthony.

A Anthony Sanders 53:33

We will see. A friend of mine who has litigated with the Minnesota Attorney General's office- as have I- said he thinks their in-house theory is that no one has standing. Whoever you are, you're suing the government, you just don't have standing. I know some very nice people at the Minnesota Attorney General's office, so I'm not personally attacking them, but that does seem to be the litigation strategy- as is the strategy of many city councils.

J Justin Pearson 54:04

Yeah, this is not a Minnesota specific critique. What I just said, I think is true of every level of government, everywhere in the nation, and it's just something we have to deal with. Sorry to get up on my soapbox here, but these individuals typically have taken oaths to uphold the Constitution, and apparently that doesn't factor into this analysis.

A Anthony Sanders 54:23

Well, we will keep a watch on that case, as we have on many cases we've discussed over the last few months on Short Circuit. And now, to close, it’s time for Where Are They Now?- something we’re trying to do a better job of here on the podcast from time to time, updating

you on where a few cases have gone. We don't update on every case- like those that get remanded and settled- but we do cover bigger developments. First, Paul Sherman, our friend and a First Amendment expert, talked about a case way back in Short Circuit 332 last July- Upstate Jobs Party v. Kosinksi, a Second Circuit case with some interesting campaign finance facts and applications of precedent that Paul found unsatisfactory. That case went to the Supreme Court, got kicked back, and ultimately, cert was denied just two days ago when the orders came out on Monday, February 24. So that's the end of that case. Now, a very interesting development- some of you may remember Gilmore v. Georgia Department of Corrections. This case involved a woman visiting her husband in prison who was suddenly told she had to submit to a strip search immediately or she would never be able to visit him again.

J Justin Pearson 55:51

Wait- it's about a Gilmore Girl? I'm sorry I have a 12-year-old daughter.

A Anthony Sanders 55:58

That would be an interesting episode, but this is definitely not one that would ever be safe for television. She submitted to the strip search, which was incredibly invasive, and it turned out she never actually had to. We covered this in Short Circuit 339, which Anya Bidwell presented- you can go back and listen if you want. Anyway, that case has gone en banc. There was an en banc hearing earlier this month in February, and afterward, the court issued a really interesting two-page order summarizing the facts alleged in the complaint. The allegations were, frankly, not safe for work- they're pretty awful. The court then stated that everyone must assume the allegations are true based on the pleadings. Then it posed two questions: Could a jury find that this violated the Fourth Amendment? And did the officers have fair warning that their actions constituted a violation? Essentially, was it an obvious violation such that qualified immunity could be defeated without an exact precedent? It's interesting that the Eleventh Circuit issued this order after argument- my guess is the argument wasn't satisfactory, so they needed to clarify. We'll wait and see how that turns out; briefs are just being filed now. To close, our friend Joe Dietrich had a case a few months ago, covered in Short Circuit 351, where he discussed a Rooker-Feldman decision from the Seventh Circuit that was pretty wild. He filed a cert petition with the Supreme Court, but unfortunately, it was denied a few days ago, so that case won't continue. And finally, our good friend and General Counsel Dan Knepper appeared on the Christmas sweater episode- if you want to see the sweaters, check out Short Circuit 356 on our YouTube channel- where he discussed Marin Audubon Society v. FAA. In that case, the D.C. Circuit suddenly ruled that CEQA regulations were totally unlawful, despite being followed for 50 years. That case also went en banc, and though the en banc review was denied, but a majority of the judges issued a separate statement clarifying where they said all that stuff about CEQA regs being unlawful- that was in the three judge panel- yeah, that was all dicta. So you have to worry about that, and then that's the end of the case.

J Justin Pearson 58:31

So wouldn't that statement be dicta?

A Anthony Sanders 58:33

Well, that's interesting- it was a majority of the en banc court.

J Justin Pearson 58:37

Yeah, but he made this statement despite denying en banc review.

A Anthony Sanders 58:41

Right. And it wasn't necessary for the holding, there is no holding. It was just denied. So is it dicta and dicta, or is it a holding?

J Justin Pearson 58:49

And it doesn't look like it was resolving a case or controversy because they denied review.

A Anthony Sanders 58:54

It's an interesting, metaphysical question. So we'll, delve into that mystery and others in future episodes. But first, I want to thank Robert for coming on. We promise it won't be six years again till you're next invited on. And Robert, if people are in interested in your cases and your work, where can they go to find out about that?

R Robert Thomas 59:22

Well, the plug you made at the beginning, www.inversecondemnation.com, that's how long it's been around- almost 20 years and I still say the www part.

A Anthony Sanders 59:35

It's been along so long that I see you have a sweatshirt with the name on there. Is that merch available?

R Robert Thomas 59:39

It is. This is a one man operation. So this is a beta version. We made some samples that I have handed out, and still have a couple left. And if there's demand, maybe I will do a second run. I don't know. But yes, it's a mouthful, so now I just point at the logo on my fleecy vest. And I'll show you this part- since we're not on camera, but this is the latest thing we got.

A Anthony Sanders 1:00:23

Anthony Sanders 1:00:23

Oh, okay, and for listeners benefit it is a duck hunting hat.

R Robert Thomas 1:00:29

So when you're out in your duck blind, thinking about the latest takings case, you can spend the time of reading a law blog.

A Anthony Sanders 1:00:41

You can think about that. And also, if you're in law school, think about contacting Justin to have a Supreme Court preview at your school if you're into that. So thank you Justin for coming on.

J Justin Pearson 1:00:52

Abviously our listeners should know this, but you know the Supreme Court term starts in October, so these previews would be in September, early October, right, right.

A Anthony Sanders 1:01:01

It's gonna be it can be a lot of fun. So reach out to him if you're interested. And in the meantime, please be sure to follow short circuit on YouTube, Apple podcast, Spotify and all other podcast platforms, and remember to get engaged.