Bound By Oath | Season 3, Episode 13 | Neat Takings Tricks

John: Hello and welcome to Episode 13 of Season 3 of Bound By Oath, a podcast on constitutional history brought to you by the Institute for Justice's Center for Judicial Engagement. If you are listening for the first time, please do back up and listen to Episode 1 of this season, which is entitled Mr. Thornton's Woods. On this episode, we're going to return to some themes from earlier this season, and we'll get into the weeds about the Fifth Amendment's Takings Clause. The Takings Clause, as we know well by now, says that when the government takes private property for a public use just compensation must be paid to the dispossessed owner. However, as clear as that command may be, government officials regularly treat it as more of a suggestion than an actual rule. And regrettably, courts sometimes play along. On this episode, we're going to explore a few different ways that comes to pass – neat tricks to take property without paying for it.

Richie DeVillier: Our whole property was flooded, all of this area for miles far as the eye could see.

John: We'll start in Texas, where the state took our client's land and turned it, and hundreds of other properties around it, into a flood-retention pond.

Richie DeVillier: I understand that there's provision in the Constitution for the state to do that. But not without paying us for it, not without proper compensation.

John: It's been almost 10 years, and Texas has not paid anyone for flooding their land and destroying their property. Instead, the state argued, all the way to the U.S. Supreme Court, that as much as Texas respects property rights, it doesn't have to pay.

> **TX SG**: Mr. Chief Justice, and may it please the Court: The Court will be hard-pressed to find any government more committed to property than Texas.

John: Because, Texas's lawyers argued, our clients cannot bring a Fifth Amendment claim in the first place.

> **TX SG**: Petitioners insist they can bring a cause of action directly under the federal Takings Clause itself. This argument is wrong for many reasons.

John: And not only did Texas argue that, so did the federal government.

> **Assistant SG**: Mr. Chief Justice, and may it please the Court: The Fifth Amendment to the United States Constitution does not of its own force create a cause of action against the government.

John: On this episode, we'll explore whether the Takings Clause is what's called self-executing. Or, as the government argues, must Congress first pass a statute giving property owners permission to bring a takings claim?

Mike Berger: The Supreme Court flat out said that's wrong. It doesn't require any statutory authorization. The Fifth Amendment says what it says, and people are entitled to go to court directly on the Fifth Amendment and file suit.

John: As it happens, that question is one that the Supreme Court has already answered. In 1987, in another case involving a flood – the seminal case of *First English v. Los Angeles*. The

First English decision is a big deal for several reasons, not the least of which is that it reined in some wild and woolly goings on in California, where the state supreme court was openly and flagrantly ignoring binding U.S. Supreme Court precedent.

Gideon Kanner: The California Supreme Court revolutionized California law and said: From now on, there is no such thing as a regulatory taking.

Mike Berger: We had no Fifth Amendment in California in that time period.

John: Which is a saga that we are going to explore on this episode along with a couple other neat tricks to avoid takings liability that will appear along the way. And then, once we're up to speed on whether the Fifth Amendment is self-executing, we'll head to the Town of Okay, Oklahoma, where we'll learn about yet another neat trick. In Oklahoma and elsewhere, the issue isn't whether property owners can get into court in the first place, it's what happens after they win.

Robert McNamara: Town officials in Okay, Oklahoma took our client's property and caused tens of thousands of dollars in damage. And the Oklahoma courts, including the Oklahoma Supreme Court, told Okay that was a taking and told the town exactly how much money it had to pay. But Okay's position is that that state court judgment is just kind of an IOU that the town can pay when it feels like it someday. Maybe.

John: Which, as we'll see, is something that happens more than you might think. On this episode, we'll ask: can they do that? Or does the Constitution mean what it says? I'm John Ross. Thanks for listening to Bound By Oath.

BBO montage - Justices taking the oath

John: As we have talked about this season, the government can only take private property for public use and it must pay just compensation. Moreover, a taking includes not only situations where the government physically takes title to a property and evicts the owner, but also when it damages or destroys property. And, it can also be a taking if the government imposes a regulation that limits a property owner's use and enjoyment of their property so much that the government may as well have taken title to the property, a so-called regulatory taking. On this episode, we're going to jump around between all three types of takings. And we'll start in Texas.

Richie DeVillier: Our whole property was flooded, all of this area for miles far as the eye could see.

John: That's IJ client Richie DeVillier. He and his family operate a 900-acre cattle ranch about an hour's drive from Houston and just a few miles inland from the Gulf of Mexico.

Richie DeVillier: I live in the house that my grandparents built in 1963 and raised their family – my father and his three sisters.

John: Richie's great grandfather originally homesteaded the property about a 100 years ago, and the family has been there ever since. And in all that time, despite the many, many storms that have come up the gulf, the ranch never once flooded. That changed in 2017 after the Texas Department of Transportation expanded the interstate highway that abuts the property.

Richie DeVillier: The interstate as it existed was two lanes on each side. And where the interstate crossed over our bayous that drain all our property, the main watersheds that go

through this property, they were bridged over. So the road was a bridge over the open span of the bayou. And no, we never had any flooding problems.

John: The state expanded the interstate from four lanes to six. It raised the road bed. It boxed in the area underneath the bridges where water had previously been allowed to flow into the bayous.

Richie DeVillier: The free-spanning bridges were boxed in with box culverts and undersized compared to the openings that were there before. Woefully undersized, I mean, noticeably undersized. So that caused restriction, and that's what backs the water up. Water can't go under. It's gonna raise up until it goes over.

John: And in addition to all that, the state built a concrete, impervious, 3-foot high median in the middle of the highway.

Richie DeVillier: And it functions exactly like a dam. So that's what created the catastrophe that we had here.

John: When Hurricane Harvey rolled through in 2017, the ranch flooded, and the damage was devastating. Richie's house flooded. His parents house, which is also on the property, also flooded. As did their ranch hand's house.

Richie DeVillier: Unlivable. For months. Our barns were feet underwater. The tools, the equipment, everything was ruined. Multiple vehicles were flooded, all of my equipment, but one tractor were unusable.

John: To escape, the DeVilliers had to evacuate by boat.

Richie DeVillier: 900 acres here completely submerged by feet, feet of water. We could go anywhere we wanted to in a boat, wide open, cross barbed wire fences, and never have to worry about hitting anything.

John: When they returned to survey the damage, they returned to a grim sight.

Richie DeVillier: The animals that weren't already dead, drowned and floating, were standing in deep water for several days, and when that happens, they will just lose all energy. And we tried to move cattle that were standing in the flood waters to higher ground, and just they wouldn't go. You just could not herd them. They wouldn't move. It's like they were shell shocked. And you can't pull cattle in a boat, because they're like an anchor. We literally could not move the cattle to higher ground. In the days that followed, when the water started subsiding, we discovered the carcasses of all the livestock hundreds of carcasses cattle, calves and even horses.

John: Over a hundred neighboring properties were similarly affected. Innumerable crops were destroyed. Some residents had to leave long term. Richie’s parents, for instance, moved out of state to live with his sister until the ranch was put right. Richie’s father, who was in poor health, didn’t ever make it back.

Richie DeVillier: We had to move him to Portland, Oregon – temporarily, we thought – where he died. Never got to come back home to the place where he was born, where he was raised, where he raised his family.

John: It took days for the waters to recede. Then, in 2019, the ranch flooded again.

Richie DeVillier: Contractors were at a premium, hard to find and hard to afford. The prices went through the roof for rebuilding, and materials were hard to come by as well. Took us a long time to recover. And then two years later, in 2019 we had a tropical storm, Imelda, that did the same thing to us, displaced us again. Our house had 23 inches of water in it. Exactly the same depth both times.

John: The DeVilliers did not have flood insurance because the ranch had never flooded in over a 100 years even after the original, smaller interstate was built in the 1960s. Before filing a lawsuit, Richie reached out to state officials, but it soon became clear that the state did not intend to help. And over the course of litigation, it became clear that officials knew full well beforehand that the changes to the interstate would turn the ranch and neighboring properties into a flood-retention pond.

Richie DeVillier: I understand that there's provision in the Constitution for the state to do that. But not without paying us for it, not without proper compensation. And this has happened twice, and it will happen again.

John: The state's justification for trapping all the water on one side of the highway is that in times of flood, it's important that the highway be clear so that ambulances can still drive on it. But taking that, pun intended, at face value, that is a taking of private property for public use that requires just compensation. The Supreme Court said as much way back in 1872, in the *Pumpelly* case about temporary flooding caused by the government, which we discussed on Episode 10. Texas, however, has no intention of paying anyone. So Richie and over a hundred of his neighbors filed lawsuits in state court invoking the guarantees of the Fifth Amendment.

Robert McNamara: And Richie and his neighbors found out pretty quickly something that's been true for the entire history of this country, which is that governments love to take property and they hate to pay for it. So Texas very promptly removed these cases from state court into federal court, and then announced that, in fact, it couldn't be sued in federal court at all.

John: That's my colleague at the Institute for Justice, Robert McNamara, who is our deputy litigation director and who argued Richie's case at the Supreme Court last year.

Robert McNamara: And Texas's theory was this: The only way to sue for a violation of the U.S. Constitution is to sue under what's called Section 1983, the civil rights act. And Section 1983 doesn't allow you to sue states. So you can only sue under Section 1983, says Texas. You can't sue us under Section 1983, and so we can't be sued.

John: Let's unpack. Richie sued in state court. Texas then had the case removed to federal court and combined with all of his neighbor's cases. Which is perfectly unobjectionable. Richie was bringing a federal constitutional claim, so there was no good-faith basis to oppose proceeding in federal instead of state court. But once the state succeeded in having the case removed, it said, ah hah! In fact, we cannot be sued here because Congress has never passed a law saying you can sue a state government in federal court for constitutional violations. Congress has passed Section 1983, but Section 1983 only lets you sue local governments and some state officials in state government, but not the state government itself.

Robert McNamara: For purposes of this argument, Texas said, "Fine, let's assume we took your property. There's nothing you can do about it. Sure, sure, the Fifth Amendment says, If we took your property, we have to pay you for it. But that's not a thing you have any power to enforce." And the district court rejected that argument.

John: Quote: “This thinking eviscerates hundreds of years of Constitutional law in one fell swoop, and flies in the face of commonsense. It is pretzel logic.” But then Texas appealed.

Robert McNamara: And they won. They persuaded the Fifth Circuit that the only vehicle we had was Section 1983. And we agree you can't sue the state under Section 1983. And the Fifth Circuit said in kind of an odd opinion that had exactly one substantive sentence of analysis in it just said: Yeah, you can't sue. You don't have any cause of action.

John: The Fifth Circuit said that before a property owner can bring a suit to enforce the Takings Clause, Congress must first pass a law authorizing lawsuits to enforce the Takings Clause. Which, we agree, when it comes to state governments, Congress has not. But the thing is, the Supreme Court has said that that’s not right.

Robert McNamara: The Supreme Court has repeatedly said that the just compensation requirement of the Fifth Amendment is what they call self-executing. And what they mean is it's the only part of the Constitution where the remedy is specified along with the right. The Constitution specifies a lot of rights. It has the right to free speech, the right to be free from unreasonable searches. But it doesn't specify what happens if the government infringes your right to free speech or conducts an unreasonable search. The takings clause does.

John: If you’re a long-time listener of this podcast, you know that institutionally our position is that you should not need permission from Congress to file a lawsuit asking for money damages for violations of the right to free speech or other constitutional rights. But the Supreme Court has held otherwise, and they make the rules. The Takings Clause is special because it says right there in the text that the remedy is just compensation.

Robert McNamara: And so that affirmative obligation, the Supreme Court says, is self-executing. It just attaches the instant the government takes your property, and so you don't need to point to a statute authorizing you to sue for damages because you're just coming into court asking the court to enforce an existing obligation. And the Fifth Circuit's ruling to the contrary, beyond the fact that it seemed directly contrary to what the Supreme Court had told us, promised to cause some real mischief. Because state high courts, including the Supreme Court of Texas, when they heard takings cases, seemed to be saying they were just enforcing the mandate of the Fifth Amendment itself, enforcing exactly the obligation the Fifth Circuit just told us courts weren't allowed to enforce.

John: After the Fifth Circuit's ruling, we reached out to Richie's lawyers and took over the case for an appeal to the Supreme Court. Which the Court granted. And which we'll soon talk about. But first, we're going to head to California so that you don't have to take our word for it that the Supreme Court has already said that the Takings Clause self-executes. That story begins in the City of Tiburon, California in 1979, and it's going to take us a bit far afield but also allow us to explore some other, entirely different neat tricks that let the government take property without paying for it. But fear not, we'll get back on track eventually.

Gideon Kanner: Dr. and Mrs. Agins, owned an absolutely unique piece of property. It was described as the most valuable piece of land in California. And nobody really argued with it. Why? It was on a ridge. So that if you looked one way, you saw the San Francisco Bay. If you look the other way, you got to see the Pacific Ocean. Five acres. Amazing, amazing property.

John: That is Prof. Gideon Kanner, a hero to us and a giant in the property rights bar, who we heard from on Episode 2. Prof. Kanner passed away recently, but fortunately we were able to

interview him about the case of *Agins v. Tiburon*, which he argued at the U.S. Supreme Court in 1980.

Gideon Kanner: The zoning said one house per acre, which is pretty generous. What they intended to do was to build five houses – one per acre – sell four and live in the fifth. But the city wanted that land.

John: Bonnie and Donald Agins owned a magnificent piece of undeveloped land in the city of Tiburon, California. When they bought it, the zoning allowed them to build five houses on it, and that's what they set out to do. However, Tiburon officials wanted the land to be preserved as open space, and they filed a condemnation action to take it by eminent domain. Which is perfectly constitutional. If a city wants open space, it can use eminent domain, pay just compensation, and preserve land for public use. However, just before the case was set go to trial on the question of how much it would have to pay, the city abruptly withdrew its lawsuit.

Gideon Kanner: So they passed the new ordinance, which said no, you can't do a one per acre as of right. You can do anywhere from one per acre to one for the entire five acres.

John: Instead of taking the property by eminent domain, the city changed the zoning. The new ordinance said you might be able to build five houses. Or maybe only one. Or maybe somewhere in between. You have to have file an application and then maybe we'll tell you.

Gideon Kanner: You have to apply for a subdivision permission and we will decide if we will permit it. Well, Agins wasn't stupid. It was obviously a ruse that was designed to have them applying and reapplying. That's a very expensive process.

John: It takes a lot of time and money to prepare a development application. Submitting multiple applications at the same time was prohibitively expensive. And the city wasn't under any obligation to grant an application or even say what it would accept. And given that officials had just tried to use eminent domain, it seemed obvious what was going on: the city was keeping the land as open space without the bother of paying for it. So the Agins sued in state court, and they argued that the ordinance was a regulatory taking. They had a reasonable, investment-backed expectation in building five houses, and the city's ordinance, by tying them up in red tape, reduced the value of their property to virtually nothing. But after a few years of litigation, the California Supreme Court issued a startling ruling.

Gideon Kanner: The California Supreme Court revolutionized California law and said: From now on, there is no such thing as a regulatory taking. They didn't mention *Pennsylvania Coal*. They completely ignored all that law. They just said: No, all you can apply for is a writ of mandate that will invalidate that regulation.

John: The California Supreme Court announced that the remedy for a regulatory taking would no longer be just compensation. Instead, the remedy would now be invalidation – meaning that the regulation would be struck down. And, as for the Agins themselves, they had asked for the wrong remedy, so they would get neither invalidation nor compensation. Nevermind that the remedy they had asked for was the right one when they filed their lawsuit.

Gideon Kanner: After they lost in the California Supreme Court, they retained me to take the case to the U.S. Supreme Court. To my amazement, they granted review. I thought I had a winner going.

Chief Justice Burger: We'll hear arguments first this morning in *Agins against City of*

Tiburon. Mr. Kanner, you may proceed when you are ready.

Gideon Kanner: Mr. Chief Justice and may it please the Court.

John: The Agins urged the Supreme Court to rule that the proper remedy for a taking is payment and that, for reasons that we will discuss more fully later on, merely invalidating a regulation is woefully inadequate: a neat trick to take property without paying for it.

Gideon Kanner: The city has announced, repeatedly, definitively: "This is an indispensable part of open space city resources. We are going to acquire it." … And it was then only when confronting the value of this land … and they abandon the condemnation and chose to stand on this ordinance, which accomplishes the very same thing.

John: On paper, the ordinance allowed the Agins to build at least one house. But they argued the city had no intention of letting them build that house, and, even if they were ever allowed to, it was not economically feasible.

Justice White: So in effect this was a device and an effective device to maintain open spaces. **Gideon Kanner**: Precisely. **Justice White**: without paying for it. **Gideon Kanner**: That's precisely what happened. It's exactly like *Nectow v. Cambridge*. We have an ordinance which on its face permits a use, but once the trier of fact heard it, he realized that that ostensibly permitted use was in fact economically impossible. … The off-site improvements necessary for the construction of one house on that parcel would make it so expensive that no one could afford it.

John: The city, on the other hand, argued that this was just a zoning case, and that courts pretty

much always defer to zoning decisions by local governments.

> **City lawyer**: I think there's a very strong policy here of protecting zoning and land use regulation from –
> **Justice Stewart**: Well, the Constitution imposes a very strong policy of not taking anybody's property without paying for it.

John: However, in a unanimous opinion, the Court ultimately decided not to reach the issue that was in front of it.

Gideon Kanner: In the *Agins versus Tiburon* case, both I and my opponent, stood there for an hour and argued the law of takings. An opinion came down that had nothing to do with takings – had to do with ripeness.

John: Instead, the Court held that the lawsuit was premature. Before the Agins could sue, the Court said, they first had to spend a bunch of time and money applying for a permit that was certain to be denied – certain, at least according to the allegations in the complaint, which in that stage of the case were supposed to be taken as true.

> **Gideon Kanner**: There is a well-recognized doctrine of futility. And that is that if the position of the public body is such that it’s manifest that they have no intention of allowing it, one is not required to perform an idle act.

John: That holding – that a property owner has to seek permission and be definitively rejected before they can get into court – is still on the books. And it is another neat trick. It imposes a burden on property owners to obtain a final decision from land-use authorities before they can

seek judicial review. But officials are under scant obligation to make a final decision. They can and do require property owners to spend a fortune on applications, reports, studies, hearings, and appeals over the course of years and sometimes decades. And even then courts will say that claims are not yet ripe for review.

Gideon Kanner: Mrs. Agins – they got divorced. She got the property. She spent over half a million dollars trying to comply. It took 30 years, and she was finally permitted to build three houses on the five acres. When I talked to her last, one had been built and sold, and the other two were under construction. I don't think she could afford to live there.

John: In 1987, seven years after the Supreme Court dismissed their case, and while they were still seeking permission to build, the Agins filed a brief with the Supreme Court explaining what had happened up to that point. They had spent over half a million dollars on fees. They were required to set aside part of their land for a public hiking trail and also to build a new road and other public improvements, which they did and then were finally given building permits. But then the city imposed a temporary construction moratorium. That moratorium was then extended with the option to re-extend indefinitely. All of which caught the Supreme Court's attention.

> **Justice O'Connor**: Mr. White, there are some horror stories out there of local governments intentionally running these things through the mill indefinitely … and effectively deprive people forever of any use. Now what's an owner to do?
> **Lawyer for Los Angeles**: Well, Justice O'Connor, I don't know of any horror stories. …
> **Justice O'Connor**: The Agins come pretty close, don't they.
> **Lawyer for Los Angeles**: Well, the Agins, I don't know what happened after the *Agins* decision was decided.

John: That was Justice O'Connor speaking with the lawyer representing Los Angeles County in a case that raised the same issue as the *Agins* case and that reached the Supreme Court seven years later.

Mike Berger: There are a couple of things that that happened during the argument that may or may not have been apparent from from reading the transcript or listening to it.

John: That is Mike Berger, a legendary property rights attorney who argued *First English Evangelical Lutheran Church v. County of Los Angeles*, to which we will now turn.

Mike Berger: One, Justice O'Connor said, well, counsel, what about all the horror stories we hear? If you had a camera trained on it, you would have seen Justice O'Connor at that point, lean back in her chair, roll her eyes and look at the ceiling.

> **Lawyer for Los Angeles**: Justice O'Connor, I don't know of any horror stories. …
> **Justice O'Connor**: The Agins come pretty close, don't they.

Mike Berger: Sadly, it wasn't enough to get us her vote. She still voted for the county, but I think it didn't help his cause any.

John: After *Agins*, the Court remained interested in the question of invalidation versus just compensation as a remedy for a regulatory taking.

Mike Berger: Leading up to *First English*, the Supreme Court had tried several times to deal with this question of, does the Fifth Amendment require compensation for regulatory taking? And four times they had they had granted cert or noticed the jurisdiction of an appeal, and each

time they had declined to rule on the case. The problem was it takes four votes to grant cert. It takes five votes to get a decision. And clearly, they always had four votes to take these cases, and all I can figure is that they were having the devil's own time getting that fifth vote to decide on what they should do with the case once they had it.

John: In *First English v. Los Angeles*, the Supreme Court finally reached the issue. And quite possibly, one of the things that helped the Court along was that a steady of stream of horror stories like the *Agins* case had been coming to light.[1] In one of the other cases where the majority of the Court had decided the claims were not yet ripe, Justice Brennan, who had wanted to reach the merits, wrote a lengthy and influential dissent. In it, he quoted a California city attorney, speaking at a conference of other city attorneys, explaining how invalidation allowed local governments to take property without paying for it.

Mike Berger: Justice Brennan wrote an incredible dissenting opinion. He, in fact, quoted from a California city attorney explaining how they how they game the system. And he says, Look, it's this simple for you if you're a city. You pass an ordinance, and your ordinance says, property owner, you can't do X. And a court comes down and they says, No, we invalidate that. You say, Okay, well in that case, property owner, you can't do Y, just redo it, set it back up again. And you set them up for more years of litigation.

John: If a property owner spends years exhausting the land-use approval process and some more years in court and then finally succeeds in getting a regulation gets struck down, the city attorney said, quote: "Don't worry about it … Merely amend the regulation and start over again."

Mike Berger: You want to talk about gaming a system. They were open about gaming the

[1] See Nasty, Brutish, and Short for list of cases as well also amicus briefs in *First English*

system – that all they had to do if they got struck down was to do something else an inch and a half different.

John: But then the Court took up *First English*.

John: The case involved Los Angeles County's response to a deadly natural disaster in the San Gabriel Mountains in 1978. First, there was a massive drought. Then, a few months later, there was a massive fire. And then there was a massive rainstorm.

Mike Berger: There was a drought first and then there was a massive fire that tends to bake the surface of the land. It literally bakes the surface of the ground so that water that might otherwise have soaked in when it rained simply flows off. And once it finally started raining, it pulled everything off the mountain side. Rocks and debris came screaming down the canyon. It just kept coming, and it wouldn't stop.

John: Sitting in the path of the debris flow was the tiny mountain town of Hidden Springs, which was essentially wiped off the map – with people and automobiles and buildings deluged and carried away. Thirteen people lost their lives in Hidden Springs as did several people in Glendale at the base of the mountains, where houses were knocked down by or filled up with mud and boulders. Some of the bodies of the victims were never found.[2] In the wake of the disaster, Los Angeles County passed an ordinance forbidding anyone from rebuilding.

Mike Berger: The ordinance was simple. The ordinance said, Stop. Initially, it said temporarily, while we study the situation, nobody builds anything there at all. And that lasted for three years. They eventually replaced it with a permanent ordinance.

---

[2] John McPhee, Los Angeles Against the Mountains, *The New Yorker*, September 19, 1988.

John: One of the property owners affected by the ordinance was the First English Evangelical Lutheran Church, which owned a 20-acre, mostly undeveloped parcel in the mountains.

Mike Berger: They used it as a camp for kids. It was open to handicapped kids of all denominations, and it was used fairly regularly.

John: The church wanted to rebuild the dining hall, the caretaker's lodge, and the two bunkhouses that had been destroyed. And you might ask yourself why – given the death and destruction the storm had wrought. But consider that as bad as the storm was, that kind of thing only happens every few decades or maybe not again for another 100 years. As long as you didn't visit the camp after an extended drought and then a fire and then a rainstorm, the risk to human life was extremely minimal. So the church sued, and it argued that the county had, in effect, converted their property into a public flood-control channel without paying for it.

Mike Berger: I was very thankful to the court of appeal in our case, because they summarized the law, and they did it in a way that set the case up for the Supreme Court. Let me tell you what they said. The court of appeals said, "We conclude that because the United States Supreme Court has not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to non-monetary relief, this court is obligated to follow *Agins*."

John: With that, the Supreme Court finally had a case that it considered ripe for review. The lower court had assumed there was a taking. And that meant the only question in the case was: what is the remedy?

CJ Rehnquist: We'll hear argument next in number 85-1199 *First English Evangelical*

Lutheran Church of Glendale vs. County of Los Angeles. Mr. Berger, you may proceed whenever you're ready.

Michael Berger: Mr. Chief Justice and may it please the Court.

John: And it bears mentioning that by the time of the argument, nine years had already elapsed between the time of the storm and the case reaching the Supreme Court. Nine years without the use of their property.

Michael Berger: As Justice Brennan's dissent … pointed out and as virtually every commentary on this issue has pointed out, there are an awful lot of government agencies that will take those regulations … make minor changes, and then re-enact them and force the property owner to litigate all over again.

Justice White: Meanwhile you haven't had the use of your property in any event.

Mike Berger: Exactly … they've been playing this game with you.

John: Much of the argument focused on the gamesmanship that *Agins* invited. If the ordinance got struck down, the county could just enact a new, slightly different ordinance. But other justices had other concerns.

Justice O'Connor: Well, Mr. Berger, do you think that local governments don't have authority to engage in flood control regulation?

Mike Berger: Oh, not for a minute do I make that assertion. … We never challenged that flood control was not a valid purpose.

Justice O'Connor: Well, do you think that anytime a local government says, in this particular location it's subject to flooding and no one may build there, that that is a taking?

> **Michael Berger**: It could be. … What I see in … our case is a piece of property … which the County comes in and says: That property is now a part of the county-owned flood control channel; we're just not going to change the title.

John: The lawyer for Los Angeles argued that since flood control is a valid public purpose that should be the end of the analysis.

> **Lawyer for L.A.**: The reason construction in flood plains is being restricted is that it's dangerous. … It's dangerous because it causes a surge of water downstream, and when the building breaks up, as these buildings did. What more proof do we need than the actual events of this case?

John: But, as we have talked about on past episodes, that just means that the cost of flood control is going to fall on individual property owners rather than society as a whole.

Mike Berger: There is always a cost to whatever the government wants to do. Somebody is going to pay, and the idea that the California courts had come up with, which was that it was too expensive to make government do this, but somehow it's not too expensive to make individuals do it, never made sense to me. But that's what they said. And they said it out loud. And there's just something that seems so fundamentally unfair about that that even the Supreme Court saw through it.

John: By a vote of 6 to 3, the Court ruled in favor of the church. The remedy for a taking is just compensation. The opinion was written by Chief Justice Rehnquist, who borrowed from and adopted Justice Brennan’s dissent from a few years earlier.

Mike Berger: The thing about Brennan's opinion was that he basically created what I've referred to as a unified field theory of takings. He looked at it and he said takings law is pretty broad, and government under the Fifth Amendment is responsible for compensating people when the property is taken. And we don't care how it's taken.

John: Physical taking, regulatory taking, property damage; they all require just compensation. Which the Court had said in pieces but never all at once. In a physical taking, the government sues you to take title to your property. In a regulatory taking or property damage case, you are suing the government, saying, hey, you forgot to pay for what you took. Justice Brennan said, none of these distinctions matter, and there's nothing special about a regulatory taking that would mean you shouldn't get just compensation just like the other kinds of takings.

Mike Berger: So he analyzed cases from across the board. He talks about the airplane overflight cases. He talked about flooding cases. He talked about direct condemnation cases. He talked about temporary cases, permanent taking cases. The temporary cases were mostly wartime cases, where the government would condemn property for the duration of the war. But they would still have to pay for it, even though it was just a temporary taking. And when Rehnquist sat down to write his opinion in *First English*, he pulled back all of that stuff and put it back into his *First English* opinion.

John: And as for whether that might make flood control projects or preserving open space or any other valid public use more difficult to undertake, so be it.

Mike Berger: And they also said, We don't care if this hinders government in its ability to operate. We have a Constitution, and that's the way the Constitution works. The Constitution is supposed to hinder government in dealings with citizens, and if that's what happens, so be it.

John: That outcome in *First English* spelled the end to one of the government's neat tricks to avoid takings liability. No more providing something other than just compensation. But the case also marked the beginning and, everyone thought, the swift demise of another neat trick – the one we started this episode with.

Mike Berger: One of the things that happened in *First English* was that the Solicitor General filed an amicus brief in support of the county which said that the Fifth Amendment is not self executing – that in fact it requires some statutory authorization before you can actually file suit.

John: In *First English*, the federal government filed a brief on behalf of the county, and it made the argument that property owners need to get permission from Congress before they can bring takings claims under the Fifth Amendment.

Mike Berger: And the Supreme Court flat out said that's wrong. It doesn't require any statutory authorization. The Fifth Amendment says what it says, and people are entitled to go to court directly on the Fifth Amendment and file suit.

John: For that proposition, Chief Justice Rehnquist cited several of the Court's earlier precedents, including *Jacobs v. United States* from 1933:

Mike Berger: When I was preparing for the argument, I thought that an old case called *Jacobs versus United States* was going to be important. And it came up, and I was trying to quote from it. One of the justices I know kept trying to interrupt me. I can't remember who it was. But it doesn't matter because what happened next, which you can't see from the transcript, is that Rehnquist turned around toward the curtains behind the Court and said something.

Mike Berger: For example, and I think this Court said it very clearly in *Jacobs*

Justice Scalia: We said. We just said. But we didn't hold it. Because

Mike Berger: That's true.

Justice Scalia: Okay.

Mike Berger: You did say it. In *Jacobs* –

Justice Scalia: … Where have we held that it's self-executing?

Mike Berger: Let me show you in *Jacobs*.

Justice Scalia: against the government

Mike Berger: In Jacobs v. United States, 290 U.S., this Court said – in the holding – that the right to recover just compensation was guaranteed by the Constitution. It rested upon the Fifth Amendment. Statutory recognition was not necessary.

Mike Berger: And a couple of minutes later, somebody poked his hand out and handed Rehnquist a book of U.S. Supreme Court reports. And he had obviously told the guy, go get me *Jacobs versus United States*. Because he then sat there literally and read the case while we were arguing.

John: *Jacobs* was about a dam constructed by the federal government that had caused flooding in Alabama, and when the government was ordered to pay just compensation it appealed – in part. It said that it would pay for some of what it took, but it had no duty to pay the 6 percent annual interest that had been building up over the years the case was litigated. In 1933, however, the Supreme Court said that the payment of interest is inherent in the idea of just compensation itself – whether or not there is a statute saying so.

Mike Berger: The right to compensation arose from the Constitution, not from the

statute.

John: Nevertheless, in Richie DeVillier's case, the case we started this episode with and that reached the Supreme Court last year, the federal government once again made the very same argument.

> **Assistant SG**: Mr. Chief Justice, and may it please the Court: The Fifth Amendment to the United States Constitution does not of its own force create a cause of action against the government.

John: And as it happens, one of the very same lawyers who filed the federal government's brief in *First English* also argued the same argument last year.

> **Assistant SG**: If there's not compensation, then the action is unlawful, and what lies is an injunction to cease the taking of the property. …
> **Chief Justice Roberts**: Mr. Kneedler, in the brief that you filed in *First English*, 38 years ago, you argued that the Constitution of its own force does not furnish a basis a court for a court to award money damages against the government. …
> **Assistant SG**: Yes, your honor.
> **Chief Justice Roberts**: Aren't you just rearguing the point that the Court rejected?
> **Assistant SG**: Not at all. Not at all.

John: He absolutely was recycling old arguments, which we point out in painstaking detail in our reply brief, comparing the arguments line-by-line. But even though the Court was not persuaded the second time around, the idea that the Fifth Amendment is self-executing is no longer on as firm a footing as it used be after *First English*. Which is a discussion we will pick up after we take

a short break. But first, there is a post-script to the *First English* case. Having assumed that Los Angeles' ordinance was a taking for the purposes of its decision, the Supreme Court sent the case back to the California courts to decide whether it is in fact a taking to convert private property into a public flood-control channel.

Mike Berger: When we got back to the California court system, the California courts threw it out again. They went out of their way to analyze their way out of what the Supreme Court had ordered done.

John: The state court of appeal made several rulings were not faithful to the Supreme Court's ruling. For instance, the Supreme Court had said that it is quote "axiomatic" that the purpose of the Takings Clause is to spread the cost of valid public projects among the public as a whole, rather than dumping them on one unlucky property owner. But on remand, a California appeals court said that because the flood-control regulations were meant to save lives, and that's a valid public purpose, there was no taking. Additionally, the lower court also said that the regulation was not a taking because it did not destroy all economically viable use of the property.

Mike Berger: The California Court of Appeals said we don't think it denied all viable use, because this was a campsite, for heaven's sake, and they could still camp on it. They can still pitch tents on it. What else can I say? The California Supreme Court denied review, and the U.S. Supreme Court then denied cert the second time around. It was exhilarating, and it came back down, and eventually the whole thing fell apart. It went nowhere.

John: As we talked about on Episode 2, when it comes to regulatory takings, lawyers, and judges, and property owners are still to this day in a bit of a fog. So now we will take a break, and when we come back, we'll return to Richie DeVillier's trip to the Supreme Court.

BREAK

Richie DeVillier: If we could be put back to where we were in 2017 before the government flooded our property, that's all we want.

John: In 1987, the Supreme Court said the Takings Clause is self-executing – and in no uncertain terms. But when we left off of Richie DeVillier's story, the Fifth Circuit had just ruled otherwise – breaking with history and tradition and binding precedent – in a two-paragraph opinion.

Robert McNamara: So IJ got in touch with with the lawyers who were litigating Richie's case and offered to step in and try to get the Supreme Court to intervene to resolve this split of authority, and the Court did.

John: That's my colleague, Robert McNamara again.

Robert McNamara: The Court took up the case, and in the course of briefing and arguing the case, Texas' tune changed.

> **TX Assistant SG**: There is no direct cause of action to sue under the Fifth Amendment. … This court should reverse and direct the district court to dismiss the plaintiff's federal takings claims.

John: That's Texas's lawyer arguing at the Fifth Circuit.

> **TX Assistant SG**: Congress hasn’t done anything here. Everyone agrees that Section 1983 doesn’t supply plaintiffs with a cause of action.

Robert McNamara: Texas argued throughout the proceedings in the lower court that the only way to enforce the just compensation requirement of the Fifth Amendment was through Section 1983. And since Section 1983 doesn't apply to Texas, the plaintiffs were just out of luck. That's what they said in the district court. That's what they said on appeal in the Fifth Circuit. And when the case finally got to the Supreme Court on the merits, Texas lost the courage of its convictions. And suddenly the argument was no longer: the only remedy available is Section 1983. The argument became: well, our only objection is that you should be proceeding under this Texas cause of action that we are inventing right here and now, and that will give you all the relief you need, and that we have somehow never mentioned at any other point throughout this litigation.

> **TX SG**: Mr. Chief Justice, and may it please the Court: The Court will be hard-pressed to find any government more committed to property than Texas.

John: That’s the Texas Solicitor General arguing at the Supreme Court.

> **TX SG**: All petitioners had to do was use Texas’ cause of action. Instead, petitioners insist they can bring a cause of action directly under the federal Takings Clause itself.

John: After years of arguing that the Fifth Amendment does not inherently contain a cause of action, Texas said, actually, the Court doesn’t need to address that. Because there is this other cause of action we haven’t mentioned until now.

Robert McNamara: I have a lot of friends who are Texas takings lawyers, and they tell me that the first they ever heard that Texas has a common law cause of action that allows you to invoke the Fifth Amendment was at oral argument in the DeVillier case. It was not widely recognized by Texas practitioners, or indeed Texas courts. But that was essentially what Texas announced to the Supreme Court.

> **TX SG**: Texas provides the cause of action for which they can bring a federal takings claim.

Robert McNamara: And Justice Sotomayor broke in and said, Well, I've read the complaint. It invokes the Fifth Amendment. How in the world does that not invoke this common law cause of action you're talking about? And the Texas Solicitor General said, well, the complaint should have cited this specific Texas Supreme Court case. And Justice Sotomayor said, that's not how anyone writes complaints. That's insane.

> **Justice Sotomayor**: Tell me how they would plead this. … What would they say in Texas court?
> **TX SG**: What I think they would say is, we are bringing our claim under state law, see, e.g,. City of Baytown. I think that would be sufficient to get us there.
> **Justice Sotomayor**: That – my gosh. I've never heard of pleadings in any state where you had to mention the law at issue. Usually you mention the facts.

John: In a complaint, one does not need to cite a list of cases, authorities, and so on that are being relied upon. That comes later. Nevertheless, Texas claimed that the real issue was that Richie's complaint had failed to include a few magic words citing to a particular case.

> **Justice Sotomayor**: This seems to me like a totally made-up case because they did exactly what they had to do under Texas law. … It's almost a bait and switch. … I don't know what you're fighting because you're telling me that Texas lets them have a cause of action under the Fifth Amendment.
>
> **TX SG**: Yes, your honor. There's no bait and switch here. I want to be clear on that, no bait and switch.
>
> **Justice Sotomayor**: Well, you're the one who removed.

Robert McNamara: If this had been the argument below that the complaint is missing four words, no one would have bothered to litigate this. And I kind of knew in the moment that that was going to resolve this case.

> **Justice Gorsuch**: Would you oppose leave to amend to add a Texas constitutional claim on remand?
>
> **TX SG**: On behalf of the state of Texas, we would not oppose that in the district court. …
>
> **Justice Sotomayor**: If they go back down and say to the district court, all we want is just compensation … under that case that you're mentioning, that's okay and you're not going to resist that.
>
> **TX SG**: We would not resist that, Your Honor.

Robert McNamara: I remember walking out of the Supreme Court and I looked at Richie, and I said, Well, you've won. What Texas just set up there means you win and your case is going to go forward. And Richie instantly said, but what about everybody else? And that was the question that was unclear after the argument.

John: Richie's case is going to go forward. And in future, property lawyers in Texas will know to

add four magic words to their complaints. But, in a unanimous opinion, the Court said it didn't need to answer the question we hoped it would.

> **Justice Thomas**: This case asked what would happen if a property owner had no cause of action to vindicate his rights under the Takings Clause, but … Texas confirmed at oral argument that its state law … cause of action allows petitioners to bring their claims under the Takings Clause. … On remand, the petitioner should be permitted to pursue all of their claims under the Takings Clause through the cause of action available under Texas law.

John: And the Court unsettled something everyone thought had been settled since *First English*.

Robert McNamara: The Court's opinion injects an awful lot of uncertainty into Fifth Amendment law, because it says, Look, *First English* doesn't answer this question. We didn't answer it in *First English*, and we're not going to answer it here, because it's not something you need to get everything you're entitled to. But the problem with saying that is that an awful lot of state courts thought that *First English* did answer this. An awful lot of state courts that said, Oh, we have to enforce the just compensation requirement, because that's what the Supreme Court said in *First English*. And if that's not what it means, it's not totally clear to me what those state courts are going to do with these claims going forward.

John: And why would the Supreme Court back off its ruling in *First English*? Based on the questions from the justices at oral argument, we have a few ideas.

Robert McNamara: The argument revealed a number of divisions on the Court. There are are

definitely some justices who view the just compensation requirement of the Fifth Amendment as just a mandatory duty the government has. And that's kind of what courts are for, is to enforce mandatory duties.

> **Justice Kagan**: Do you agree with Mr. McNamara that if a state takes a person's property and doesn't give compensation, that state is violating the Constitution every day? It's an ongoing violation. Do you agree with that? ….
>
> **TX SG**: Yes, your honor.
>
> **Justice Kagan**: Okay. So aren't courts supposed to do something about that?

John: For Justice Kagan, or at least reading into her questions, the Fifth Amendment says what it says and that's enough to call it a day. Other justices, though, want to dig into the nuts and bolts of what happened historically when people sought just compensation.

> **Justice Barrett**: It's a little bit hard to see how in 1791 … those who ratified it had to see the Fifth Amendment as itself supplying the cause of action because this was the crucial way to vitiate … the right to just compensation.
>
> **Robert McNamara**: One problem here is the difficulty of mapping the modern conception of cause of action onto 1791 visions of the Court. I think if you asked a lawyer in 1791 whether the Fifth Amendment contained a cause of action, they probably wouldn't understand the question. But if you asked them can a property owner sue to enforce just compensation, the answer absolutely would have been yes.
>
> **Justice Gorsuch**: Well, that establishes at most, it seems to me, that the Fifth Amendment envisioned some remedial mechanism would be available. … It doesn't necessarily mean that there is itself an independent cause of action under the Fifth Amendment.

John: So there are a few different things to note about that exchange. For one, the justices were asking about how takings litigation worked during the Founding – as opposed to a different important era in constitutional history: the time of Fourteenth Amendment.

Robert McNamara: That's actually a question the Supreme Court has never resolved, of which period matters. The Supreme Court has very publicly refused to say in a Fourteenth Amendment case whether you're supposed to look at history at the ratification of the original Constitution in the 18th century, or whether you're supposed to look at history at the ratification of the Fourteenth Amendment in the 19th century.

John: In addition to being a Fifth Amendment case, Richie's case is also a Fourteenth Amendment case. Because, as we explored in great depth on Season 1, it is the Fourteenth Amendment that allows claims like Richie's to proceed against state governments. So given that Texas was the defendant here, you might think that if you're going to look at how takings litigation worked historically, 1868 rather 1791 would be relevant historical era. But, as you heard, some justices were instead very interested in the Founding era when the legal mechanisms that were available to get just compensation looked very different.

Robert McNamara: At the Founding, there was no such thing as suing a government entity and saying, You took my property. You owe me money for that. You'd have to bring a case that sounded in trespass. You would have to bring a case asking for what was called a writ of ejectment. It's not a suit against the government entity, it's suit against the individual people who are on your land, because there wasn't a writ that ran against the government for taking your property.

John: Starting in the 1860s, however, that traditional common law approach gave way to modern lawsuits.

Robert McNamara: And once the forms of action are abolished, once you start to see modern lawsuits, well, then the modern lawsuits do what modern lawsuits do, and they sue the entity that actually did the thing. The problem is not the forklift driver who is on my land. The problem is the entity that has purported to take away my land and let the forklift driver on there without paying me.

John: And, we should also mention one other historical mechanism for getting just compensation that did not involve litigation at all.

> **Justice Barrett**: Moreover, the historical evidence of private bills runs contrary to your argument because, yes, there was a right to just compensation, but we have all of this time throughout the 19th century of Congress enacting private bills to give just compensation.

John: We talked about private bills on the last episode. In the 1800s and early 1900s, it was common for anyone with any kind of beef with the government to ask for special legislation, called a private bill, to compensate them for any kind of harm or loss. Congress was under no obligation to pass private bills. But contrary to Texas' argument, the fact that sometimes Congress paid people that way for a taking does not show that just compensation itself was considered optional.

Robert McNamara: The insistence on sort of artificially figuring out who the correct defendant would have been 200 years ago is getting in the way of enforcing what everybody agrees was

viewed at the time as a mandatory obligation, that there is widespread consensus that whatever the mechanism was for getting paid, whether the mechanism was getting a damages award from an individual government defendant, whether the mechanism was having Congress pass a special bill saying such and such property owner will be paid $1,000. Whatever that mechanism was, no one believed that anyone in government had discretion to not pay that money. And what is happening in a lot of modern takings litigation is a set of circumstances that allow the obligation to become optional. Because we're so focused on figuring out what the correct mechanism should be, who the defendant should be, that just compensation awards go unpaid.

John: All of which is to say that no matter whether the Court decides that 1791 or 1868, or some mix of the two, is the proper historical period to analyze, there is no period in which anyone thought just compensation was optional. Nonetheless, even though *DeVillier v. Texas* pushed off big questions for another day, it remains to be seen just how unsettling the decision will be in actual practice.

Robert McNamara: It seems like there is a real possibility for a lot more litigation about whether the just compensation obligations are enforceable by courts. And it remains to be seen how much of that litigation actually happens. Because I think what Texas discovered in the course of the *DeVillier* case is that it's very, very hard to stand in front of a court and say, yep, the Constitution obligates me to pay this money, but I shan't. I just don't wanna, and you can't make me. And I'm not sure how many other states will be willing to go out on that branch.

John: If a property owner can get past all the procedural hurdles and get the question of does the Constitution mean what it says before the courts, it is very, very hard for government lawyers to then stand up and say that the Fifth Amendment is just a suggestion. For example:

> **Lawyer for Violet Dock Port**: Your honor … What my client wants is they want compensation. After 10 years of being without the property, … paying for lawyers for 10 years, … they just want what the Fifth Amendment says we were entitled to, which is compensation.

John: That is the lawyer for a property owner arguing before the Fifth Circuit in 2020. The case involved the seizure of a one-mile stretch of land next to the Mississippi River in St. Bernard Parish, Louisiana. After many years of litigation, the Louisiana courts told the parish how much it had to pay for taking the property. But when it was time to cut a check, officials said that they didn't have to.

> **Lawyer for Violet Dock Port**: In their brief before this court, St Bernard, starting on page 33, says this is a discretionary matter. Their view is they have discretion to decide if they ever want to pay the judgment. That's just not what the Fifth Amendment stands for.

John: But when it was time to defend that proposition in court the parish, like Texas, lost the courage of its convictions.

> **Lawyer for parish**: Thank you, may it please the court. … This is, in our view, a collection action –
>
> **Judge Ho**: When is your client going to pay? … There's a judgment for a specific amount of money. You're supposed to pay that amount. …
>
> **Lawyer for parish**: Well, frankly … the landowner has to request an appropriation before the port has to pay.
>
> **Judge Elrod**: And your position is that that has not been done, and so it's never going to have to pay this judgment?

John: After arguing that just compensation was merely optional, if the parish ever decided to get around to it, instead, for the first time in over a decade of litigation, the parish said: actually, there is a secret procedure we've never told anyone about that the property owner failed to follow. And that is the reason for the hold up.

> **Judge Elrod**: So until such time as it specifically asks for the appropriation, it's your position that they your client has no obligation to pay. Is that your position or not?
> **Lawyer for parish**: We recognize that we have the obligation to pay it …
> **Judge Barksdale**: So pay up.
> **Lawyer for parish**: We don't –
> **Judge Barksdale**: This is really – this is really ludicrous.

John: Ultimately, the court did not issue an opinion because the parties settled after oral argument. And we don't know the terms of the settlement, but it is safe to presume that the parish did indeed pay up. But the idea that a court-ordered judgment to pay just compensation is just an IOU turns out to be not all uncommon. And that is the final trick that we'll talk about on this episode.

> **New Orleans Sewerage Board lawyer**: They have a constitutional right to just compensation. We have an obligation to pay just compensation. Where the parties really disagree is when payment is required.

John: That is the lawyer for the New Orleans Sewerage Board. And I'm sorry that the audio quality for him is not great, but what he just said is that we concede we have an obligation to pay just compensation. The question is when we have to pay.

> **New Orleans Sewerage Board lawyer**: We have an obligation to pay just compensation. Where the parties really disagree is when payment is required.

John: The case involved a flood-control project in New Orleans that damaged numerous homes and businesses and a church. The construction damaged foundations. It caused buildings to shift, walls to crack, and roofs to leak. Access to people's properties was blocked off. All things that are compensable. But the board refused to pay, and when the neighbors filed suit, Louisiana courts ordered it to pay millions of dollars. And the Sewerage Board said, of course, we'll pay. But not right now. And we won't say when.

> **New Orleans Sewerage Board lawyer**: Those judgments shall be payable when the legislature or the political subdivision allocates money … They owe the money. The question is, when.

John: Those judgments shall be payable, he said, whenever the legislature gets around to it. And, he said, the courts don't have the authority to order us to pay – an argument that the justices did not much like.

> **New Orleans Sewerage Board lawyer**: The legislature could pass a statute tomorrow, saying, pay these judgments. But with respect, it's not the judiciary's place to make those decisions.
>
> **Judge 1**: What I'm concerned about, though, is these people's property has been damaged, and there's no compensation forthcoming. …
>
> **Judge 3**: Do your clients intend to pay?
>
> **New Orleans Sewerage Board lawyer**: Yes, they have an obligation to pay.

Judge 3: Well, they have an obligation to it, but people have obligation to do a lot of things that they don't do.

New Orleans Sewerage Board lawyer: I understand your concern. …

Judge 3: Have they no shame?

John: You can't see this on a podcast obviously – and actually I haven't seen it either – but we have it on good authority from a reliable source who watched the oral argument that at that moment, when the justice asked the government's lawyer if his clients had no shame, the justice turned his chair around and showed the lawyer his back for the rest of the argument.

Judge 3: Have they no shame?

John: So I say again that arguing that just compensation is optional is a tough row to hoe. And, fortunately, last year, the Louisiana Supreme Court told government entities in that state to knock it off. However, this particular neat trick remains a live issue in other states. Like Oklahoma.

Melisa Robinson: When we purchased River Valley mobile home community, we took one year to clean it up, get all the old homes out, to turn it around, to make a new community.

John: That is IJ client Melisa Robinson, who along with her husband Mike, operates a small mobile community in the rural Town of Okay, Oklahoma. When they bought it, the property was in a state of serious disrepair, and the town was on the verge of declaring it a nuisance. Melisa and Mike fixed things up – doing a service to the town by getting a derelict property back on the tax rolls and doing an even greater service to the 10 or so families that call it home.

Melisa Robinson: I provide homes that anyone can afford. Also safe environment to raise children close to schools. It is important to both of us that we provide a safe, affordable, clean living environment for other families.

John: By all accounts, Melisa and Mike are first-rate landlords. Today, if you swing by, instead of syringes lying around all over the place, you'll see families with kids. Tenants there tend to stick around long term. Melisa is on-site regularly keeping up with maintenance, and she is always on call if there is a problem. But then, one day in 2009, when Melisa was making her rounds, she found town employees with heavy equipment digging up sewer lines on the property – and they were doing a very poor job of it.

Melisa Robinson: It did take an attorney to get them to even stop doing damage. They were hitting power lines. People's power was going out. It was blowing air conditioners and refrigerators right and left. We had tenants that could not even flush a toilet or take a bath because it wouldn't drain.

John: Without telling the Robinsons, the town had decided to install new sewer lines on their property. Which, of course, is a public use, and municipalities all across the country routinely use eminent domain to take easements and buy the right to bury pipes and other kinds of public infrastructure on private property. It is city management 101.

Robert McNamara: The town never approached the Robinsons about buying easements. It never tried to condemn easements. Their engineer, who designed the project, had told them they would need an easement to do it, and they just didn't bother. So the first Melisa and Mike learned about the sewer project was when they showed up to find town employees digging up their land.

John: Plus, the new lines weren't graded properly, so water from people's toilets and showers wouldn't drain. In the course of a day's work, the town made the place unlivable. Even so, initially the Robinson's reaction was, mistakes happen, let's deal with this as efficiently and smoothly as possible without any fingerpointing or hurt feelings. To that end, they paid tens of thousands of dollars out of their own pocket to put everything right.

Melisa Robinson: It was just let's just get this fixed, and everyone move on, and it not cost anyone a whole lot.

John: But from that day 15 years ago to this, the town has refused to reimburse the Robinsons.

Melisa Robinson: There was no responsibility ever taken. Their comment was: we bettered your property. As of today, we have never received any type of just compensation for anything.

Robert McNamara: So in 2009 Melisa did what you do in this situation. She filed a lawsuit that said, Hey, you didn't have an easement to dig up my land. You were supposed to condemn an easement first. And since you didn't do it, now you have to pay me for the easement essentially you just illegally took.

John: That lawsuit took three years to get to trial in state court. And then, just before the case was finally going to be heard, the town claimed that it was not the right entity to be sued. Rather, it said, the Robinsons should have sued the town's sewer board.

Robert McNamara: The town says, kind of muahaha, we didn't take anything. It wasn't us. It was our sewer board. The sewer board dug up that new sewer. And incidentally, the sewer

board is exactly the same set of people who sit on the Okay city council.

John: Okay is a tiny town with a population of about 600 people. The town hall is a two-room building. The town council and its sewer board are exactly the same people.

Robert McNamara: And so Melissa said, fine, and she amends her complaint to say the sewer board took my property. The sewer board owes me money. And another year goes by, and the case finally goes to trial and the court rules that this is a taking it sets the amount of just compensation.

John: But the sewer board appealed, and it argued that actually the Oklahoma state law that authorizes municipalities to create sewer boards did not grant sewer boards the power of eminent domain to build sewers.

Robert McNamara: Oklahoma law says that certain entities, like sewer boards, have authority to use eminent domain for certain defined projects, and one of the projects they can use eminent domain for is, quote, “furnishing water for domestic purposes.”

John: The sewer board argued that furnishing water only meant furnishing drinking water, not wastewater. And therefore, it only had the power to use eminent domain to build infrastructure for drinking water and not sewer lines.

Robert McNamara: And that argument, you know, obviously raises other questions like, Why are you digging up people's properties if you don't have the legal authority to dig up people's properties. But more to the point, I think it shows that the town's litigation strategy here is just to kick the can down the road using whatever gambit it thinks it can use to avoid paying for what it

took.

John: In 2022, after 13 years of litigation, the Oklahoma Supreme Court rejected the argument that water for domestic purposes somehow does not include wastewater. It said that there had been a taking, and it told the town pay for the easements and for the damage it had caused, plus interest and attorney fees.

Robert McNamara: And so once all that was over, the town raised a new argument for the first time. They said, Sorry, but the sewer board doesn't actually have any money or assets it could use to pay the judgment. Their position is the town has created this mystical entity that has the power of eminent domain, the power to take property, but never has the ability to pay for what it's taken.

John: According to the mayor, who doubles as the head of the sewer board, when people pay their water bills, the sewer board deposits that money directly into the town's bank account. A neat trick to avoid takings liability. And one which, we submit is preposterous, a shell game, and obviously done in bad faith. And we are now representing Melisa and Mike in federal court arguing that it violates the Fifth Amendment to delegate the power of eminent domain to an entity that cannot pay just compensation.

Robert McNamara: The Supreme Court has for centuries said that when government takes property, it owes just compensation. But it's never had occasion to address this idea that just compensation can be satisfied just with a piece of paper that says, I owe you a certain amount of money that I can never be forced to pay. What we're looking for is a ruling from the Supreme Court that says just compensation means payment, not an empty promise of payment in the future.

John: We filed the lawsuit last year, and so far the town is sticking to its guns. Which has come at a real cost not only to Melisa and Mike but to everybody in town. Initially, the sewer board was ordered to pay about $80,000 dollars, but with interest and legal fees from the long delay, the town now owes something like $200,000 dollars. On top of that, to pay for the town's lawyers, the sewer board recently added a $10 surcharge to everybody's water bill each month.

Conclusion:

John: And with that, we have reached the end of our episode on neat tricks to avoid takings liability. If you are keeping score, Trick 1 was whether or not the Fifth Amendment is self-executing. That's up in the air. Trick 2 was whether, in regulatory takings case, governments can just change their regulations when a court finds there was a taking, and never pay up. That trick is no more. Trick 3 is whether local governments can string property owners along, making them exhaust an inexhaustible land-use process before they can seek judicial review. That trick is alive and well. And finally, whether governments can simply refuse to pay court-ordered just compensation. That's an issue the Supreme Court has not yet squarely addressed, and we hope to put it before the Court soon. Until then, we have one final episode coming up this season. Thanks for listening.

Credits: Bound By Oath is a production of the Institute for Justice's Center for Judicial Engagement. This project was edited by Kais Ali and Charles Lipper at Volubility Podcasting. This episode was produced by John Ross. The theme music is by Patrick Jaicomo. Audio from the Supreme Court comes from Oyez. With production assistance by Brian Morris and Cary Chapman.