The Supreme Crow Of The United States?

Eating crow. No one likes to do it, including the Supreme Court justices. Yet, based on the oral argument in *Lingle v. Chevron* in late February, the justices seem headed in that direction, perhaps even unanimously.

At issue in *Lingle* is the validity of the Court’s unequivocal statement in a unanimous opinion 25 years ago in *Agins v. City of Tiburon* that a regulation of property that fails to “substantially advance” a legitimate governmental interest amounts to a regulatory taking. In a notoriously muddled area of constitutional law, where the Court has often stressed that there is no “general formula” for legal analysis, the *Agins* test has been one of the few clear statements offered by the Court. According to Justice Breyer during the *Lingle* argument, the Court has repeated the substantially advance language on 12 separate occasions since *Agins*.

Taking the Supreme Court at its word, the Ninth Circuit in *Lingle* concluded that the State of Hawaii’s regulations aimed at protecting consumers from high retail gasoline prices amounted to an unconstitutional taking of property because the state regulations failed the *Agins* substantially advance standard. The regulations challenged in the case restrict the amount that an oil company can charge a dealer who leases a company-owned station. The court of appeals accepted the district court’s finding that the dealers would likely just pocket the savings themselves rather than pass them on to consum-
ers in the form of lower prices, and the court of appeals affirmed.

The problem with the Ninth Circuit’s ruling, however, is not necessarily the district court’s assessment of the efficacy of the Hawaii law. The problem is far more straightforward. The Supreme Court’s *Agins* test, no matter how often repeated, just does not make any sense as a regulatory takings test. It did not make sense when the Court announced it in June 1980. And, it does not look much better with age.

The substantially advance test has two obvious flaws. The first is that it is a means-ends inquiry that sounds in substantive due process rather than regulatory taking. The regulatory takings inquiry is first and foremost concerned about whether an owner of private property is, because of a regulation, being forced to take on a burden that as a matter of “justice and fairness” should be borne by society as a whole. The substantially advance prong of the *Agins* takings test, however, completely ignores that central inquiry. The burden on the property owner is not a relevant factor. A regulation, therefore, can be deemed a taking of property even though there might be no adverse economic impact at all.

The second flaw is that by converting the takings test into the legal equivalent of a heightened substantive due process test, due process ceases to be of independent constitutional significance. Why would anyone challenging the fairness of a regulation assert a due process violation when they can easily secure a far more demanding and, therefore, potentially plaintiff-friendly standard of judicial review by just invoking the takings label instead? The short answer is no one would, lending force to those who complain that the substantially advance test lets in through the takings back door the very kind of judicial second-guessing of the wisdom of legislative action epitomized by the *Lochner* era that the Court long ago flatly rejected in due process challenges.

During the oral argument in *Lingle*, it was quickly apparent that the Court perceived these same flaws. Not surprisingly, Justices Breyer, Souter, and Ginsburg took the *Lochner* route. Justice Stevens, who would normally have led the attack, was a no show because he was stranded on a town when his flight was canceled. Peppering counsel for Chevron with questions, Breyer pointedly asked, “What in heaven’s name does goodness or badness of the relation have to do with whether a taking, before then proceeding to answer his own question: “It has to do with whether you have to pay.”

What was more foreboding for Chevron, however, was Kennedy, O’Connor, and even Scalia appeared no less skeptical of the substantially advance inquiry as a possible takings test. In an unprecedented moment at oral argument, a regulatory takings case, Scalia pronounced that he “agree[d] with Justice Scuter” that respondent’s position was “crazy.” It simply cannot be deemed a taking even though it doesn’t make sense, you pay for it.

It was a long thirty minutes. Chevron’s counsel, which is also he wisely sat down before his time had expired. Of course, he can hardly be blamed for his plight. The difficulties he faced at argument were not of his making, but rather largely of the Court itself. After all, if, as the justices all appeared to agree, respondent’s legal position was crazy, the font of that lunacy was the Court’s ruling in *Agins*. All respondent had done was fairly use the Court’s opinion in the lower federal courts. Scalia was the only one to acknowledge the Court’s complicity, questioning the Hawaii attorney general, Scalia intimated that the Court was going to “have to eat crow no matter what we do.”

For individuals with positions of great responsibility such as Supreme Court justices, a little crow in the judicial diet every once in a while probably not a bad thing. Or, at least some humble pie.

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