
At least it's Napoleon's
Death Mask

Last week, I reported a couple of recent appellate court opinions that grapple with the question of a "facial" takings claims — neither of them, in my view, very satisfactorily. The problem, as I see it, is this: a regulatory takings claim turns on the impact of a government regulation on the plaintiff. But since it depends upon impacts, how can a plaintiff raise a facial claim?

Well, after thinking it through a bit more, and talking to colleagues, I have come to the conclusion that 1) up until a few years ago, the facial regulatory takings claim made sense; but 2) in light of recent Supreme Court precedent, it no longer does. Thus, in regulatory takings situations, so-called "facial" claims no longer exist. Private property rights lawyers, who often spend time waxing eloquent on the virtues of federalism, will now have to bring all their regulatory takings claims in state court.

As I just noted, regulatory takings claims depend largely upon their impact on the plaintiff . This familiar. Penn Central RR v. City of New York balances 1) the "character" of the government action; 2) the economic impact of the regulation on the plaintiff; and 3) the when the regulation has destroyed the plaintiff's legitimate and reasonable "distinct investment-backed expectations." Lucas v. South Carolina Coastal Council offers a "rare" exception to this framework, holding that if a regulation destroys "all economically viable use" of a piece of property, then it is a taking per se. So how could either of these tests have presented a facial challenge?

The answer is that up until three years ago, a *third* test also existed for regulatory taking challenges, from the 1980 case of *Agins v. City of Tiburon*. In *Agins,* an almost summary decision, the Court's opinion by Justice Powell held that if a regulation failed to "substantially advance" a "legitimate state interest", then it would also constitute a taking. Note the difference: the *Agins* test did not concern the plaintiff's property at all. If a regulation did not meet it, then it didn't matter how much or how little the plaintiff's property was affected. The *Agins* test could be applied without regard to individual litigants.

Little wonder, then, that as the 10th Circuit noted in one of the cases I earlier discussed, *Alto Eldorado Partners v. County of Santa Fe,* basically all previous facial takings challenges were brought under *Agins.*

In 2005, however, the Supreme Court decided *Chevron v. Lingle,* in which it unanimously removed the *Agins* test from takings jurisprudence. To be sure, the Court said, if a regulation fails to substantially advance a legitimate government interest, then it has constitutional problems. But those problems fall under the Due Process Clause, not the Takings Clause. And because they fall under the Due Process Clause, the challenged regulations warrant the very substantial deference that governmental actions usually get unless they affect fundamental rights. And as far as I can tell, the "property" prong in the Due Process Clause has never received any stricter scrutiny than rational basis scrutiny.

Thus, facial challenges used to make sense, when *Agins* was the law. But *Agins* no longer is the law, and any facial challenges to regulations regarding property rights must have the strong deference afforded them under the Due Process Clause. Plaintiffs can indeed challenge government regulations as Takings — but they must do so as an as-applied challenge, which means that they must go to state court first, as *Williamson County* and *San Remo Hotel* held, with the claim- and issue-preclusion effects of prior state court judgments. Physical takings challenges (i.e. *Loretto v. Teleprompter*) can still be brought as facial claims, but those are physical takings, not regulatory takings.

I realize that the Takings bar won't like this conclusion much. Like all plaintiffs' civil rights lawyers, they would much rather get their cases into federal court. But criminal lawyers have had to deal with these issues for decades: they routinely challenge evidence and confessions under the Fourth and Fifth Amendments in state criminal proceedings, and I have yet to see the private property rights bad express any sympathy for them. Besides, as my former colleague Bill Rubenstein has persuasively argued, civil rights plaintiffs often can get important advantages from state courts. And private property rights attorneys usually spend a lot of their time arguing for the virtues of federalism. Now they can put their litigation where their mouths are.