

I recently reread an article that my late colleague Joe Sax published exactly fifty years ago. It's a striking piece of scholarship, all the more impressive so early in his career. But one particular statement made a particular impression on me: "Nevertheless, the predominant characteristic of this area of law is a welter of confusing and apparently incompatible results." That remains just as true today, fifty years later. But why? It seems to me that there are three reasons, none of them likely to change.

First, regulatory takings law is a collision between the government's need for flexibility in serving the public interest and the need for robust property rights. Striking a balance between the two is an inherently messy process, involving deeply conflicted perspectives on societal values.

Second, the financial and political stakes are high. So there is a strong incentive for governments to manipulate the rules and for owners (especially developers) to bring lawsuits. Just as in tax law, the result of this dynamic is escalating complexity based on fine distinctions. The complexity is amplified by the tendency of courts to distinguish rather than overrule prior cases, though the reality is that the majority's perspective has changed in the meantime.

Third, regulatory takings doctrine alternates between rules and standards — or as Carol Rose once put it in terms of property law generally, between crystals and mud. No sooner is a clear rule announced than there is an impulse to add a more flexible tweak. No sooner is a standard adopted than there is an impulse to provide more clearcut guidance through rules.

Put all these together, and what you have is a recipe for confusion. So however much judges and lawyers may complain, and however much theorists offer novel frameworks, don't expect takings law to get clearer any time soon.