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Carol M. Rose

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THE LAW OF TAKINGS: AN INTRODUCTION  
Property, Takings, and the Evolution of  
Resource Regulation

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Regulatory Takings and Resources:  
What Are the Constitutional Limits

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Takings, Property and the Evolution of Resource Regulation  
or  
Deja Vu All Over Again

Carol M. Rose

I. INTRODUCTION: THE TAKINGS JUNKYARD

A. The character of state/local resource regulations: a  
lightening overview.

Run-of-the mill takings cases have historically arisen from the exceedingly pedestrian circumstances of local regulation. The doctrine is a well-known morass, which scholars periodically vow to clean up, more or less fruitlessly

B. Federal judicial reactions

For many years, higher-level federal courts left state/local takings issues alone, and major takings issues were left to be hashed out in the states. In recent years this pattern has changed, with a flurry of new Supreme Court takings cases.

C. The Federal regulatory dimension

A somewhat less noted phenomenon has been increased

federal judicial "takings" supervision over federal legislation as well as state and local.

D. Some questions posed:

- 1) What are the sources of new activism?
- 2) Are the "takings" cases in the context of federal legislation simply deja vu, or a new departure?

II. SOURCES AND HISTORY

A. "Takings" and property regimes.

"Takings" cases and doctrines have to be understood in relationship to underlying theories of property.

B. Why have property?

Three major theories of property are, roughly speaking, libertarian, civic republican and utilitarian. I will concentrate on utilitarian views, since I think these dominate much of our law and thinking about property.

C. Implications of utilitarian property

- 1) Property as an institution encourages investment and careful use of resources, but this means that property rights should be relatively stable.
- 2) Property rights are not always well-defined, with the result that property uses sometimes cause externalities or spillover effects. Regulation is often justified as preventing

externalities, or in older parlance, preserving "public rights." Externalities take several forms; the most important for regulation are common pool externalities.

D. The evolutionary character of property rights & regulatory regimes

Property rights tend to evolve from less-defined to more sharply-defined as resources grow scarcer; the regulation of externalities also evolves, and in a similar pattern.

III. REGULATION, PUBLIC RIGHTS AND "TAKINGS" PROBLEMS

A. Practical problems in regulation

1. The usual stuff: Regulators may have dumb ideas, or take graft, or get "captured" by the regulated entities.

2. The "piggy-back commons problem": uses of property may use common resources in ways that cause external harms to others (e.g. smoking, waste disposal in air or water), but by the time these are noticed as problems, property-owners think that their property rights include the infliction of externalities on others. Hence regulation faces the obstacles of entrenched entitlements; the purported baseline property right includes a piggy-backed externality.

3. The uncertain hopes of planning: Advance planning is often cited as an antidote to entrenchment, by signalling that particular property uses may be subject to regulation in the future; but planning may or may not work to give the proper

signals.

B. Regulating the regulators--another evolutionary process.

Regulation may have external effects or other problematic effects of its own (e.g. exclusionary zoning or NIMBY regulation may cause external harms to neighboring communities). Hence regulatory activities too may require supervision, just as property owners' uses require supervision by regulation.

C. The Federal courts and the evolution of "regulating the regulators"--judicial supervision in context.

There are a number of institutions that have policed or supervised local and state regulatory bodies--notably state courts and state legislation. Perhaps for this reason, federal judicial supervision was very low-key for a number of years, but now has staged a great resurgence with the recent flurry of Supreme Court takings cases. The larger context of "regulating the regulators," however, also includes federal legislative supervision of state and local measures, e.g. in the major air and water pollution control acts.

IV. "TAKINGS" CLAIMS AGAINST FEDERAL ACTIONS

A. The great scope of federal resource management

Federal legislative resource management has been important in the public lands for many years, but particularly in recent years, with the turn to conservationist approaches.

Federal legislation has also massively entered resource management through other routes, e.g. legislation for pollution control, mining regulation, wildlife management etc.

B. New role of the Federal claims court:

As federal resource management has expanded, takings challenges against the federal government have centered on the federal court of claims.

1. familiar substantive claims

Claims court cases have a familiar substantive base, and tend to revolve around land uses--e.g. challenges to regulations about mining, wetlands, wildlife habitat. Like the subjects of state/local regulation, land uses subject to federal legislation also frequently involve a "piggy-backed" common resource (air, water, wildlife) associated with the land use.

2. unfamiliar institutional character

Institutionally, the takings claims against federal legislation are quite different. Congress is very large and diverse, by comparison with local or even state legislative bodies, and should have different institutional strengths and weaknesses. E.G., Congress may be able to marshal more investigative resources and scientific sophistication than state and local bodies. But since there are many states and localities, citizens have more choice among legislative "packages" at the state or local level. "Capture" as a problem thus might take on different characteristics as between federal



or state/local legislatures.

C. Do the feds need a different kind of takings discussion?

The above issues suggest that "takings" challenges to federal legislation might best be analysed in a different way from state or local legislation; but the claims court to date appears not to have provided any such analysis.

V. CONCLUSION

1) Federal legislative and judicial supervision over state/local legislation was predictable from the evolution of property rights and regulations

2) Federal judicial supervision over federal legislation perhaps also predictable, given the massive federal entry into resource management

3) But federal legislation emerges from a quite different institutional setting from state/local regulation, and those differences call for independent consideration, and perhaps a different takings jurisprudence--something we may not get, in any systematic way, from an Article I court.