The Politics of Takings: Choosing The Appropriate Decisionmaker

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THE POLITICS OF TAKINGS: CHOOSING THE APPROPRIATE DECISIONMAKER

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Deciding who should define takings, especially regulatory takings, is a daunting task. It is daunting because years of effort by all three branches of the federal government have failed to produce an effective solution. For very different reasons, each branch has failed to develop a sound approach to regulatory takings. It is also daunting because the definition of a regulatory taking is so fundamentally important to the future of our economic, legal, political, and natural systems that it may require

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1. The term "regulatory takings" refers generally to takings resulting from regulatory conduct that restricts private property in such a way that the owner no longer can exercise the rights that he or she legitimately and reasonably expected to have. The Supreme Court first announced the notion that regulatory conduct could go too far under the Takings Clause in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

2. See infra Part II.

3. See infra Parts I and II.
the wisdom of Solomon to resolve.

Which branch, then, should define when a taking occurs because of regulatory conduct? The response will depend on the values and purposes that an individual attaches to the Takings Clause and on the expectations that an individual has for the takings decision-making process. The response of Professor Peter Byrne and others is that the regulatory takings doctrine raises utilitarian issues best handled by the democratically accountable legislative branch. My response is that the branch best able to provide principled decision making should handle the regulatory takings problem. As used in this Article, the phrase "principled decision making" refers to decision making that is principled in the sense of process, and not necessarily in the sense of providing a unified or coherent set of substantive principles—that is, decision making that is objective and neutral and not controlled by the personal interests or beliefs of the decisionmaker or the parties directly affected by the decision.

What explains the inherently different approaches to solving the regulatory takings problem? Perhaps fundamentally different expectations about what a solution can or should accomplish explain the differences. In any event, my suggestion to focus on the branch best able to engage in principled decision making results in part from previous unsuccessful attempts by all three branches of the federal government to address the regulatory takings problem. Those unsuccessful attempts have convinced me that the problem is far too complex to yield a single substantive solution or a coherent set of principles. I am therefore much

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4. The Takings, or Just Compensation, Clause appears in the Fifth Amendment and provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.
5. See infra Part II.
7. See infra Part II.
8. For a discussion of some of those unsuccessful attempts, see infra Part II.
more willing to focus on the takings decision-making process and on a branch's capacity for principled decision making in determining which branch should have primary responsibility for defining regulatory takings.

This Article focuses on the problem of choosing the appropriate decisionmaker for regulatory takings issues. To support my conclusion that the judicial branch should be the primary takings decisionmaker, Part I of the Article reiterates the constitutional dimensions of the regulatory takings problem. In addition to discussing why government action that excessively regulates property poses a constitutional takings issue even though the action is otherwise a valid exercise of the police power, Part I examines the potential for political process unfairness to property owners, a central concern of the Takings Clause. Then, in Part II, the Article addresses each branch's role in defining regulatory takings—a topic of much debate in this Symposium issue. This Part first makes the case for judicial branch resolution of regulatory takings issues and then examines the case against choosing the legislative or executive branch as the primary regulatory takings decisionmaker. Each discussion explains why the judiciary is the branch best able to engage in principled decision making and to avoid the politics of takings. Finally, Part III summarizes the conclusions of the Article and introduces the main themes of this Symposium issue.


10. See, e.g., Mark Sagoff, Muddle or Muddle Through? Takings Jurisprudence Meets the Endangered Species Act, 33 WM. & MARY L. REV. 825 (1997) (discussing the political function of the Supreme Court in endangered species protection); Treanor, supra note 6, at 1158-58 (proposing a partial legislative solution).

11. For other views on the appropriate role of the different branches in resolving regulatory takings, see Byrne, supra note 6 (arguing that the Court's regulatory takings doctrine should be replaced with a legislative solution); Treanor, supra note 6, at 1158-60 (supporting greater legislative branch involvement).
I. THE CONSTITUTIONAL DIMENSION OF THE REGULATORY TAKINGS PROBLEM

In his 1995 article in *Ecology Law Quarterly*, Professor Peter Byrne argued that the regulatory takings doctrine should be abolished and that the legislative process should instead be used to resolve the essentially utilitarian issues raised by the doctrine.12 As support for this conclusion, he described the morass into which the doctrine had taken the courts,13 the lack of textual, precedental, or utilitarian support for the doctrine,14 the failure of the doctrine to promote economic efficiency,15 and the illegitimate and unwise use of the doctrine to curb environmental protection efforts.16 He also asserted that federal court enforcement of the doctrine against the states “upsets appropriate notions of federalism”17 because it impairs the states’ “authority to adjust the limits of property interests created by the states themselves . . . .”18 At the very least, this impairment suggests the “need for a stronger justification for the exercise of national power.”19 Professor Byrne’s suggested legislative solution basically would provide a developer with a property right in development plans upon the issuance of a crucial permit.20 To “allow government to respond to changes in circumstances and overall goals,” he proposed that a reasonable time limit be imposed on the permit and therefore on the property right.21 The “thrust” of his statutory solution “would be to give property status to the approved development plan at a clear point in the process, so that non-excepted subsequent prohibitions on completion would require payment of compensation.”22

To accept some of Professor Byrne’s arguments in support of

12. Byrne, supra note 6, at 89-90.
13. See id. at 102-06.
14. See id. at 91-102, 115-17.
15. See id. at 123-28.
16. See id. at 117-23, 131-36.
17. Id. at 111.
18. Id. at 112.
19. Id.
20. See id. at 140.
21. See id.
22. Id.
his solution would require denying the constitutional dimension of the regulatory takings problem. Original understandings of the Takings Clause admittedly did not consider police power regulation to pose a serious takings problem. Courts focused on whether the challenged police power action involved a physical appropriation and generally were not concerned about the regulation of property, not even when the regulation had a significant economic impact. Despite those original understandings, though, the drafters of the Takings Clause and the early courts that interpreted the clause surely could not have anticipated the degree of regulation that exists currently, especially in the environmental area. Because clean air, clean water, trees, fisheries, wildfowl, and other natural resources were overwhelmingly abundant in the 1700s and 1800s, there was minimal need to understand the adverse environmental impact of land use.


24. See id. at 695-98, 711; see also Byrne, supra note 6, at 91-96 (discussing the original intent and early judicial interpretation of the Takings Clause); Treanor, supra note 9, at 792-97 (discussing early interpretations of the Takings Clause and of state counterparts); cf. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 9, 25, 48, 59-61, 155 (1992) (recognizing that property rights were not inviolate and yielded to social and economic needs, but also that property included certain fundamental economic interests).

25. Early settlers wrote in glowing terms of the abundance and beauty of natural resources in America. See, e.g., Letter from William Brewster to the Earl of Salisbury, reprinted in ALEXANDER BROWN, THE FIRST REPUBLIC IN AMERICA 33 (1898) (describing the "most statlye, Riche Kingdom in the woorld"); BROWN, supra, at 34-37 (reprinting an unattributed early description of the fish, types of land, woods, soil, and other riches of Virginia); THE TRUE TRAVELS, ADVENTURES AND OBSERVATIONS OF CAPTAIN JOHN SMITH 94 (E.A. Benians ed., Cambridge Univ. Press 1908) (writing that "heaven and earth never agreed better to frame a place for man's habitation" than in Virginia); see generally 1 PHILIP ALEXANDER BRUCE, ECONOMIC HISTORY OF VIRGINIA IN THE SEVENTEENTH CENTURY 71-139 (1907) (describing the physical character of "aboriginal Virginia"). Some scholars have maintained that this abundance of resources affected the development of public and private rights in America's resources. See LYNDA L. BUTLER & MARGIT LIVINGSTON, VIRGINIA TIDAL AND COASTAL LAW § 6.2 (1988). Because of Virginia's abundant resources, development of the commons concept, which recognizes certain public rights in natural resources, was more restrained in Virginia than in England. See id. The development of private land rights, by contrast, was promoted by the abundance of natural resources, which created expectations of being able to acquire land that was free of most traditional English law constraints. See id. § 8.1.

Colonial and early statehood governments did, of course, regulate natural resources. Early on, for example, Virginia adopted measures to govern and protect its abundant
Furthermore, the problem of excessive or abusive governmental regulation of property by laws that otherwise are valid exercises of the police power seems to raise precisely the type of constitutional concerns that the Takings Clause should address.\(^26\) The concern expressed by the Court in *Pennsylvania Coal Co. v. Mahon*,\(^27\) that government may go too far in regulating property,\(^28\) is exactly the type of concern that courts existing in a modern regulatory state should consider under the Takings Clause. The Court should not, as a matter of constitutional takings doctrine, allow government to regulate property so extensively that the market value of the property is driven down to a point at which government can condemn the property at a bargain rate.\(^29\)

Treating such excessive regulation of property as equivalent to a physical appropriation seems to logically extend the traditional concepts of eminent domain and of property law. If government were not prevented by the Court's takings jurisprudence from adopting regulations that were valid exercises of the police power but that went too far in burdening private property, government would rarely, if ever, need to exercise its power of condemnation. It could simply over-regulate a tract of land until the market value fell to a point at which the landowner would prefer to sell natural resources. During the period between 1678 and 1680, for instance, a Middlesex County court decided to protect fisheries by enjoining the spearing of fish. See John C. Pearson, *The Fish and Fisheries of Colonial Virginia*, 23 WM. & MARY Q.2D 278, 280 (1943). Spear-fishing apparently wounded four times more fish than it captured. See *id.* (quoting *Middlesex County Court Records, 1677-78, reprinted in 8 VA. MAG. HIST. & BIOGRAPHY* 186 (1900)). For other examples of laws regulating Virginia's natural resources, see Butler & Livingston, *supra*, § 6.2 (discussing regulation of common rights and uses in Colonial Virginia), id. § 7.3 (discussing regulation of water-related uses in Colonial Virginia), id. ch. 8 (discussing regulations affecting distribution of private interests in land), id. § 9.2 (discussing Virginia's enclosure laws for open lands). These regulatory measures, however, did not reflect a deep or systematic commitment to the health of the environment. For an interesting discussion of the ecological changes resulting from European colonization of New England, see William Cronon, *Changes in the Land* (1983).  

26. Whenever the phrase "excessive or abusive government regulation of property" is used in this Article, it refers to losses and burdens imposed on private property by regulatory conduct that generally is valid under constitutional provisions other than the Takings Clause.

27. 260 U.S. 393 (1922).

28. *See id.* at 415.

29. *See id.* at 413 (stating that government is limited in how much it can decrease the value of property before compensation is necessary).
the property and government was one of the few parties interested in buying the property. Such manipulation of market value to circumvent the need for condemnation would be inconsistent with the just compensation constraint imposed on government's eminent domain power. The same constitutional values of fairness, distributive justice, and freedom from majoritarian exploitation that underlie physical appropriations surely exist in cases of excessive or abusive government regulation of property. These values do not just involve the problem of surprise resulting when a property owner buys land with the expectation of developing it for a profit only to discover that new government regulations prevent development. The values also focus on the unfairness and outrageousness of being singled out and forced to bear the costs of government action and of being subjected to disproportionately burdensome government action.

Furthermore, property law already has numerous doctrines that treat one situation as equivalent to another, despite the absence of key characteristics or even the ultimate fact, because of

30. James Madison, in an essay written after ratification of the Bill of Rights, urged a broad reading of the Fifth Amendment to include protection from indirect, as well as direct, infringements of property. See James Madison, Property, NAT'L GAZETTE, Mar. 27, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 266-68 (Robert A. Rutland et al. eds., 1983).


32. Cf. Byrne, supra note 6, at 130 (discussing the unfairness of surprise as one key argument for constitutional protection of property owners).

33. In Armstrong v. United States, 364 U.S. 40 (1960), the Supreme Court explained that the Takings Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Id. at 49; see also Michelman, supra note 31, at 1214-24 (discussing the ethical and utilitarian justifications for the Takings Clause, including the problems of demoralization and systematic exploitation).
the importance of promoting fundamental principles or policies of property law. Under landlord/tenant law, for example, courts routinely recognize that a landlord's interference with a residential tenant's use and enjoyment of the leasehold premises can be functionally equivalent to an actual eviction.\(^4\) When the interference is serious or substantial, the tenant may no longer be able to enjoy or use the property and thus, for all practical purposes, is evicted.\(^3\) Additionally, under the law of gifts, courts treat delivery of the sole means of access and control of personal property as being equivalent to the actual manual transfer of the property.\(^3\) Courts typically explain that the functions and policies of the delivery requirement are served, so long as a donor gives up dominion and control over her property.\(^7\)

The absence of political process unfairness to property owners similarly is not a convincing reason to conclude that the regulatory takings problem is without constitutional dimension.\(^3\) Many property owners admittedly have significant impact on the political process.\(^3\) That these property owners do not suffer

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35. See id.
37. See id.
38. Some scholars might even dispute the absence of political process unfairness to property owners, at least since the New Deal era when government began to increase its regulation of property and economic interests significantly. See ELY, supra note 24, at 8-9, 119-34, 153-54; see also Herman Belz, Property and Liberty Reconsidered, 45 VAND. L. REV. 1015, 1022 (1992) (reviewing James W. Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (1992)). But see Treanor, supra note 9, at 855-87 (arguing that the Takings Clause should be reinterpreted to protect property only when process unfairness is likely).
39. See Byrne, supra note 6, at 129-30. Private property holdings provide an important resource base for state and local governments. Statistics for 1992, for example, indicate that state and local governments received about $179 billion of their $1.185 trillion in total revenues from property taxes, or approximately 15% of their total revenues. Local governments alone received about $172 billion of the property tax revenues, which amounted to almost 27% of their total revenues ($648 billion). See BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1995, at 299 (115th ed. 1995) [hereinafter 1995 CENSUS]. Furthermore, significant increases in certain types of real property have occurred. Occupied housing units, for example, have risen from 42,826,000 units in 1950 to 80,390,000 units in 1980 and 94,724,000 units in 1993, with 55% of those units having been occupied in 1950, 64.4% having been occupied in 1980, and 64.7% having been occupied in 1993. See id. at 735.
from widespread bias within the political process is as likely due to the effective incorporation of the property concept into the fabric of our constitutional and political structure as it is due to the ability of property owners to impact the political process itself. Furthermore, though the class of property owners in the United States may be relatively large, the nature of property interests varies significantly. Although some property owners

Additionally, total housing units have risen from 45,983,000 units in 1950 to 86,759,000 units in 1980 and 106,611,000 units in 1993. The number of detached housing units alone has increased from 29,116,000 units in 1950 to 53,596,000 units in 1980 and 64,283,000 units in 1993. See id. at 733.

Supporters of the private property movement have gained significant power in recent years. See Betsy Carpenter, This Land Is My Land, U.S. News & World Rep., Mar. 14, 1994, at 65. According to some experts, the private property movement primarily represents wealthy landowners and benefits from the lobbying efforts of rich special interest groups. See id. at 68-69; see also infra note 52 and accompanying text (discussing the private property movement). But see H. Jane Lehman, Private Property Rights Proponents Gain Ground, Wash. Post, Sept. 17, 1994, at E1 (discussing three flanks to the private property movement, including one composed of small property owners). For further discussion of the nature of the property rights and related wise-use movements, see Let the People Judge (John D. Echeverria & Raymond Booth Eby eds., 1995).

According to Professor Jennifer Nedelsky, the Madisonians, for example, ensured that election districts were sufficiently large to make the election of property owners likely. See generally Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism 53-54, 170-87, 199-207, 215-18 (1990) (discussing the importance of property as a concept in the history of the Constitution).

For an interesting discussion of property as a reflection of traditional American values, see Jon Roush, Introduction: Freedom and Responsibility: What We Can Learn from the Wise Use Movement, in Let the People Judge, supra note 39, at 1, 2-3.

See Byrne, supra note 6, at 129. Statistics from the 1995 census demonstrate the large size and diversity of the "residential property" category used in the census. Statistics for 1993, for instance, reveal a total of 106,611,000 housing units, with 61,252,000 of the occupied units being owned (57.5%), 33,472,000 of the occupied units being rented (31.4%), and 8,799,000 of the total housing units standing vacant (8.3%). 1995 Census, supra note 39, at 737. The 1993 statistics also classify housing units according to the following categories: single-family detached unit, single-family attached unit, mobile home or trailer, 2 to 4 units, 5 to 9 units, 10 to 19 units, 20 to 49 units, or 50 or more units. See id. Those categories then are classified according to the type of main heating equipment used, the presence of air conditioning, the source of water, and the means of sewage disposal. See id. Further, in addition to these categories, multi-unit structures are classified according to the number of stories built within the structure, and single-family units are distinguished according to the type of foundation used. See id.

The variation in the nature of residential property, however, does not necessarily result in significant diversity among the types of property owners. Indeed, some evidence indicates a trend toward monopolization of land ownership. According to one scholar, 5% of landowners in the country hold title to 75% of the land that is privately
have both the financial resources and the opportunity to impact the political process, many others lack both.\textsuperscript{43} Political process fairness to wealthy or commercial property owners should not serve as the benchmark for determining the need for constitutional protection of property rights. Indeed, judgments regarding the lack of a political process reason for protecting property owners from regulatory conduct through the Takings Clause seem to run contrary to the fundamental purpose of the clause: to protect individual property owners from majoritarian exploitation.\textsuperscript{44} As Professor James Ely has explained: "Much legislation frankly seeks to achieve a wider distribution of wealth by divesting owners of their right to use property to its maximum advantage and by altering contractual arrangements. Such opportunistic behavior is less painful to lawmakers than levying taxes to finance governmental programs."\textsuperscript{45}

Further, even if majoritarian exploitation of property owners is not a problem now, it could become a problem in the future.\textsuperscript{46} As traditional property distinctions fade in response to the blurring of public and private spheres and to greater recognition of land's ecological value, the problem of governmental abuse "may well become more intense."\textsuperscript{47} Furthermore, if significantly more restrictive limits are placed on campaign spending, then election politics could change drastically, shifting the emphasis to name recognition and identification with the masses.\textsuperscript{48} Coupling such

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\textsuperscript{43} See Carpenter, \textit{supra} note 39, at 69.
\textsuperscript{44} See Ely, \textit{supra} note 24, at 155; Michelman, \textit{supra} note 31, at 1216-17. But see Treanor, \textit{supra} note 9, at 855-87 (arguing that the Takings Clause and the original understandings of the clause now require reinterpretation in light of modern circumstances to allow compensation to be paid only when political process unfairness is likely and not necessarily when traditional jurisprudence and understandings support compensation).
\textsuperscript{45} Ely, \textit{supra} note 24, at 155. Professor Ely rejects the notion that the economic values underlying property rights should be "left entirely to the political process[,]" because then property ownership would be "simply a matter of legislative sufferance." \textit{Id.} Such an approach thus would ignore the utilitarian and libertarian need for constitutional protection of property and economic rights. \textit{See id.}
\textsuperscript{46} Madison's unease about the "future security of property" motivated him to push for greater constitutional protection of property. \textit{See id.} at 53-54.
\textsuperscript{48} \textit{See generally} Marty Jezer & Ellen Miller, \textit{Money Politics: Campaign Finance
limits with increased access to the information superhighway would provide a less expensive method of gaining political support and would therefore make the election of citizens with limited income or property more likely. An absence of political process unfairness to property owners thus does not justify judicial indifference to the problem of political unfairness in interpreting and applying the Takings Clause.

Finally, those scholars who reduce the regulatory takings problem to a utilitarian equation miss one of the key points of the private property rights movement. More than mere desire to protect economic interests drives grassroots supporters of that movement; an unwavering belief in the fundamental importance of property rights to personal liberty and to our political and constitutional structure also motivates them. That this belief

50. The conflict between property and democracy becomes the basis of Professor Ely's determination that the Supreme Court must play a key role in "carefully adjusting the demands of political democracy with the explicit protection of property ownership contained in the Constitution." Ely, supra note 24, at 154.
51. See Byrne, supra note 6; supra text accompanying note 12.
52. As a representative of the National Cattlemen's Association explained in addressing the Senate Committee on Environment and Public Works:

At the root of the current dissatisfaction among property owners is the environmental statutes themselves, and their lack of regard for the importance of the right to own and use private property. This right is a fundamental principle upon which our country was founded and the primary reason that Americans are able to enjoy the standard of living that we do. Erosion of this right
may, at times, be used for antiquated purposes—as an excuse, for example, for refusing to accept the concept of ecological accountability as a necessary part of property ownership—does not remove the constitutional dimension of the regulatory takings problem. Rather, this belief makes the problem more complex and more in need of fundamental changes in the value structure of property law.

Private Property Rights and Environmental Laws: Hearings Before Senate Comm. on Environment and Public Works, 104th Cong. 107, 112 (June 27, 1995) (statement of Jim Little, National Spokesman for the National Cattlemen's Association) [hereinafter Little Statement]. Senator Dole similarly explained the importance of a private property bill that he sponsored in 1993 by stressing the constitutional foundation of the bill. He noted that the "Founding Fathers deeply believed in the right of American citizens to hold private property and that Government should not invade upon that right." 139 CONG. REC. S5337 (daily ed. Apr. 19, 1993) (statement of Sen. Dole). The intent of the bill that he was sponsoring was to "requir[e] Federal employees to uphold the Constitution." Id.; see generally LAND RIGHTS (Bruce Yandle ed., 1995) (discussing the 1990s' property rights rebellion); Nancie Marzulla, The Magic of Property Rights, NATIONAL WILDERNESS INST. RESOURCE, Spring 1995, reprinted in Defenders of Property Rights, Media Coverage, Education & Coalition Building 18 (1995) [hereinafter Defenders of Property Rights] (discussing the private property movement and the link between private property and protection of natural resources); Nancie Marzulla, State Private Property Rights Initiatives as a Response to Environmental Takings, in ROGER CLEGG ET AL., NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST, REGULATORY TAKINGS: RESTORING PRIVATE PROPERTY RIGHTS 101-05 (1994) (discussing the private property movement and federal executive and legislative attempts to protect private property); Carpenter, supra note 39 (discussing the property rights movement); Lehman, supra note 39 (discussing the successes of the property rights movement); Defenders of Property Rights, supra (containing information about print, radio, and television coverage of the property rights movement).

Two groups working for greater protection of private property are the National Legal Center for the Public Interest and Defenders of Property Rights. The first group promotes the protection of individual rights, including private ownership of property. See CLEGG ET AL., supra, at inside back cover. The second group describes itself as "leading the fight" to protect property and as having, as its "sole endeavor[,]" ensuring "that government respects Fifth Amendment property rights, the foundation of all our constitutional liberties." Defenders of Property Rights, supra, at inside front cover.

53. Professor Sax interprets Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), as rejecting the "demands of the economy of nature as legitimate obligations of land and of landowners." Sax, supra note 47, at 1446. By "economy of nature," he is referring to an ecological view of land that recognizes the important ecological services being performed by land in an unaltered state. Id. at 1442. Sax interprets Justice Scalia's opinion in Lucas as sending the message that "[s]tates may not regulate land use solely by requiring landowners to maintain their property in its natural state as part of a functioning ecosystem, even though those natural functions may be important to the ecosystem." Id. at 1438 (footnote omitted).
II. CHOOSING THE APPROPRIATE BRANCH FOR DEFINING REGULATORY TAKINGS

Assuming that the constitutional dimension of regulatory takings is accepted, the critical question about the regulatory takings problem thus becomes: Which branch is best able to provide the principled decision-making process needed to resolve the fundamental questions of individual fairness, social obligation, and popular democracy that underlie the regulatory takings problem? In this Part of the Article, I argue that the judicial branch is the only branch that even has a chance of handling regulatory takings cases in a principled manner.\(^\text{54}\) The word "chance" is used to recognize that even the judicial branch may fail to provide principled decision making in the regulatory takings context, choosing instead to let political values or personal interests control decision making in the takings area.\(^\text{55}\) Indeed, at times, the opinions of some Justices of the Supreme Court seem more consistent with the political ideology of the private property movement than with the Court's own precedent.\(^\text{56}\)

Because of the nature of the judicial process, however, the judiciary has the best chance of being objective and rendering decisions that are not affected by a judge's own political values. One key aspect of that process is the principle that governs judicial decision making: stare decisis.\(^\text{57}\) Under this principle, courts

\(^{54}\) If properly structured, a branch with a judicial-type process also might have a "chance" of providing a principled decision-making process.


\(^{56}\) Justice Scalia's opinion for the Court in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), for example, has been criticized for its treatment of Supreme Court precedent and for its inconsistent adherence to the principle of judicial restraint depending on whether economic interests or liberty interests are at stake. See Byrne, supra note 6, at 117-19; see also Lucas, 505 U.S. at 1046-55 (Blackmun, J., dissenting) (criticizing Justice Scalia's treatment of the Court's takings jurisprudence); id. at 1062-64, 1068-73 (Stevens, J., dissenting) (criticizing Justice Scalia's cavalier dismissal of the doctrine of judicial restraint and his treatment of precedent); see generally William W. Fisher III, The Trouble with Lucas, 45 Stan. L. Rev. 1393 (1993) (discussing Justice Scalia's inconsistent approach to constitutional interpretation and his cavalier use of constitutional principles).

must follow the rule of law or, when they do not, they at least must clearly justify significant departures in light of articulated changes in circumstances, social needs, or information that necessitates a reevaluation of old rules. In the context of constitutional issues, the Court has developed a rule of absolute necessity to determine when to even address a question of constitutional law. Additionally, because of constitutional and prudential concerns, federal courts generally limit their decisions to the facts of the case that is before them. Finally, as James Madison explained, the courts act as "independent tribunals of justice" and will, because of the constitutional protections for property and other rights, "consider themselves in a peculiar manner the guardians of those rights." The nature of the judicial process thus serves two important goals: it helps to promote objective and independent decision making, and it helps to limit the impact of bad, improper, or unprincipled decisions.

The case for judicial branch resolution of regulatory takings disputes and the case against legislative or executive branch responsibility for defining regulatory takings is discussed in the following three Parts of this Article.

A. The Case for Judicial Branch Resolution of Regulatory Takings Issues

A number of reasons further explain why the judicial branch is best able to provide the principled decision-making process


62. Id.

63. See generally CARDOZO, supra note 57, passim (discussing the methods of history, tradition, and sociology underlying judicial decision making and the judiciary's adherence to precedent).
needed to resolve the fundamental questions of individual fairness, social obligation, and political theory raised by the regulatory takings problem. First, decisions that are made by parties about the constitutionality of land-use regulations reflect behavioral choices that make judicial development of regulatory takings law desirable—at least until the behavioral choices are better understood—and that need the type of incremental decision making the courts conduct. Second, the Takings Clause serves an important protective function for individuals, providing a type of protection to individual property owners that requires judicial involvement not only to set minimum levels of constitutional protection against regulatory conduct, but also to resolve constitutional questions about regulatory takings standards. Third, the Takings Clause serves a fundamental political theory function, helping to define the constitutional balance between public and private interests—in particular, between the interests of private property owners and popular democracy. This balance is best and most appropriately defined through the type of ad hoc fine-tuning that the courts provide.

Although selecting the judiciary as the most appropriate takings decisionmaker is not intended to suggest approval or disapproval of any particular court-created takings principle or, more generally, of the Court’s takings jurisprudence, the selection does reflect a different view of decision making under the uncertainty of takings law than that identified under conventional decision-making theory. That is, decision making conducted under the uncertainty of takings law—more specifically, the uncertainty of whether any particular regulation affecting property is valid without compensation—involves different and more complex behavioral choices than the choices identified under conventional economic thinking. These more complex behavioral choices not only make judicial control of regulatory takings law desirable; they also necessitate the type of marginal analysis and evaluation of individual interests and expectations that the

64. For further discussion, see infra notes 77-87 and accompanying text.
65. See generally JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (3d ed. 1953) (discussing conventional decision-making theory).
courts traditionally conduct.\textsuperscript{66}

One widely used conventional model of decision making, expected utility theory, defines the thought process used by a decisionmaker according to some basic assumptions about human behavior.\textsuperscript{67} One key assumption of this model is that people evaluate options and outcomes in terms of their impact on welfare, which is defined in terms of economic variables such as wealth, income, and consumption.\textsuperscript{68} Because these economic variables typically include an assumption of diminishing returns, the decisionmaker is, at least implicitly, assumed to be risk averse, or hesitant to take risks, once a certain level of welfare is reached.\textsuperscript{69} A second key assumption is that the decisionmaker is a rational actor and therefore evaluates options based on rational expectations.\textsuperscript{70} This assumption of a rational actor who uses rational expectations to evaluate options basically means that events that have been anticipated or that are irrelevant to the consequences of the decision or action will not alter the decisionmaker's choice.\textsuperscript{71} That is, the decisionmaker will make choices so as to maximize his or her net expected utility.\textsuperscript{72}

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\textsuperscript{69} See Machina, supra note 67, at 136-39; Noll & Krier, supra note 68, at 750; Quattrone & Tversky, supra note 67, at 720-21. For further discussion of risk preferences, see infra note 75.


\textsuperscript{71} See NICHOLSON, supra note 67, at 78; Noll & Krier, supra note 68, at 750-51.

\textsuperscript{72} See Quattrone & Tversky, supra note 67, at 719; Robert E. Scott, \textit{Error and Rationality in Individual Decisionmaking: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices}, 59 S. CAL. L. REV. 329, 330 n.5 (1986). Implicit in this rational actor assumption are the following postulates: (1) An individual
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Some commentators, applying conventional economic theory to landowners deciding whether to pursue a land use regulated by government, conclude that the uncertainty of regulatory takings law, particularly the possibility that the regulatory conduct will not be a compensable taking, will cause the decisionmaker to be less willing to invest in wealth-creating enterprises. Under conventional decision-making theory, this result would occur if the decisionmaker were risk averse and lowered the expected value from the land-use option to reflect the decisionmaker's risk aversion. This adjustment, in turn, could cause the deci-

always prefers more to less, (2) An individual is not tempted to select alternatives that do not maximize individual welfare, (3) An individual's preferences are consistent; they vary neither over time nor according to the manner in which the alternatives are described, and (4) An individual's preferences are transitive; if the individual prefers A to B and B to C, then the individual prefers A to C. See Nicholson, supra note 67, at 76-77; Machina, supra note 67, at 136, 140-44; Scott, supra, at 330 n.5.

Other models of rational choice theory include Bayesian theory (dealing with how individuals react to subsequent evidence and basically providing that individuals will predictably revise their opinions about probabilities in light of new information), see David A. Lombardero, Do Special Verdicts Improve the Structure of Jury Decision-making?, 36 Jurimetrics 275 (1996), and the riskless theory of choice among commodity bundles (dealing with how individuals allocate income among a number of commodity bundles subject to a budget constraint and providing that a person will choose a bundle of commodities such that "the marginal utility of the last dollar spent on all commodities purchased is the same"). See Mansfield, supra note 70, at 423-24; see also Noll & Krier, supra note 68, at 750; Quattrone & Tversky, supra note 67, at 719-20; Scott, supra, at 330 n.5.

73. For explanations and analyses of this argument, see Byrne, supra note 6, at 124-25; William A. Fischel & Perry Shapiro, Takings, Insurance, and Michelman, Comments on Economic Interpretations of "Just Compensation" Law, 17 J. Legal Stud. 269, 269-77 (1988); see generally Farber, supra note 9 (discussing and evaluating various economic models of takings).

74. The expected value concept is one of the early probability theories used to explain decision making. Reflecting an ex ante perspective, the concept measures the value of a possible outcome or prospect in terms of its probability, or likelihood of occurrence, and the magnitude of its effect. See Nicholson, supra note 67, at 238-39. If a choice involves a range of outcomes or set of events, the expected value of that choice would be the sum of the expected payoffs of each outcome or event. See id. The expected value of a prospect thus does not represent an actual outcome, but rather a weighted average of all possible payoffs, where the weight used with each payoff is its associated probability. See id. at 239. In choosing among payoffs, a rational actor would choose the payoff with the greatest expected value. See Charles J. Goetz, Law and Economics 76-77 (1984); Machina, supra note 67, at 135.

75. In the early 1700s, probability theorists began to demonstrate that a decisionmaker did not consider expected value alone in making choices under uncertainty. See Nicholson, supra note 67, at 240. In particular, expected value theory ignored the decisionmaker's reaction to the degree of risk posed by each outcome. See
sionmaker to choose another option over the land-use option even though the two options had the same expected value, with one option involving a higher degree of risk than the other, or even though the land-use option had a higher expected value than the chosen option if no reaction to risk were considered. 76

The behavioral choices of landowners deciding whether to pursue a regulated land use, however, do not appear to reflect the disincentive to invest that is predicted to result from the uncertainty of regulatory takings law under conventional decision-making theory. Although some landowners may be unwilling to invest because of concern over the possibility of an uncompensated taking, 77 the fact is that the amount of undeveloped land held by private parties continues to decline. 78 Further, because most privately owned land is subject to some sort of environmental or land-use regulation restricting development, 79 landowners

id. at 241. A risk-averse decisionmaker would react negatively to risk and discount a prospect's expected value because of the degree of risk. A risk-prone or risk-seeking decisionmaker would react positively to risk and adjust the expected value of an outcome up to reflect higher levels of risk. Finally, a risk-neutral decisionmaker would not care about the degree of risk posed by a prospect and therefore would not need to adjust the expected value of the prospect. See ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 57-62 (1988); GOETZ, supra note 74, at 79-82; see also Machina, supra note 67, at 135-36 (explaining the development of modern probability theories).


77. For discussions of when this situation might arise, see Byrne, supra note 6, at 124 & n.221; Farber, supra note 9, at 281-82.


79. "In nearly every urban area of the United States, and in a growing number of rural communities, a landowner must ... comply with ... building codes, zoning regulations, and subdivision controls" before improving his or her land. 1 KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 1.02, at 4 (4th ed. 1995). As early as 1930, 35 states had adopted the Standard State Zoning Enabling Act. See id. § 2.21, at 68. Eventually, every state adopted some type of zoning-enabling legislation. See id. Further, as one commentator observed, "[f]ederal regulatory acts governing air, water, land, and animals have brought in components of the federal government as active forces in shifting agendas towards greater environmental regulation at the federal, state, and local levels." JOHN G. FRANCIS, THE POLITICS OF REGULATION 165 (1993). In many parts of the United States, local and state governments have developed "environmentally informed land-use regulatory regimes." Id.
appear to be choosing development options even when those options require government approval or modification to meet government requirements.\textsuperscript{80}

Additionally, a significant portion of privately owned land located in coastal areas is subject to wetlands and other environmental regulations. See WILLIAM L. WANT, LAW OF WETLANDS REGULATION § 13.01 (1996) (discussing state wetland laws and other regulations enacted pursuant to the Coastal Zone Management Act). Currently, wetlands constitute five percent of the contiguous United States. See 2 U.S. SECRETARY OF THE INTERIOR, THE IMPACT OF FEDERAL PROGRAMS ON WETLANDS 33 (1994). For more information on the treatment of wetlands in the United States, see WANT, supra, § 2.01[3] (discussing the ecological nature of coastal lands); id. §§ 2.02-3.04 (discussing federal and state wetlands regulations).

80. Privately owned land that is subject to zoning or other public land-use controls may be subject to government approval of development plans if the plans violate lot size, frontage, and yard restrictions. See DANIEL R. MANDELKER, LAND USE LAW §§ 6.41-.42 (3d ed. 1993). Approval also may be required for “conditional” uses, such as gas stations in commercial districts or apartments in single-family residential districts. See id. § 6.53. Privately owned land that qualifies as wetlands often requires federal, state, and local government approval of development plans. See WANT, supra note 79, §§ 4.06[2]-3, [5]. The federal government, for example, requires a permit to modify or destroy wetlands when such modification involves the discharge of dredged or fill materials, see id. §§ 4.06[2]-3, or when the modification utilizes pilings that are closely spaced, replace the bottom of a waterway, reduce water circulation, or adversely affect aquatic functions. See id. § 4.06[5]. For a more complete discussion of activities that are subject to wetlands jurisdiction, see id. § 4.06; LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE §§ 4.03[3][a]-[f] (1995) (discussing the regulation of wetlands by the Environmental Protection Agency and the Army Corps of Engineers (ACE)).

The ACE is responsible for granting permits under section 10 of the Rivers and Harbors Appropriation Act of 1899 for any work in or over navigable waters of the United States or any work that affects the course, condition, capacity, or location of those waters. See 33 U.S.C. § 403 (1994). The ACE also grants permits under section 404 of the Clean Water Act for the discharge of dredged or fill material into the waters of the United States. See id. § 1344(a). During the fiscal year (FY) 1995, the ACE received 13,856 applications for individual permits. In addition, 6395 applications were carried over from the previous year and 6009 applications were withdrawn. See Army Corps of Engineers, U.S. Dep't of Defense, Quarterly Performance Data Report for the Regulatory Program: Fiscal Year 1995 (unpublished document, on file with author) [hereinafter ACE 1995 Report]; Telephone Interview with Frank Torbett, Program Analyst, United States Army Corps of Engineers (June 24, 1996) [hereinafter Torbett Interview]. Of the 14,242 remaining applications, 5556 were issued by the "standard" process (which involves public notice), 3210 were issued through letters of permission (which bypass the public notice process), 75 were denied with prejudice (which means that the permits were denied based on the evaluation of the ACE), 272 were denied without prejudice (which means that the ACE denied the permits because the applicants' state government or other governing unit refused to allow the permit to be issued), and 5129 were not processed during FY 1995 and were carried over to FY 1996. See ACE 1995 Report, supra; Torbett Interview, supra. In addition to the individual permits, the ACE also granted 30,260 regional permits and 39,677 nationwide permits. See ACE 1995 Report, supra; see generally WANT, supra note
The psychological effect of the Takings Clause may explain why landowners who consider development options are not as discouraged by the uncertainty of takings law as predicted. By the psychological effect of the Takings Clause, I mean the effect that the presence of the clause in the Constitution has on decisionmakers, whether they are regulators, legislators, or private parties. As a result of the clause's existence, many decisionmakers apparently believe that property owners have a constitutionally protected right to develop their property and to make a profit, sometimes even when only a small portion of the owner's original property remains and the owner has already made a significant profit from the part that has been sold. Though property owners may accept limitations existing at the time of initial investment, they strenuously resist changes in government restrictions that are made subsequent to that time and that adversely affect this perceived right to develop and to profit from their land.

79, § 5.03 (discussing regional and nationwide permits).

81. For other explanations of why uncompensated takings do not discourage investment by property owners as predicted, see Byrne, supra note 6, at 124-25; Farber, supra note 9, at 280-82.

82. Justice Scalia's opinion in Lucas v. South Carolina Coastal Council appears to reflect this belief. See 505 U.S. 1003, 1017-19 (1992) (equating land with profit and productive or economically beneficial use and explaining how reciprocity of advantage would not exist if productive use was not permitted); see also Lynda L. Butler, Private Land Use, Changing Public Values, and Notions of Relativity, 1992 BYU L. Rev. 629, 634-36 (discussing the development perspective taken by Justice Scalia in Lucas). For a discussion of the nature and source of these private land use expectations, see id. at 632-40. See generally Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 515-20 (1987) (Rehnquist, J., dissenting) (arguing that only the regulated property interest should be considered in determining the economic impact of a state law); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) (focusing only on the regulated portion, about 12 acres of wetlands, and not on the original parcel of 250 acres, in determining whether a taking existed); Changes in Requirements for National Register of Historic Places: Hearing on Historic Preservation before the Subcomm. on National Parks, Forests and Lands of the House Comm. on Resources (Mar. 20, 1996), available in 1996 WL 7137193 (testimony of Nancie G. Marzulla, President and Chief Legal Counsel, Defenders of Property Rights) (arguing that the maintenance of a free society requires the respect of an individual's right to possess, enjoy, and use his or her property); 141 Cong. Rec. H2587 (daily ed. Mar. 3, 1995) (statement of Rep. Cooley) (referring to millions of acres of valuable timber that lie unharvested because of spotted owl regulations); John A. Humbach, Law and a New Land Ethic, 74 Minn. L. Rev. 339, 351-65 (1989) (discussing the notion of a constitutional right to profit and the market ratchet effect).

83. The lengthy and costly judicial suits that landowners are willing to pursue to
In the context of land-use decision making, the psychological effect of the Takings Clause appears to have helped landowners overcome whatever disincentive to invest that the uncertainty of regulatory takings law might have produced. Although the exact psychological effect of the clause cannot be determined without further study,\textsuperscript{84} one plausible consequence is that the clause’s psychological effect leads to the formation of a heuristic, or rule of thumb, which helps in deciding whether a government regulation constitutes a compensable taking either generally or in a particular situation.\textsuperscript{85} Although heuristics can be useful in eval-

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\textsuperscript{84} Further study is needed because of the diversity of psychological theories on decision making and the absence of empirical data on the relationship between the Takings Clause and individual decisions. For additional discussion of cognitive decision-making theories, see infra note 85.


Unlike economic decision-making theory, which has been dominated for decades by
Evaluating options and outcomes, they also can lead to "severe and systematic errors." Heuristics based on the "takings psyche," or the psychology of the Takings Clause, could produce overestimation of the strength and scope of property rights, underesti-

the theory of expected utility, the field of cognitive decision-making research is filled with a variety of approaches and hypotheses. See Scott, infra note 72, at 332-33. The subject of human cognition and decision making encompasses at least three distinct fields of social science research: the acquisition of information, the formation of preferences, and the implementation of those preferences in the choice process over time. See id.

Because of the variety of cognitive decision-making theories and the fields developing in the cognitive research area, the possible effects of the takings psyche appear to be numerous. For instance, competing interest groups’ "framing" of the legal, moral, and economic issues associated with takings can have a tremendous effect on how landowners receive and process information. See Noll & Krier, infra note 68, at 769 (discussing how the characterization of an issue will dramatically affect the preferences of voters).

Additionally, both the anchoring phenomenon, see Paul Slovic et al., Facts Versus Fears: Understanding Perceived Risk, in HEURISTICS AND BiASES, supra, at 463, 481-82, and the availability heuristic, see id. at 465-72, could cause a landowner to either ignore or misjudge the influence of relevant information, leading to inaccurate estimates of the probability of a taking. See Slovic et al., supra, at 465-72, 481-82 (discussing the availability heuristic and the anchoring effect); infra notes 94-95 and accompanying text (discussing heuristics and anchoring).

In the context of takings issues, a number of theories of choice and decision-making strategy suggest a variety of individual responses to the existence of the Takings Clause. A landowner, for example, may view the clause, particularly its compensation requirement, as a factor that mitigates some of the risk of a taking, thus failing to account for all relevant costs. See Louis Kaplow, An Economic Analysis of Legal Transitions, 99 HARV. L. REV. 509, 531 (1986) (discussing this aspect of a compensation requirement and how a failure to consider all costs results in an inefficient level of investment). Alternatively, under the theory of self-command or pre-commitment, a landowner may limit or modify future behavior to ensure commitment to a present decision to ignore the possibility of a taking made because of the existence of the clause. See Scott, supra note 72, at 342-47 (discussing internal rules and pre-commitment strategies). Or a landowner may assume that the Takings Clause embodies a societal concern for fairness, and decide to develop his or her land with the belief that a subsequent government appropriation or regulation implicating that concern for fairness will result in equitable relief in the form of compensation. See Thomas S. Ulen, Rational Choice and the Economic Analysis of Law, 19 L. & SOC. INQUIRY 487, 497-501 (1994) (reviewing RICHARD H. ThALE, QUASI RATIONAL ECONOMICS (1991) and RICHARD H. ThALER, THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE (1992)) (discussing a number of psychological experiments that indicate the presence of fairness concerns in individual decisions). Finally, a landowner may make different development decisions depending on whether he or she views the Takings Clause as a legal mechanism that provides a gain or one that minimizes a loss. See Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk, 47 ECONOMETRICA 263, 279 (1979) (proposing that individuals are risk-averse in protecting perceived gains and risk-seeking in avoiding perceived losses).

86. See Tversky & Kahneman, supra note 85, at 3.
mation of the probability of no regulatory taking being found, and false optimism about the right to pursue development plans.\textsuperscript{87}

Judicial resolution of regulatory takings is needed to deal with the biases and errors in land-use decision making that might result from application of heuristic principles based on the takings psyche. These heuristic principles would vary according to the decisionmaker's perception of takings risk,\textsuperscript{88} to the particular situation that the decisionmaker faced,\textsuperscript{89} and to the type of

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87. Because the planning of land development projects often involves compound events, biases in the evaluation of the events can be significant. See id. at 16. If, for example, the project has a conjunctive character, its success depends on the occurrence of each of a series of events. See id. Though the probability of each event may be high, the overall probability of success will be lower, sometimes significantly so, if a large number of events must occur. See id. at 15-16. Empirical studies have shown that people tend to overestimate the probability of conjunctive events. See id. at 15. This general tendency, in turn, leads to "unwarranted optimism in the evaluation of the likelihood" that the project will succeed. See id. at 16.

88. Psychological studies indicate that people can have dramatically different perceptions of risk. See Slovic et al., supra note 85, at 465-72. An individual's perception may be affected by the intensity of media coverage of an event or by the frequency with which the event occurs. See id. at 465, 467-68. An individual may overestimate the likelihood of an event's occurrence if that event easily is called to mind. See id. at 465. Conversely, if information regarding an event is unavailable or if an individual has little experience with an event, he or she may underestimate the likelihood of that event. See id. at 465-72.

Studies also indicate that individuals tend to make probability estimates based on initially presented values. See id. at 481. Thus, an individual's perception of takings risk is likely to be "anchored" to his or her initial values or original information base. See id. at 481-82; infra note 94 and accompanying text (discussing the phenomenon of anchoring). In an area as confusing as takings law, this anchoring effect could conceivably have an even more dramatic impact on the estimation of probability, perhaps causing the decisionmaker to ignore the confusing new information or to magnify the error committed in assessing the probability of a taking by misinterpreting the new information.

89. Studies have shown, for example, that decisionmakers react differently to situations depending on whether the situations have a conjunctive or disjunctive character. See Tversky & Kahneman, supra note 85, at 15-16. In a conjunctive situation, the success of a project or plan depends on the occurrence of each of a series of events. See id. at 16. In a disjunctive situation, events are statistically independent of each other. See id. Individuals tend to overestimate the probability of conjunctive events and underestimate the probability of disjunctive events. See id. at 15. The overestimation of the likelihood of conjunctive events leads to unjustified optimism about the success of a project. See id. at 16. In the context of risk evaluation of complicated systems, the underestimation of the probabilities of disjunctive events leads to the underestimation of the likelihood of failure. See id. at 15-16.
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heuristic involved. The heuristic could, for example, involve a landowner's belief that constitutionally protected property includes the right to make a profit and that government action that prevents a return on any recognized property interest or that causes a diminution in value constitutes a taking. It could also involve a landowner's belief that constitutionally protected property includes the right to use property and that any significant restriction or prohibition of a lawful use constitutes a taking. Some of the takings psyche heuristics could be due to the phenomenon of anchoring, which refers to an individual's tendency to allow initial values to bias subsequent probability estimates. Other takings judgments might reflect the availability heuristic, which involves assessing an event or outcome in light of recent or easily recalled instances of similar events or outcomes. A more generalized decision-making process, like

90. See generally id. at 4-20 (describing the representativeness, availability, and anchoring heuristics).
91. For a discussion of this perceived right and a response, see Humbach, supra note 82, at 354-60.
92. See id.
93. See id. at 360-69 (discussing permissible limitations on land use and investment-backed expectations).
94. Studies indicate that probability estimates are "anchored" to initial values, which result from either partial probability computations or the initial "framing" of the situation. See Tversky & Kahneman, supra note 85, at 14-15. The anchoring effect can lead to a significant misestimation of probabilities. See id. at 14-18. For instance, in many disjunctive systems, even when the perceived likelihood of the failure of any one essential component is small, the probability of overall failure can be quite substantial if the system contains many essential components. Because of the anchoring phenomenon, though, an individual may perceive the probability of failure of the entire system to be low. See id. at 15-16; see also supra notes 87 and 89 (discussing the perception of risk in disjunctive and conjunctive systems).
95. See Slovic et al., supra note 85, at 465-72; Tversky & Kahneman, supra note 85, at 11-14. In some situations, people have a tendency to evaluate the probability of an event by the ease with which examples of that event can be recalled. See Slovic et al., supra note 85, at 465. This tendency may lead individuals to overestimate the likelihood of events that are in the news or the probability of events that are easily imaginable. See id. at 465, 467-68; Tversky & Kahneman, supra note 85, at 11-14; see also supra notes 85-87 and accompanying text (discussing the effects of heuristics). In the takings context, then, an individual may overestimate the probability that a regulation will be considered a taking if recent decisions have so classified similar regulations or if public sentiment reflects a strong belief that many current environmental regulations amount to takings. This optimism may be unwarranted given the fact-specific nature of takings decisions.
the legislative process or administrative rulemaking, would not be as effective in dealing with these takings heuristics because it could not correct errors occurring in particular decision-making situations or on an individual basis. Further, the legislative process might even magnify the errors that the heuristics produced, especially if the group of land-use decisionmakers employing the heuristic has the power to influence legislators. Although the administrative process might be better able to make corrections than the legislative process, the administrative branch also would be subject to political influence.  

In addition to the corrective function that courts would serve in evaluating land-use decision making under the Takings Clause, judicial resolution of regulatory takings issues is needed to promote an important protective function. Because the Takings Clause protects individual rights and not majoritarian expressions of will, courts are the only branch that can appropriately be the final arbiter of regulatory takings disputes. To suggest that courts eliminate the troubled regulatory takings doctrine and allow the legislative branch to deal with the problem of regulated property rights discounts the protective function and individual rights focus of the Takings Clause. The mini-

96. See Clayton P. Gillette & James E. Krier, Risk, Courts, and Agencies, 138 U. Pa. L. Rev. 1027, 1065-69 (1990) (discussing the potential influence of interest groups on administrative agencies). Although the judiciary admittedly also is subject to heuristics, its incremental decision-making process tends to minimize error. Additionally, the judicial decision-making process generally is not a political process, but rather is governed by other principles that help to ensure more neutral decision making. See supra notes 54-63 and accompanying text.

97. Professor Treanor's response to this point about discounting probably would be that the protective function would not be discounted even if the legislature played a larger role because the courts still would provide constitutional protection of property when such protection is needed to avoid political process unfairness. See Treanor, supra note 9, at 863-66. Unlike Professor Byrne, then, Professor Treanor sees some constitutional role for judicial resolution of regulatory takings though that role would be different from, if not more limited than, the current one. Compare id. at 855-56 (noting the role of courts to "protect those whose property interests are . . . particularly unlikely to receive fair consideration from majoritarian decision-makers"), with Byrne, supra note 6, at 93-96, 115-17, 128-37 (arguing that "changes in the scope of property interests" should not raise constitutional questions). One difficulty with Treanor's position is that it ignores the role that the Takings Clause and current takings jurisprudence may have played in ensuring political process fairness for property owners. See infra note 101 and accompanying text.
mum level of protection provided by the clause should not be de-
defined through the democratic process. Though that process now
appears to protect property owners,98 the political process fair-
ness accorded to property owners could change in the future,
especially if the regulatory takings doctrine is, as some have
advocated, removed as a constraint on federal and state govern-
ments99 or if campaign spending rules are changed to alter the
incentives placed on legislators.100 In addition, political process
unfairness may not pose a problem for property owners precisely
because of the protection given to property by the Takings
Clause and other parts of the Constitution;101 part of that pro-
tection includes the regulatory takings doctrine.

Furthermore, although legislators could decide to improve ju-
dicial regulatory takings standards or to increase the level of
takings protection accorded property owners beyond the consti-
tutional minimum, these initiatives still would not eliminate the
need for judicial resolution of regulatory takings issues.102 Any
increased or improved protection enacted by a legislature must
be tied in some way to judicial takings standards developed
around the individual rights focus of the clause.103 To the ex-
tent that a legislative initiative increased the protection set by
judicial takings standards, the initiative would be making fund-
damental public policy choices—not constitutional choices—that
should be evaluated under normal tools of policy analysis. To the
extent that the legislative initiative improved judicial takings
standards—in all likelihood by providing clearer but, by neces-
sity, more generalized standards—the initiative would risk inher-
ent inconsistency with the individual rights focus of judicial
standards and the Takings Clause. Such an initiative also would
run the risk of being too inflexible to allow government to func-

98. Some scholars use this current protection as a reason for limiting the
judiciary's role in resolving regulatory takings issues and relying instead on the leg-
islative process. See Byrne, supra note 6, at 115-17, 128-31; Treanor, supra note 9,
at 784, 864-72; supra notes 9, 38-50 and accompanying text.
99. See supra note 12 and accompanying text.
100. See supra note 48 and accompanying text.
101. See supra note 40 and accompanying text (discussing the way the drafters
incorporated property into the American political structure and the Constitution).
102. For further discussion, see supra Part I.
103. See supra Part I.
tion effectively, as well as the risk of providing a significant subsidy for property owners. Further, all of these risks could occur even though the initiative would not necessarily avoid the costs of constitutional litigation.\(^{104}\)

The Takings Clause should not be treated in isolation or as a subterfuge for the promotion of political values without consideration of the delicate balance between private and public interests now reflected in the Constitution. Some of the proposed legislative initiatives have lost sight of the complex balance of rights, interests, and powers set forth in the Constitution. Recently proposed congressional takings bills, for example, would, by legislative fiat, place property rights on a pedestal supported neither by the drafters of the Constitution nor by 200 years of Supreme Court interpretation.\(^{105}\) The courts traditionally have

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104. Senate Bill 605, better known as the Omnibus Private Property Rights Bill, provides examples of all three risks. S. 605, 104th Cong. (1995). For example, by automatically awarding compensation to property owners who suffer at least a 33% diminution in value because of certain government action, regardless of the justification for the government action or the property owner's expectations, see id. § 204(a)(2)(D), the bill provides a bright line rule at the expense of individual fairness and justice and at the expense of the public interest. Individual property owners who suffer a diminution in value greater than or equal to 33% due to covered government action would automatically receive compensation, while those who suffer a 32.5% diminution or who suffer more than a 33% diminution because of government action exempted by the bill would not receive compensation. See id. Furthermore, because the diminution in value is linked to the property interest being regulated, instead of to the property as a whole, see id. § 204(a)(2)(B), the amount of compensation owed to property owners because of the diminution-in-value provision could be significant. See Private Property Rights and Environmental Laws: Hearings Before Senate Committee on Environment and Public Works, 104th Cong. 181 (July 12, 1995) (statement of Alice M. Rivlin, Director, Office of Management and Budget) [hereinafter Rivlin Statement]; id. at 187, 190-92 (July 12, 1995) (statement of Michael L. Davis, Assistant for Regulatory Affairs, U.S. Army Corps of Engineers) [hereinafter Davis Statement]; id. at 65, 66-70 (June 27, 1995) (statement of John R. Schmidt, Associate Attorney General, Department of Justice) [hereinafter Schmidt Statement]; Byrne, supra note 6, at 130, 136-39. Finally, the bill places restrictions on the funding of compensation awards that some predict would cripple the federal government. See S. 605, supra, § 204(a)(2)(B)-(D); Davis Statement, supra, at 189-92; Rivlin Statement, supra, at 182-83; Schmidt Statement, supra, at 66, 68-70.

105. Senate Bill 605, for example, has been criticized for its inconsistencies with takings jurisprudence. See Private Property Rights and Environmental Laws: Hearings Before Senate Committee on Environment and Public Works, 104th Cong. 215 (July 12, 1995) (statement of Richard J. Lazarus, Professor of Law, Washington University School of Law in St. Louis) [hereinafter Lazarus Statement]; id. at 94 (June 27, 1995) (statement of Frank I. Michelman, Robert Walmsley University Professor, Harvard Law School) [hereinafter Michelman Statement]; id. at 76 (June 27, 1995)
considered that balance through their ad hoc approach to takings. Although the ad hoc approach may not result in clear or comprehensive solutions, it does allow for the fine-tuning of benefits and burdens necessitated by the constitutional balance.

B. The Case Against Legislative Branch Resolution of Regulatory Takings Issues

Relying on the legislative branch to handle the regulatory takings problem would not be effective for a number of other reasons. Assuming, for the sake of argument, that the courts have failed to develop legally, philosophically, historically, or economically sound regulatory takings standards, there is no compelling reason to believe that the legislative branch would succeed when the courts have failed. At least some of the scholars and policymakers who favor legislative resolution of regulatory takings issues appear to assume that the legislature will engage in rational decision making. Proposed legislative takings initiatives, however, suggest that fiscally, legally, or scientifically sound policy choices will not necessarily result. As several commentators have explained, those initiatives would remove incentives for landowners to take into account the public good and, in fact, would reward speculative land investment at public expense. The proposed congressional bills also would encourage landowners to pursue the most environmentally destructive land uses and would have significant fiscal implications.

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106 For criticism of federal takings bills, see Davis Statement, supra note 104; Lazarus Statement, supra note 105; Michelman Statement, supra note 105; Rivlin Statement, supra note 104; Sax Statement, supra note 105.

107 See Davis Statement, supra note 104, at 191; Lazarus Statement, supra note 105, at 220; Sax Statement, supra note 105, at 77-78. But see Private Property Rights and Environmental Laws: Hearings Before Senate Committee on Environment and Public Works, 104th Cong. 221, 227-28 (July 12, 1995) (statement of Jonathan Adler, Director of Environmental Studies for the Competitive Enterprise Institute) [hereinafter Adler Statement] (arguing that the incentives created by regulatory takings result in greater environmental destruction).

108 See Davis Statement, supra note 104, at 190-93; Lazarus Statement, supra note 105, at 220.
Even a legislative solution like the one outlined by Professor Byrne would encourage land development and use at the expense of natural systems. Moreover, the legislative initiatives generally deemphasize science either by recognizing a taking after a legal threshold involving diminution in value is passed or by vesting a property right in a landowner once the landowner passes a certain point in the development approval process. If the legislature cannot develop a more effective solution, then society probably would be better off with the ad hoc, incremental, and error-minimizing approach of the judiciary than with the broad-based, generalized, and error-magnifying solutions typical of the legislative branch.

These concerns over legislative takings initiatives are not intended to suggest that legislative intervention in the environmental regulatory process is improper or illegitimate. To the contrary, legislative intervention into the environmental regulatory process after the details of regulation have been developed by agencies is probably the only practical way for the legislature to provide democratic legitimacy in the environmental area. Environmental regulation requires too much technical data and too many detailed decisions for the legislature to make all of the necessary policy choices up front at the time of enactment.

The overly rigid takings bills recently introduced in Congress, however, will interfere with the very necessary step of developing detailed environmental standards through the use of the technical expertise of agencies. A reactive instead of proactive democratic process of regulation may be the best way to legitimate the development of rules in an area as complex as environmental law.

109. See generally Byrne, supra note 6 (arguing for the abolition of the regulatory takings doctrine).

110. See Carpenter, supra note 39, at 68.

111. For further discussion of incremental decision making and disjointed problem solving, see CHARLES EDWARD LINDBLOM, THE INTELLIGENCE OF DEMOCRACY: DECISION MAKING THROUGH MUTUAL ADJUSTMENT 179 (1965); WILLIAM OPHULS, ECOLOGY AND THE POLITICS OF SCARCITY 191-93 (1977).

112. For a more complex suggestion for promoting democratic legitimacy and competence in environmental policy-making by linking decision-making methods with substantive tasks, see SUSAN ROSE-ACKERMAN, CONTROLLING ENVIRONMENTAL POLICY 78-80, 120-40 (1995).

Furthermore, because of the incentives of the electoral process and the psychological effect that the Takings Clause has on property owners who either serve in the legislative branch or lobby legislative officials, legislators are likely to skew their decision making in favor of at least certain types of property owners. This skewing could occur because legislators overvalue the constitutional strength of property rights, discount the public interest justifying uncompensated regulation, or respond to the economic and political pressures of certain property owners. A number of scholars have written about the incentives of the electoral process and about the political influence of property owners.\textsuperscript{114} Under a public choice theory of government, legislators are more likely to respond to "small groups with high stakes [that] have a disproportionately great influence on the political process."\textsuperscript{115} Empirical and theoretical evidence offered by these scholars supports classifying property owners as such a group.\textsuperscript{116} Additionally, the demoralizing psychological effect of takings on victims,\textsuperscript{117} and, perhaps more implicitly, the psychological effect of the Takings Clause in general, could skew the decision-making process of property owners and lawmakers in favor of property rights. The psychological effect of the Takings Clause, for example, could cause property owners, particularly those who have been "victims" of past uncompensated takings or who knew such victims, to resist land-use regulation more strenuously in the future.\textsuperscript{118} It could also cause property owners in

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that the joint sharing of authority to define constitutional rights between judicial and legislative branches "promotes a dialogue that inhibits both judicial overreaching and the abandonment of individuals' rights to intemperate legislative majorities." Edward Keynes, Liberty, Property, and Privacy, at x (1996).

114. See Byrne, supra note 6, at 129-30; Farber, supra note 9, at 288-94; see generally Treanor, supra note 9, at 866-78 (discussing the views of public choice and other legal theorists on political process failures affecting property interests).

115. Farber, supra note 9, at 289. But see Lovmore, supra note 9, at 306-07 (maintaining that the victims of takings, like the owners of land condemned for a highway or dam, are not likely to have much influence in the political process).

116. See Farber, supra note 9, at 289-90.

117. See id. at 285-86; Fischel & Shapiro, supra note 73, at 281-83; Michelman, supra note 31, at 1216-17, 1234.

118. For a strenuous defense of private property rights and a call to Americans to join the fight to ensure the continuing vitality of the Fifth Amendment, see David Lucas, Lucas vs. The Green Machine (1995).
general to overestimate the constitutional strength of their rights in deciding whether to proceed with a land-use option in the face of uncertainty about whether the regulatory conduct constitutes a taking. Alternatively, the psychology of the Takings Clause might cause a lawmaker to discount the public interest justifying uncompensated regulation and use per se rules or bright line tests that do not allow consideration of the public interest in defining regulatory takings.\textsuperscript{119}

Finally, a legislative solution to regulatory takings probably will not ensure avoidance of the constitutional question. Courts have an obligation to resolve facial and fact-specific challenges to government action raised under the Takings Clause.\textsuperscript{120} Such challenges will still arise despite the existence of a legislative solution. Assume, for example, that Professor Byrne's suggested legislative approach is followed and that a statute is enacted that vests a property right in a landowner upon issuance of a site-specific building or development permit.\textsuperscript{121} If a permitting authority in such a jurisdiction denies a permit to a landowner, the owner may still challenge the permit denial as a deprivation and taking of property in violation of the Constitution even though no statutory taking exists. Further, even if an earlier judicial decision did as Byrne suggests and eliminated the regulatory takings doctrine, a subsequent court could reexamine the issue and decide anew whether the values and principles of the Takings Clause required such a doctrine.

Legislative solutions to regulatory takings problems, in other words, are too susceptible to bias and too limited by basic constitutional principles to be effective. The potential for political, economic, and personal influence means that a legislative solution would not provide much comfort to those who lost under the solution. Further, because of basic separation of powers principles, the legislative branch could not be the final arbiter of constitutionally based takings claims.\textsuperscript{122}

\textsuperscript{120} See U.S. Const. art III; see generally RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW ch. 2 (2d ed. 1992 & Supp. 1996) (discussing federal jurisdiction and the creation of Article III courts).
\textsuperscript{121} See supra notes 20-22 and accompanying text.
\textsuperscript{122} See generally ROTUNDA & NOWAK, supra note 120, ch. 1 (discussing separation
C. The Case Against Executive Branch Efforts To Define Regulatory Takings Issues

Likewise, the executive branch, at least as currently configured,\(^\text{123}\) cannot be expected to define regulatory takings in a way that reflects constitutional analysis and principles instead of the political ideology of the elected leadership. The primary executive branch tools for addressing the regulatory takings problem, Executive Order 12,630\(^\text{124}\) and its accompanying guidelines, allow the elected leadership to influence the goals and priorities of federal agencies at the administrative level.\(^\text{125}\) If, on the one hand, elected executive branch officials favor greater protection of private property, then the executive order provides a quiet and effective tool for dismantling, or at least halting, environmental and other regulatory programs.\(^\text{126}\) Such

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of powers and the origins of judicial review). In a 1976 article, Professor Michael Perry argued that the judiciary is competent to—and should—define the constitutional basis of the public welfare limit to the police power through the development of the substantive due process doctrine. See Michael J. Perry, Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process, 23 UCLA L. REV. 689, 692 (1976). He argued that, because it is removed from daily political conflicts, the judiciary plays an important function in balancing competing interests under the Due Process Clause by providing fundamental ethical principles to guide the political process. See id. at 715-18. In contrast to those involved in the political process, the judiciary can take a long-term view in construing open-ended constitutional concepts. See id.

123. One possible alternative for dealing with the regulatory takings problem is the creation of a new judicial-type decision-making system either within the executive branch or as a separate administrative court independent of the executive branch. This alternative system could be used to resolve regulatory takings and other legal issues involving the regulatory programs of the federal administrative system. For a discussion of a similar idea for the environmental policy-making process, see ROSE-ACKERMAN, supra note 112, at 138-39.


125. See generally ROBERT A. SHANLEY, PRESIDENTIAL INFLUENCE AND ENVIRONMENTAL POLICY (1992) (discussing how Executive Order 12,630 and other executive orders have been used to influence the environmental agenda). For a recent discussion of executive oversight of regulatory policy generally and of the politicization of the executive branch, see RICHARD A. HARRIS & SIDNEY M. MILKIS, THE POLITICS OF REGULATORY CHANGE (2d ed. 1996).

126. See, e.g., SHANLEY, supra note 125, at 78-82 (discussing how the Reagan Administration used Executive Order 12,630 to relieve businesses of some of the burdens of environmental regulations). For further discussion of the order's effect, see Jerry Jackson & Lyle D. Albaugh, A Critique of the Takings Executive Order in the Context of Environmental Regulation, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10,463 (Nov. 1988); James M. McElfish Jr., The Takings Executive Order: Constitutional Juris-
executive branch action is not subject to the same level of public scrutiny and political debate as legislative action or the same decision-making process as judicial opinions, and therefore is not as accountable to the public. Although the Supreme Court has imposed some limitations on the use of executive orders, the Court also has recognized the power of the President to "resolv[e] the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." If, on the other hand, the elected officials favor greater environmental protection, then the executive order primarily presents a paper hurdle that can be overcome easily. Implementation and enforcement, after all, ultimately are left to the heads of agencies, who are appointed by the President. Additionally, agency officials and staff are embroiled in the regulatory process and understandably might have difficulty conducting rigorous and objective takings risk analysis at the same time that they are meeting their normal regulatory responsibilities—especially if the elected leadership favors great-

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129. See U.S. CONST. art. II, § 2, cl. 2; see generally FISHER, supra note 128, at 23-52 (discussing the appointment powers of the President); 1 JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 5.02[1] (1996) (describing the appointment process for top agency officials).
er environmental regulation. Just as it might be difficult to expect objectivity from a property owner asked to examine the external costs of her land use to the environment, it might be difficult to expect objectivity from an agency asked to examine its regulations for their takings impact.

Furthermore, the takings Executive Order has not become a meaningful tool for resolving regulatory takings issues. The order admittedly has caused the United States Attorney General to develop detailed guidelines for assessing takings implications in consultation with affected executive departments and agencies.\(^3\) It also has led to more systematic consideration of takings implications and property rights concerns, at least by the agency officials responsible for takings implications assessments.\(^3\) It has not, however, led to a more clear or more principled way to address the regulatory takings problem than that developed by the courts—in large part because the order originated as and still remains a political tool of the executive branch.\(^2\)

Issued by President Reagan in 1988, Executive Order 12,630 was the last of several orders directed at minimizing the burden of federal regulation on private interests.\(^3\) To achieve this

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132. See SHANLEY, supra note 125, at 49-89, 109-63.

133. See id. at 78-84. Express purposes of Executive Order 12,630 include promoting "[r]esponsible fiscal management and fundamental principles of good government" and reducing the risk of "unnecessary takings." Exec. Order No. 12,630,
purpose, Executive Order 12,630 basically requires executive de-
partments and agencies\textsuperscript{134} to “identify the takings implications
of proposed regulatory actions and address the merits of those
actions in light of the identified takings implications, if any, in
all required submissions made to the Office of Management and
Budget.”\textsuperscript{135} In notices of proposed rulemaking and messages
transmitting legislative proposals to Congress, executive depart-
ments and agencies also should identify and discuss “[s]ignificant takings implications.”\textsuperscript{136} Finally, affected federal
departments and agencies are directed to “identify each existing
Federal rule and regulation against which a [t]akings award has
been made or against which a takings claim is pending”\textsuperscript{137} and
to submit annually an itemized compilation of takings awards
entered against the United States.\textsuperscript{138}

The potentially broad scope of the order is seen in its provi-
sions defining key terms and criteria. Under the order, policies
having takings implications include federal actions that “could
effect a taking” by limiting private property use or requiring ded-
ications by or exactions from private property owners.\textsuperscript{139} Fur-
ther, in addition to adhering to some general principles guiding

\textit{supra} note 124, § 1(b).

\textsuperscript{134} For further discussion of federal departments and agencies affected by the
Executive Order, see Attorney General’s Guidelines, \textit{supra} note 130, at 8-9.

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} \textit{Id.} § 5(b).

\textsuperscript{137} \textit{Id.} § 5(c).

\textsuperscript{138} \textit{See id.} § 5(d).

\textsuperscript{139} \textit{Id.} § 2(a).

The phrase “[p]olicies that have takings implications” does not include[:]
\begin{enumerate}
\item [(1)] actions . . . that lessen [] interference with the use of private prop-
erty;
\item [(2)] actions [relating] to properties held in trust by the United
States or in preparation for or during treaty negotiations with foreign
nations;
\item [(3)] law enforcement actions involving seizure . . . of property
for forfeiture or as evidence in criminal proceedings;
\item [(4)] studies or similar efforts or planning activities;
\item [(5)] communications between Federal agencies or departments and State or local land-use planning agencies
regarding planned or proposed State or local actions regulating private
property . . . ;
\item [(6)] the placement of military facilities or military activi-
ties involving the use of Federal property alone; or
\item [(7)] any military or foreign affairs functions . . . but not including the U.S. Army Corps of
Engineers civil works program.
\end{enumerate}

\textit{Id.} § 2(a)(1)-(7). For further discussion of the scope of the Executive Order, see At-
torney General’s Guidelines, \textit{supra} note 130, at 4-9.
the formulation or implementation of policies that have takings implications, executive departments and agencies must meet more specific criteria when implementing an action that imposes a condition on the granting of a permit, restricts the use of private property, or regulates private property for the protection of public health or safety. Two key criteria include the requirement that the action "[s]ubstantially advance" the appropriate public purpose and that the restriction or regulation "not be disproportionate to the extent to which the [property] use contributes to the overall [risk or] problem" being addressed by the government action. Through these specific criteria, the takings Executive Order provides the basis for restricting or even preventing affected executive departments and agencies from implementing actions having takings implications.

Although a takings implication assessment (TIA) is classified as "internal" under the Executive Order and the accompanying Attorney General's Guidelines, and therefore is generally not published or made available to the public, agency actions reported in the Federal Register provide some evidence of the type of consideration given to Executive Order 12,630 by federal agencies. For example, 156 agency actions explicitly addressing the requirements of Executive Order 12,630 were published in volumes 53-56 of the Federal Register for the years 1988-1991. A review of these actions suggests that, at least on

140. See Exec. Order No. 12,630, supra note 124, § 3.
141. See id. § 4(a)-(b), (d).
142. Id. § 4(a)(2), (d)(2).
143. Id. § 4(b), (d)(3).
144. See id. §§ 4-5.
145. The phrase "takings implication assessment" appears in the Attorney General's Guidelines and not in the Executive Order. See Attorney General's Guidelines, supra note 130, at 2, 3.
146. See Exec. Order No. 12,630, supra note 124, § 6.
147. See Attorney General's Guidelines, supra note 130, at 2, 27. The Guidelines also describe the evaluations conducted under the Executive Order as "predecisional." Id. at 2, 3, 21, & app. at 2.
148. See McElfish, supra note 126, at 10,475.
149. The 156 agency actions included 65 final rules, 69 proposed rules, 16 notices of rulemaking, and 6 interim rules. See infra p. 786 tbl.1. More detailed information about the 156 actions is on file with the William and Mary Law Review and may be obtained upon request.
the surface, the Executive Order is not having much of an impact. Published by twenty-one different agencies or administrative units from eight departments, the agency actions cover a wide range of topics, including, among others, onshore and offshore oil and gas exploration, use of public lands, timber sales, wild free-roaming horses and burros, financial guarantee policies, patent rights, testing procedures for certain appliances, designation of marine sanctuaries, and a list of the agencies and departments involved, see infra p. 786 tbl.1.

150. For a list of the agencies and departments involved, see infra p. 786 tbl.1.


### TABLE I

**AGENCY ACTIONS ADDRESSING EXECUTIVE ORDER 12,630 FOR MAR. 15, 1988 THROUGH DEC. 31, 1991**

<table>
<thead>
<tr>
<th>Dep't/Agency</th>
<th># of Actions</th>
<th>Final Rules</th>
<th>Proposed Rules</th>
<th>Notice of Rulemaking</th>
<th>Interim Rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>DOC, NOAA, NOS, OCRM</td>
<td>12</td>
<td>2</td>
<td>5</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>DOC, Tech. Admin.</td>
<td>2</td>
<td>1</td>
<td>1</td>
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</tr>
<tr>
<td>DOC, Travel &amp; Tourism</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>DOC, Under Sec. for Econ. Affairs</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>DOD, Corps</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>DOE, Off. of Conserv. &amp; Renewable Energy</td>
<td>5</td>
<td>3</td>
<td>0</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>DOI, Bureau of Indian Affairs</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>DOI, Bureau of Land Mgm't.</td>
<td>32</td>
<td>9</td>
<td>20</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>DOI, Fish &amp; Wildlife Serv.</td>
<td>19</td>
<td>10</td>
<td>9</td>
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<tr>
<td>DOI, Minerals Mgm't. Serv.</td>
<td>39</td>
<td>21</td>
<td>16</td>
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<td>DOI, National Park Serv.</td>
<td>7</td>
<td>2</td>
<td>5</td>
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<td>0</td>
</tr>
<tr>
<td>DOI, Off. of Hearings &amp; Appeals</td>
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<td>1</td>
<td>3</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>DOI, Off. of Sec.</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>DOI, Off. of Surface Min. &amp; Reclamation</td>
<td>3</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>DOI, DOI</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>DOT, Off. of Sec.</td>
<td>3</td>
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<td>1</td>
<td>0</td>
</tr>
<tr>
<td>DOT, Res. &amp; Special Programs</td>
<td>4</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>HSS, FDA</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>HUD, Off. of Sec.</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>USDA, Food Safety &amp; Inspection Serv.</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>USDA, Forest Serv.</td>
<td>10</td>
<td>4</td>
<td>4</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>USDA, Off. of Sec.</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td><strong>156</strong></td>
<td><strong>65</strong></td>
<td><strong>69</strong></td>
<td><strong>16</strong></td>
<td><strong>6</strong></td>
</tr>
</tbody>
</table>
TABLE 2
TYPE OF LANGUAGE USED IN AGENCY ACTIONS ADDRESSING EXECUTIVE ORDER 12,630 FOR MAR. 15, 1988 THROUGH DEC. 31, 1991

<table>
<thead>
<tr>
<th>Dep't/Agency</th>
<th># of Actions</th>
<th>Generic Language*</th>
<th># Using Only Generic Language</th>
<th># Using Special Explanation**</th>
</tr>
</thead>
<tbody>
<tr>
<td>DOC, NOAA, NOS, OCRM</td>
<td>12</td>
<td>no takings</td>
<td>3</td>
<td>5</td>
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<tr>
<td></td>
<td></td>
<td>wouldn't have TI</td>
<td>3</td>
<td>(see notes A-C)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>no TIA prepared</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>DOC, Tech. Admin.</td>
<td>2</td>
<td>no significant TI w/i meaning of EO</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>DOC, Travel &amp; Tourism</td>
<td>2</td>
<td>no TIA w/i meaning of EO</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(see notes D &amp; E)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DOC, Under Sec. for Econ. Affairs</td>
<td>1</td>
<td>no TI sufficient to require prep. of TIA</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(see note E)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DOD, Corps of Engineers</td>
<td>4</td>
<td>doesn't require TIA b/c won't affect use/ value</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>DOE, Off. Conserv. &amp; Renewable Energy</td>
<td>5</td>
<td>no taking</td>
<td>0</td>
<td>4</td>
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<tr>
<td></td>
<td></td>
<td>has been reviewed</td>
<td>1</td>
<td>(see notes G-I)</td>
</tr>
<tr>
<td>DOI, Bureau of Indian Affairs</td>
<td>2</td>
<td>no TIA necessary; won't affect use/ value</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(see note J)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DOI, Bureau of Land Mgm't.</td>
<td>32</td>
<td>not a taking</td>
<td>30</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>TIA not prepared</td>
<td>1</td>
<td>(see note K)</td>
</tr>
<tr>
<td>DOI, Fish &amp; Wildlife Serv.</td>
<td>19</td>
<td>no TI; no significant TI</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>no taking</td>
<td>11</td>
<td>(see notes L &amp; M)</td>
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<td></td>
<td></td>
<td>no impacts subj. to EO</td>
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<td>not capable of interference; TIA not prepared</td>
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<td>8</td>
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<td></td>
<td></td>
<td>(see notes N-S)</td>
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<td>DOI, National Park Serv.</td>
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<td>no TI under EO</td>
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<td>4</td>
</tr>
<tr>
<td></td>
<td></td>
<td>not require TIA</td>
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<td>(see notes T-W)</td>
</tr>
<tr>
<td>DOI, Off. of Hearings &amp; Appeals</td>
<td>4</td>
<td>no TI requiring prep. of TIA</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>DOI, Off. of Sec.</td>
<td>1</td>
<td>would not cause a taking</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(see note X)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DOI, Off. of Surface Min. &amp; Reclamation</td>
<td>3</td>
<td>TIA prepared</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td></td>
<td>excluded from coverage</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>DOI, DOI</td>
<td>1</td>
<td>no TI</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>DOT, Off. of Sec.</td>
<td>3</td>
<td>does not pose risk of taking of constitutionally protected prop.</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>DOT, Res. &amp; Special Programs</td>
<td>4</td>
<td>same lang. as DOT, Off. of Sec.</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>HSS, FDA</td>
<td>2</td>
<td>will not interfere w/ use of prop.; no taking</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(see notes Y &amp; EE)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>HUD, Off. of Sec.</td>
<td>1</td>
<td>no takings implications</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(see note AA)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>USDA, Food Safety &amp; Inspection Serv.</td>
<td>1</td>
<td>has takings implications</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(see note Z)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>USDA, Forest Serv.</td>
<td>10</td>
<td>no risk of taking</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td></td>
<td>no TIA; no sign. TI</td>
<td>3</td>
<td>(see notes K, BB-DD)</td>
</tr>
<tr>
<td>USDA, Off. of Sec.</td>
<td>1</td>
<td>same lang. as DOT, Off. of Sec.</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>TOTALS</td>
<td>156</td>
<td>N/A</td>
<td>118</td>
<td>38</td>
</tr>
</tbody>
</table>

*Generic language* refers to boilerplate language used by the agency to reflect its general conclusions about takings.

**The phrase "special explanation" refers to an explanation reflecting more specific takings conclusions about the agency action being reviewed. Though the explanation typically is short, it explains why no takings problem exists in the context of the action that has been adopted or proposed and in the context of takings standards. Some explanations include the agency's generic language. The references to notes found in the "Special Explanation" column are to notes appearing in the Appendix to this article.
### TABLE 3
TAKINGS CONCLUSIONS REACHED IN AGENCY ACTIONS ADDRESSING EXECUTIVE ORDER 12,630 FOR MAR. 15, 1988 THROUGH DEC. 31, 1991

<table>
<thead>
<tr>
<th>Dep't/Agency</th>
<th># of Actions</th>
<th>Generic Language</th>
<th># &amp; Type of Conclusion in Special Explanation Actions**</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Cat. A</strong></td>
<td><strong>Cat. B</strong></td>
<td><strong>Cat. C</strong></td>
<td>Inconclusive</td>
</tr>
<tr>
<td><strong>DOC, NOAA, NOS, OCRM</strong></td>
<td>12</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td><strong>DOC, Tech. Admin.</strong></td>
<td>2</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td><strong>DOC, Travel &amp; Tourism</strong></td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>DOC, Under Sec. for Econ. Affairs</strong></td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>DOD, Corps</strong></td>
<td>4</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>DOE, Off. Conserv. &amp; Renewable Energy</strong></td>
<td>5</td>
<td>0</td>
<td>0</td>
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<tr>
<td><strong>DOI, Bureau of Indian Affairs</strong></td>
<td>2</td>
<td>0</td>
<td>0</td>
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<tr>
<td><strong>DOI, Bureau of Land Mgm't.</strong></td>
<td>32</td>
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<td>30</td>
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<tr>
<td><strong>DOI, Fish &amp; Wildlife Serv.</strong></td>
<td>19</td>
<td>5</td>
<td>11</td>
</tr>
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<td><strong>DOI, Minerals Mgm't. Serv.</strong></td>
<td>39</td>
<td>0</td>
<td>0</td>
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<tr>
<td><strong>DOI, National Park Serv.</strong></td>
<td>7</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td><strong>DOI, Off. of Hearings &amp; Appeals</strong></td>
<td>4</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td><strong>DOI, Off. of Sec.</strong></td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>DOI, Off. of Surface Min. &amp; Reclamation</strong></td>
<td>3</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>DOI, DOI</strong></td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td><strong>DOT, Off. of Sec.</strong></td>
<td>3</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td><strong>DOT, Res. &amp; Special Programs</strong></td>
<td>4</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td><strong>HSS, FDA</strong></td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>HUD, Off. of Sec.</strong></td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>USDA, Food Safety &amp; Inspection Serv.</strong></td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>USDA, Forest Serv.</strong></td>
<td>10</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td><strong>USDA, Off. of Sec.</strong></td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td>156</td>
<td>19</td>
<td>55</td>
</tr>
</tbody>
</table>

* Categories A, B, and C are defined *infra* notes 163-65 and accompanying text.

** "Special explanation" is defined *supra* p. 787 Table 2.
and food labeling requirements for juice beverages. One significant omission from the list of agencies reporting on the takings Executive Order in the published actions is the Environmental Protection Agency (EPA). Though this omission is surprising, given the number of regulatory programs that EPA administers, it is consistent with the numerous exclusions included in the 1993 Attorney General's Supplemental Guidelines for EPA.

In all but one of the published actions, the drafting agency either concluded that the relevant action did not raise takings problems under Executive Order 12,630 (151 out of 156 actions) or made no affirmative finding of a taking or of takings implications in the published action (4 out of 156 actions). In almost seventy-five percent of the actions (115 out of 156), the agency typically used its own boilerplate or generic language to conclude that one of the following existed: (A) the action did not raise significant or potential takings implications, (B) the ac-
tion did not pose a takings risk," 164 or (C) the action did not require a TIA. 165 Approximately 26.3% of the published actions (41 out of 156) summarily stated through generic language that no TIA was necessary, without clearly or directly expressing a judgment about takings implications or risks (category C); 35.3% (55 out of 156) summarily concluded either that the action would not cause a taking or that it posed no takings risk (category B); 12.2% (19 out of 156) summarily concluded that the action did not raise significant or potential takings implications (category A); and 1.9% (3 out of 156) were inconclusive in their use of boilerplate language. 166 Only a few indicated that a TIA had been done, but even those then stated that the TIA revealed no significant takings. 167 Of the remaining thirty-eight actions

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a category A conclusion, see supra p.787 tbl.2; infra the Appendix.

164. Category B includes actions stating that no takings risk was posed or that no taking existed. Some of the category B actions stated that the action would not cause a taking or pose a takings risk and that no TIA was prepared. These actions were put in category B, instead of category C, because of the conclusion reached about the absence of a taking or risk of taking. Thus, the key factor distinguishing categories B and C is that the actions in category B clearly indicated that the agency affirmatively found either no taking or no risk of taking. For more information about the generic language typically used to state a category B conclusion, see supra p.787 tbl.2; infra the Appendix.

165. Category C includes actions stating that no TIA was required or prepared, that the action was exempt or excluded from the Executive Order, or that the action had no impacts that were subject to the Executive Order. Some category C actions reached a conclusion relevant to takings assessments but did not specifically state a finding of no takings, takings implications, or takings risk. Thus, the common theme of category C actions is that the drafting agency decided not to prepare or was not required to prepare a TIA and did not clearly, directly, or affirmatively express a judgment about takings implications or risks within the meaning of the Executive Order. For more information about the generic language typically used in category C conclusions, see supra p.787 tbl.2; infra the Appendix. Categories A, B, and C are used supra p. 788 tbl.3 in describing takings conclusions reached by agency actions addressing Executive Order 12,630.

166. See supra p. 788 tbl.3.


Without exhaustive research into how each action was handled, it appears to be impossible to tell whether a TIA was conducted for those agency actions that do not otherwise indicate the type of process used to comply with Executive Order 12,630.
(which contained more specialized explanations), only one indicated that it might cause a taking and suggested some alternatives to minimize the problem. Of subsequent actions relating to this "possible taking" action, however, ignore the takings Executive Order altogether. Of the other thirty-seven actions, thirty-six contained specialized explanations of why the particular action did not raise problems under the takings Executive Order, and one explained that procedures were being developed to implement the Executive Order. For the most part, even the specialized explanations were concise, usually consisting only of a few sentences, though a few contained several paragraphs. Four of these published actions, for instance, explained that the relevant action would not have a severe enough effect to deny economically viable use, and one of the

Telephone Interview with Mariam McCall, Attorney-Advisor, Office of General Counsel for Fisheries, National Oceanic and Atmospheric Administration (July 17, 1996).

168. See Nutrition Labeling of Meat and Poultry Products, 56 Fed. Reg. 60,302, 60,364 (codified in final form at 9 C.F.R. pts. 317, 320 & 381 (1996)). On the same date that the Food Safety and Inspection Service of the Department of Agriculture issued the proposed rule indicating a possible taking, the Food and Drug Administration (FDA) of the Department of Health and Human Services published a regulatory impact analysis statement on the costs and benefits of food labeling regulations proposed by the FDA. See Regulatory Impact Analysis of the Proposed Rules to Amend the Food Labeling Regulations, 56 Fed. Reg. 60,856. The agency observed that although the labeling requirements "may cause firms to alter names currently trademarked," no takings analysis was necessary under Executive Order 12,630. Id. at 60,865. The FDA explained that "any firm which will be forced to change the name of its product is now using terms that misbrand its products, and therefore no legal property right exists." Id. at 60,865.


170. See supra p. 788 tbl.3; infra the Appendix. The precise number of actions having specialized explanations depends on how the reader distinguishes between actions using generic language and actions having specialized explanations. A few of the actions contain statements that could be classified either as generic statements or as brief attempts to explain why no takings problem exists. See, e.g., Coal Product Valuation, 55 Fed. Reg. 35,427, 35,433 (1990) (codified at 30 C.F.R. pt. 206) (summarily concluding that "this rule will not affect the use of or the value of private property" and therefore did not require a TIA).

171. See infra the Appendix (providing the specialized explanations).

172. See United States Travel & Tourism Administration Facilitation Fee, 56
four also stated that the action would not affect existing lease rights.\textsuperscript{173} A number of the published actions containing specialized explanations stressed that the particular agency action at issue either would enhance existing rights and interests\textsuperscript{174} or would not affect them.\textsuperscript{175} At least on the surface, then, the 156 published actions reveal that the Executive Order is not having the severe impact on regulatory programs predicted by critics.\textsuperscript{176} Even the actions that explained why no serious takings problems exist used conclusory statements indicating compliance with the Executive Order, while the one action that indicated a possible taking was implemented nevertheless.\textsuperscript{177}

Because the TIA process is intended to be internal\textsuperscript{178} and

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{176}For critiques of Executive Order 12,630, see Jackson & Albaugh, supra note 126; McElfish, supra note 126; and Plosom, supra note 126.
\item \textsuperscript{177}See supra notes 161-65, 168-69 and accompanying text. Even when takings concerns cause an agency to amend proposed actions, the concerns cannot necessarily be attributed to Executive Order 12,630. A proposed rule to define valid existing rights to mine coal, for example, was amended to reflect takings issues resolved through litigation. See Federal Lands Program; Areas Unsuitable For Mining; Areas Designated by Act of Congress; Requirements for Coal Exploration, 56 Fed. Reg. 33,152 (to be codified at 30 C.F.R. pts. 740, 761 & 772) (proposed July 18, 1991).
\item \textsuperscript{178}See supra notes 146-47 and accompanying text.
\end{enumerate}
\end{footnotesize}
does not require the preparation of lengthy documents,\(^\text{179}\) the process does not allow an outside observer to conduct an accurate or complete evaluation of the impact of Executive Order 12,630. For example, the published actions reveal little, if anything, about the TIAs that were performed, the internal process used to conduct the assessments, the reactions of agency officials to the TIAs, or the number of proposed agency actions, if any, that were halted because of takings implications.\(^\text{180}\) The outside observer, in other words, would not necessarily be able to determine from the published actions whether the order's impact was significant. Indeed, assuming that the order had such an impact, agency actions published in the Federal Register probably would not reflect significant takings implications. Thus, it is difficult to tell whether the summary treatment given Executive Order 12,630 in published agency actions is due to the order's negligible impact, to the incorporation of property rights concerns into agency actions, or to the overall absence of any significant regulatory takings problem in federal programs subject to the order.

Annual compilations of takings awards made against rules and regulations of agencies in fiscal years 1985, 1986, and 1987 suggest that agency action did not pose a regulatory takings problem, at least for those years. Submitted to the Office of Management and Budget pursuant to Executive Order 12,630\(^\text{181}\) and disclosed in response to a Freedom of Information Act request,\(^\text{182}\) the compilations reveal that no regulatory takings awards were made against the government in those years.\(^\text{183}\) Further, although the Justice Department did file Tucker Act takings awards figures of $23.1, $5.5, and $20.2 million for those three years, respectively, the "vast majority were traditional nonregulatory takings."\(^\text{184}\) Thus, at least for

\textit{179. See Attorney General's Supplemental Guidelines for Interior, supra note 130, at 3.}

\textit{180. See supra notes 161-70 and accompanying text.}

\textit{181. See Exec. Order No. 12,630, supra note 124, § 5(c).}

\textit{182. See McElfish, supra note 126, at 10,478.}

\textit{183. See id.}

\textit{184. Id. The Tucker Act provides that the United States Claims Court "shall have jurisdiction to render judgment upon any claim against the United States}
fiscal years 1985-1987, "no substantial record of takings by permit or regulation" exists.\textsuperscript{185}

In any event, the message to the outside observer from published agency actions—whether accurate or not—is that the order receives only superficial treatment and generally has not resulted in a finding of significant takings implications in those actions.\textsuperscript{186} A review of the guidelines accompanying the Executive Order provides some support for this interpretation. Although the Attorney General's Guidelines reflect a serious commitment to implementing the Executive Order, they place responsibility for conducting the TIAs and for determining the "form and manner" of the TIAs on the individual agencies and departments,\textsuperscript{187} in particular on designated agency officials who generally are not the agency program personnel drafting the action.\textsuperscript{188} In addition, the general guidelines developed by the Attorney General, as well as the more specific guidelines developed for particular departments, provide for numerous

\begin{itemize}
  \item founded either upon the Constitution, or any Act of Congress or any regulation . . . or upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1) (1994); see also Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 11-12 (1990) (discussing whether the Tucker Act provides a remedy for takings).
  \item 185. McElfish, infra note 126, at 10,478.
  \item 186. Because Executive Order 12,630 requires notices of proposed rulemaking to address significant takings implications and because the Attorney General's Supplemental Guidelines for the Department of the Interior require published rules to incorporate their TIA into all Determinations of Effects of Rules, the published actions provide some support for the proposition that agencies are not generally finding significant takings implications. See Exec. Order No. 12,630, supra note 124, § 5(b); Attorney General's Supplemental Guidelines for Interior, supra note 130, app. I at 2. The summary treatment given the Executive Order in the published actions, however, does not reflect the time-consuming efforts of agency staff to draft supplemental guidelines, develop valuation methodologies, and prepare internal guidance for implementation. See McElfish, supra note 126, at 10,475.
  \item 187. See Attorney General's Guidelines, supra note 130, at 3 ("in a form and manner chosen by the agency"); id. at 20 (designation of responsible agency official is "solely within the discretion of the agency head"); id. at 21 ("in a form and manner in the agency's discretion"); id. at 23 ("in a form and manner in the agency's discretion"); id., app. at 1 (integrate "in ways to be determined by the agency").
  \item 188. The TIAs generally are conducted by each agency's counsel. See id., app. at 1 ("t[he takings implication consideration . . . will normally be one requiring close consultation between agency program personnel and agency counsel."); Attorney General's Supplemental Guidelines for Interior, supra note 130, app. I at 2 (designating the solicitor as the official responsible for TIAs).
\end{itemize}
exclusions. Finally, the guidelines tend to limit the TIA process to facial challenges because of the absence of actual factual settings.

On the other hand, executive branch efforts to address the regulatory takings problem have resulted in greater sensitivity to private property rights. The Attorney General's Guidelines, for example, take a broad approach to defining both property and the economic impact of regulations on property, assessing the takings implications for "any distinct legally protected property interest" and examining the economic impact of the action on the "property interest involved" and "each property interest recognized by the applicable law." The Guidelines also take an expansive view of regulatory takings, interpreting some Supreme Court cases more broadly than may be necessary. The Guidelines therefore err on the side of property rights in defining regulatory takings.

Recent takings decisions of the Supreme Court indicate that, even if a regulatory takings problem did not exist in the past, a problem may arise in the future. Those decisions suggest a move towards greater protection of property rights and reinforce the psychological effect of the Takings Clause. One of those deci-

189. See, e.g., Attorney General's Guidelines, supra note 130, at 5-8; Attorney General's Supplemental Guidelines for EPA, supra note 130, at 4-12; Attorney General's Supplemental Guidelines for Interior, supra note 130, at 3-6 & app. IV.

190. See, e.g., Attorney General's Supplemental Guidelines for Interior, supra note 130, app. III (providing a sample TIA).


192. Id. at 14.

193. Id. at 18.

194. The Guidelines, for example, suggest that the merit review or nexus test of Nollan v. California Coastal Commission, 483 U.S. 825, 834-37 (1987), applies generally to permit programs imposing conditions on private property owners, not just to situations involving conditions resulting in a physical occupation or invasion. See Attorney General's Guidelines, supra note 130, at 6-9.

195. Other evidence of greater sensitivity to property rights can be found in recent agency documents providing for more cooperative or conciliatory approaches to environmental protection. See, e.g., Issuance of Nationwide Permit for Single-Family Housing, 60 Fed. Reg. 38,650 (1995) (effective Sept. 25, 1995) [hereinafter NWP for Single-Family Housing Activities] (announcing issuance of nationwide permit authorizing activities in wetlands related to the construction or expansion of single-family homes); FWS Cooperative Approach to ESA, supra note 131, at 1, 3, 5-9 (describing ways to assure fair treatment of landowners).
sions, *Lucas v. South Carolina Coastal Council*,\(^{196}\) reaffirms the importance of diminution in value as a takings test by declaring a total diminution in value suffered by a property owner as a result of a government regulation to be a per se taking.\(^{197}\) A second decision, *Dolan v. City of Tigard*,\(^{198}\) adopts a new merit or nexus test for evaluating the validity of regulations affecting property owners under the Takings Clause and shifts the burden of proof from the landowner to the government, at least in certain types of regulatory situations.\(^{199}\) Together, the decisions provide landowners with reason to be hopeful about the burdens imposed by government regulations and agency officials with reason to be hesitant about the adoption of more stringent regulations.

*Lucas* recast the diminution-in-value test as a per se rule when the diminution is total.\(^{200}\) First developed by the Court in *Pennsylvania Coal Co. v. Mahon*,\(^{201}\) the diminution-in-value test recognizes that government action that does not physically occupy or appropriate property may nevertheless go too far in depriving the property owner of economically beneficial use.\(^{202}\) Writing for the majority, Justice Scalia offered a number of possible justifications for the per se rule followed in *Lucas*. One possible justification is that a "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."\(^{203}\) Additionally, when government action does not allow a landowner to make economically viable use of the land, government cannot be assumed to be "adjusting the benefits and burdens of economic life"\(^{204}\) in order to secure the "average reciprocity of advantage."\(^{205}\) Nor should the categorical rule interfere with the effective functioning of government because, according to Justice Scalia, the rule would only apply in rare sit-

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197. See id. at 1015-19.
199. See id. at 386, 391 & n.8.
201. 260 U.S. 393 (1922).
203. Id. at 1017.
205. Id. at 1018 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).
uations. Finally, government action that deprives a landowner of all economically viable use carries "a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."  

Though the per se takings approach of *Lucas* is appealing when considered in light of its justifications, the rule is problematic because of a number of uncertainties surrounding its application. The majority in *Lucas*, for example, did not clearly identify the appropriate property benchmark for measuring diminution in value. Because the majority assumed a total diminution in value, the Court did not have to determine how a total diminution in value would be measured. In a footnote, however, the majority suggested that the regulated portion may be the appropriate property benchmark. According to Justice Scalia, the answer may be found:  

[In how the owner's reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.]

In describing its per se rule, the Court also did not clearly explain some important qualifications to the rule. According to the majority, total diminution in value requires compensation "without case-specific inquiry into the public interest advanced in support of the restraint" unless the limitation "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." The limitation must "do no more than duplicate the result that could have been achieved in the

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206. See id.
207. Id.
208. See id. at 1020 & n.9.
209. See id. at 1017 n.7.
210. Id.
211. Id. at 1015.
212. Id. at 1029.
courts—by adjacent landowners . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise. 213

The per se approach of Lucas is also problematic because the Court's explanation and justification of the approach reflect changes in or inconsistencies with prior takings principles. 214 First, in contrast to the per se approach to total diminution in value announced in Lucas, the Court in Pennsylvania Coal had stated that determining whether government action causing diminution in value was a taking was a "question of degree [which could not] be disposed of by general propositions." 215 Second, a number of Supreme Court decisions had treated the property as a whole, as opposed to the regulated portion alone, as the appropriate property benchmark for measuring diminution in value. 216 Third, the majority in Lucas described the qualifications to its per se takings rule in ways that seem inconsistent with traditional notions of the judicial process and state law prerogatives. 217 For example, the Court stressed that the state, on remand, must "identify background principles of nuisance and property law that prohibit the uses [the landowner] now intends in the circumstances in which the property is presently found." 218 Further, these background principles must be based on "an objectively reasonable application of relevant precedents." 219 This burden appears to lock in the state not only to the uses that the owner presently intends but also to background principles that presently exist. 220 Judicial opinions that

213. Id.
214. See id. at 1063-64 (Stevens, J., dissenting).
215. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922); accord Lucas, 505 U.S. at 1063 (Stevens, J., dissenting). Subsequent cases reiterate the decision to avoid an absolutist approach and to uphold laws under the Takings Clause even though they render property valueless. See id. at 1064.
217. See Lucas, 505 U.S. at 1029, 1031.
218. Id. at 1031.
219. Id. at 1032 n.18.
220. See id. at 1068-69 (Stevens, J., dissenting) ("The Court's holding today effectively freezes the State's common law, denying the legislature much of its tradi-
established new precedent by finding the uses to be harmful through the normal evolution of the common law of nuisance and property would appear to be beyond the scope of permissible background principles. Furthermore, the Court's burden "alters the long-settled rules of review," particularly the presumption of legislative validity Thus, when considered in light of the Court's suggestion that the regulated portion may be the appropriate property benchmark, the Court's disagreement with some of its prior takings cases, and the Court's limited view of the qualifications to the per se rule, the majority's description of the total diminution-in-value situation as a per se taking suggests greater protection of private property rights.

The second opinion, Dolan v. City of Tigard, heightened the level of merit review applied to regulations affecting property under the Takings Clause. According to the Court in Dolan, a two-pronged test governs the legitimacy of government regulations under the clause. Under the first prong, the Court must "determine whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the [government]." Under the second prong, the Court must, after determining that the essential nexus test is met, decide whether the "required degree of connection"—a "rough proportionality"—exists "between the exactions and the projected impact of the proposed development." Although the Court pointed out that this standard did not require a "precise mathematical calculation," the Court then stressed that

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221. See id. at 1052 n.15, 1054-55 (Blackmun, J., dissenting).
222. Id. at 1045 (Blackmun, J., dissenting).
223. See id. (Blackmun, J., dissenting).
224. See supra note 209 and accompanying text.
225. See supra notes 214-16 and accompanying text.
226. See supra notes 217-19 and accompanying text.
228. See id. at 386.
229. Id. (quoting Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987)).
230. Id.
231. Id. at 391.
232. Id. at 386.
233. Id. at 391.
under the "rough proportionality" standard the government had to "make some sort of individualized determination that the [re-
striction] is related both in nature and extent to the impact of
the proposed development." The decision in Dolan represents
a clear shift in the allocation of the burden of proof from the
landowner to the government at least in land-use cases involv-
ing an adjudicative decision affecting a particular property own-
er, as opposed to land-use cases involving generally applicable
regulations.

After Lucas and Dolan, agency officials conducting takings
implications assessments of proposed agency actions are more
likely to undervalue the public interest supporting more string-
ent regulation of private property and the probability that more
stringent regulatory options would prevail under the Takings
Clause. This discounting might be seen in decisions to with-
draw proposed agency actions, in the adoption of less stringent
regulatory options, or in the more favorable application of agen-
cy rules and regulations to property owners. Though the tak-
ings Executive Order provides the formal vehicle for consider-
ation of takings implications, judicial decisions are providing

234. Id. (footnote omitted).

235. See id. at n.8. In his dissenting opinion, Justice Stevens described the ma-
jority as making a "serious error by abandoning the traditional presumption of con-
stitutionality and imposing a novel burden of proof on a city implementing an ad-
mittedly valid comprehensive land use plan." Id. at 405 (Stevens, J., dissenting).

236. Cf. supra notes 84-96 (discussing the effect of the Takings Clause on land-
use decision making).

237. Some evidence of discounting existed prior to the Lucas and Dolan decisions.
The Attorney General's Guidelines that were issued in 1988, for example, state that the
purpose of the Executive Order and Guidelines is to "assure that governmental decision-
makers are fully informed of any potential takings implications of proposed policies and
actions" and thus to enhance the "cost-efficient administration of agency programs." The
Guidelines then recommend that "[i]n those instances in which a range of alternatives are available, each of which
would meet the statutorily required objective, prudent management requires selection of
the least risk alternative." Id. As one commentator has noted, this recommendation is
"an interesting variation of risk assessment, which Congress more typically structures so
as to compel the agencies to adopt policies and regulations that produce the least risk to
public interests." McElfish, supra note 126, at 10,474. Some agency documents issued af-
ter the decisions, however, demonstrate a more formalized effort to work with property
owners. See, e.g., NWP for Single-Family Housing Activities, supra note 195; FWS Coop-
erative Approach to ESA, supra note 131, at 1, 3, 5-9.

238. See supra notes 134-44 and accompanying text.
regulators with the ultimate principles for assessment and with the increased incentive to use greater caution in regulating property rights.\footnote{239}

Thus, although the takings Executive Order has had some impact on the regulatory process, it is, first and foremost, a political tool. In response to the order, agency personnel have shown greater sensitivity to property rights\footnote{240} and have incorporated consideration of takings implications into their administrative process.\footnote{241} Much of this impact, however, also could have resulted from guidance received by the agencies from their internal counsel and Department of Justice attorneys after their review of recent takings decisions. Furthermore, the impact of the takings Executive Order and of other executive branch efforts to deal with regulatory takings issues through the administrative process ultimately depends on the political values of the elected leadership.\footnote{242} Those leaders who favor greater protection of property rights and less regulation of private economic interests will promote aggressive enforcement of the Executive Order through a more demanding and centralized review process, recognition of fewer exclusions, and more rigorous application of criteria.\footnote{243} Elected leaders who favor greater environmental regulation, on the other hand, may repeal the Executive Order, or, if some support for private property rights is preferred, may retain the order but enforce it less aggressively through a less demanding assessment and review process, recognition of more exclusions, and more lenient interpretation of principles and criteria.\footnote{244} The Executive Order, in other words, provides a number of opportunities for political manipulation.\footnote{245} Thus, the processes available to the executive branch

\footnotesize{\begin{itemize}
\item[239.] \textit{See supra} notes 196-236 and accompanying text.
\item[240.] \textit{See supra} note 195.
\item[241.] \textit{See} McElfish, \textit{supra} note 126, at 10,475 (discussing the agencies' implementation of the TIA requirements).
\item[242.] \textit{See supra} notes 125-29 and accompanying text.
\item[243.] Cf. \textit{Shanley}, \textit{supra} note 125, at 49-89, 131-63 (discussing the use of executive orders in the Reagan and Bush Administrations and the impact of the orders on environmental policy-making).
\item[244.] \textit{See id.} at 83 ("[Executive orders] are ... amended or sometimes revoked by succeeding presidents of different partisan or ideological outlook.").
\item[245.] The definitions, standards, exclusions, TIA process, and degree of agency
\end{itemize}}
are less well-suited to resolving takings issues and are correspondingly less effective at doing so.

III. CONCLUSION AND PROLOGUE

For a number of reasons, then, the judicial branch is best able to escape the politics of takings and provide the type of principled decision making needed in the regulatory takings area—decision making that does not depend on the political values of the latest elected leaders or the political incentives of the legislative process. In addition to involving behavioral choices that need the type of marginal analysis conducted by the courts, regulatory takings decisions implicate important protective and political theory functions of the Takings Clause. These functions require the judiciary to be the primary takings decisionmaker.

Admittedly, a key danger in having the courts decide the regulatory takings question is that a judicial decision to provide strong protection to traditional property rights and to curb environmental and land-use regulations puts private land-use choices beyond political controls. For this danger to arise, however, a court must consistently adhere to the classical view of property in the face of the Supreme Court's own precedent on the general validity of police power regulation of property, on the need for ad hoc determinations of takings, and on the normally nondeterminative role of diminution in value. Furthermore, for this danger to arise, a court must consistently override state environmental and land-use laws and evolving common law concepts of property and nuisance. Although all of these circumstances could arise, it is highly unlikely that they will.

The remaining articles in this Symposium issue provide interesting and provocative perspectives on questions raised by the regulatory takings debate—questions concerning the effectiveness of the judicial branch in resolving regulatory takings cases,246 the role of the majoritarian political process in resolving discretion established by the Executive Order and accompanying guidelines all provide opportunities for strategic use of the order. See Exec. Order No. 12,630, supra note 124, §§ 2-5; Attorney General's Guidelines, supra note 130, at 4-26; Attorney General's Supplemental Guidelines for EPA, supra note 130, at 4-13; Attorney General's Supplemental Guidelines for Interior, supra note 130, at 2-13 & app. IV.

246. See James E. Brookshire, The Delicate Art of Balance—Ruminations on
regulatory takings issues, the value of ad hoc determinations of takings, and the need for resolving debates over theory or principle. The Symposium articles offer a rich diversity of perspective and opinion on the regulatory takings problem. This diversity includes significant variation in the fundamental questions posed, the substantive solutions proposed, and the analytical approaches used.

In his article Muddle or Muddle Through? Takings Jurisprudence Meets the Endangered Species Act, for example, Mark Sagoff focuses on the appropriate scope of judicial decision making in the takings area and on whether the courts should resolve theoretical and metaphysical disputes over conceptions of property. Dr. Sagoff uses the context of recent Endangered Species Act litigation to highlight the fundamental and conflicting conceptions of property that fuel the regulatory takings debate. Concluding that the Supreme Court should not be in the business of adjudicating metaphysical disputes, Dr. Sagoff explains that disputes over the fundamental character of property and its relation to liberty, nature, and ecology involve political choices, not judicial ones. Thus, instead of resolving metaphysical disputes, the courts should limit themselves to “reining in regulation at its own frontier” and ensuring that regulation does not become extreme in any direction. If the courts were to adopt a general theory of takings, they would remove the incentive for bargaining and accommodation. The Supreme Court thus is correct, in Dr. Sagoff’s view, in “constrain[ing] land-use policy at the margins while still permitting the political process to deter-

Change and Expectancy in Local Land Use, 38 WM. & MARY L. REV. 1047 (1997); Douglas W. Kmiec, Inserting the Last Remaining Pieces into the Takings Puzzle, 38 WM. & MARY L. REV. 995 (1997); Sagoff, supra note 10, at 825.
247. See E. Donald Elliott, How Takings Legislation Could Improve Environmental Regulation, 38 WM. & MARY L. REV. 1177 (1997); Treanor, supra note 6, at 1151.
248. See Richard J. Lazarus, Counting Votes and Discounting Holdings in the Supreme Court’s Takings Cases, 38 WM. & MARY L. REV. 1099 (1997); Sagoff, supra note 10, at 825.
251. Id. at 845.
mine its overall direction. The uncertainty that exists because of the judiciary's ad hoc approach to regulatory takings has a "moderating" effect, restraining regulation at the fringes and giving parties a reason to cooperate. For these reasons, Dr. Sagoff believes that "[a] clear theory of regulatory takings is not needed."

Doug Kmiec, in his article *Inserting the Last Remaining Pieces into the Takings Puzzle,* also focuses on the role of the courts in resolving takings disputes. He provides an interesting perspective on the implications of recent Supreme Court takings decisions for judicial resolution of regulatory takings issues. The key, according to Kmiec, is realizing that "judicial protection of legitimate private property rights is not tantamount to inappropriate judicial theorizing about social policy." Professor Kmiec has no problem making this distinction because of what he describes as the "objective, natural law basis of common law property rights." Private property "preexists government and is protected not merely because this or that law may be in place, but because it advances the nature of the human person more effectively and directly than alternative forms of property distribution." Recent Supreme Court decisions have solved the takings puzzle, according to Kmiec, by recognizing that the natural law basis of common law property provides an objective basis for judicial resolution of regulatory takings issues.

Jim Brookshire also focuses on the judiciary's role in defining regulatory takings but from a different perspective: that of a practicing attorney who litigates takings cases and sees firsthand the impact of takings decisions on private parties and governments. In his article *The Delicate Art of Balance—Ruminations on Change and Expectancy in Local Land Use,* Mr. Brookshire evaluates the effectiveness of judicial takings decisions by considering their

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252. Id. at 849.
253. See id. at 850.
254. Id. at 851 (footnote omitted).
256. Id. at 997.
257. Id. at 998 (footnote omitted).
258. Id. at 998-99 (footnote omitted).
impact on local land-use systems. He believes that judicial decision-making is effective in the takings area because it allows local governments to balance change and expectancy in their daily land-use decision-making process. He believes that the "accommodation of change and expectancy occurs routinely and ... with increasing precision as the decision-making body becomes more localized." The resulting "tradition of bridging land-use goals and individual expectancy" demonstrates, in Brookshire's view, the "remarkable ... sensitivity [of the Court] when resolving fundamental land-use issues ...." 261

In his essay *Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases*, Richard Lazarus focuses on the predictive value of the Court's takings decisions by examining a dimension of regulatory takings decisions generally overlooked: "Why the Court is so persistently splintered and its precedent so seemingly schizophrenic." Understanding the implications of recent takings cases requires one to pierce the Court's "judicial veil" and realize that the Court is not a "monolithic institution" but rather "nine individual Justices who speak through the voice of shifting coalitions of at least five Justices." By piercing the judicial veil, regulatory takings lawyers and scholars will recognize the need to identify the underlying reasons for the Court's splintering and shifting majorities. Identifying these reasons will reveal that the Justices are pulled in different directions by crosscutting issues that make the development of a stable majority on regulatory takings issues especially difficult to maintain. Piercing the judicial veil also will reveal the types of arguments that might be persuasive to a new majority coalition and the pragmatism that will be necessary to maintain that majority.

Jim Krier's article, *The Takings-Puzzle Puzzle*, questions

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260. *Id.* at 1048.
261. *Id.* at 1049.
262. 38 Wm. & Mary L. Rev. 1099 (1997).
263. *Id.* at 1100.
264. *Id.* at 1100-01.
265. See *id.* at 1101.
266. See *id*.
267. 38 Wm. & Mary L. Rev. 1143 (1997).
the ability of the courts—or anyone else for that matter—to ever solve the takings puzzle. He argues that the regulatory takings problem is intractable because of the ambiguities inherent in takings cases. These ambiguities include uncertainty in the application of general principles to particular situations, uncertainty arising from "theoretical differences regarding what the general principles should be," and uncertainty arising from "divergent metatheoretical approaches to arguments over theory."\(^{268}\) In Krier's view, the ambiguities inherent in regulatory takings are so pervasive that people should not be puzzled that the takings puzzle cannot be solved.

The two remaining Symposium pieces—by Bill Treanor and Don Elliott—focus on the need for a legislative solution to the regulatory takings problem. In his essay *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*,\(^{269}\) Bill Treanor argues that a legislative solution is needed to fill the gap created by process theories of the Takings Clause and to deal with serious fairness concerns that tend to increase support for flawed compensation bills already proposed. Proponents of process theories argue that courts should defer to the majoritarian political process in their resolution of regulatory takings disputes unless process failure is suspected. As Professor Treanor explains, a legislative response is especially needed in a group of regulatory cases involving unanticipated regulations that significantly destroy part of the total assets of a property owner. Courts do not generally allow compensation in these cases because the courts focus on harm to particular property, not on harm to the property owner. Developing a legislative solution for this particular type of regulatory takings problem would, in Treanor's view, help to shift the debate about takings by providing redress for property owners "who, despite being greatly harmed by regulation, have no hope of judicial redress. ... without simultaneously making regulation impossible."\(^{270}\) Ignoring this regulatory takings problem would be a serious political mistake because it would make more attractive the overly

\(^{268}\) *Id.* at 1147.

\(^{269}\) 38 WM. & MARY L. REV. 1151 (1997).

\(^{270}\) *Id.* at 1157.
broad proposals of the property rights movement.

The second article focusing on a legislative solution, Don Elliott's How Takings Legislation Could Improve Environmental Regulation, argues that a legislative solution could improve environmental regulation and result in stronger environmental laws. A legislative solution that clarified and expanded the right to compensation would minimize unnecessary burdens on property owners, therefore increasing distributive fairness and possibly decreasing political opposition. Such a solution also would spread out the costs of environmental regulation over a larger portion of the citizenry and would give government greater incentive to exercise care in drafting environmental regulations.

The diversity of opinions and perspectives offered by the Symposium articles helps to provide a more complete picture of the texture and richness of the regulatory takings debate. The diversity also reveals how difficult it is to find a solution to the regulatory takings problem. If experts in the area cannot even agree on whether a problem exists or a solution is possible, then how can one ever expect satisfactory resolution of regulatory takings issues? A possible answer to this question was suggested by my article and would require a change in expectations about the nature and type of solution that realistically might be possible.
APPENDIX: SPECIAL EXPLANATIONS USED IN AGENCY ACTIONS ADDRESSING EXECUTIVE ORDER 12,630 FOR MARCH 15, 1988 THROUGH DECEMBER 31, 1991

NOTES*

NOTE A

E.O. 12630. This E.O. requires that each Federal agency prepare a Takings Implications Assessment (TIA) for any of its administrative, regulatory, and legislative policies and actions that affect, or may affect, the use or value of any real or personal private property. These policies include regulations that propose or implement licensing or permitting requirements, conditions, or restrictions otherwise imposed by an agency on the use of private property, and actions relating to, or causing the physical occupancy or invasion of, private property. DOC is developing procedures to implement the requirements of this E.O.; these regulations will be appropriately amended to implement the DOC procedures when they become available.¹

NOTE B

This proposed rule, if issued in final form as proposed, would not have any takings implications within the meaning of Executive Order 12630 because it would not appear to have an effect on private property sufficiently severe as to effectively deny economically viable use of any distinct legally potential property interest to its owner or to have the effect of, or result in, a permanent or temporary physical occupation, invasion, or deprivation.²

* The passages following each lettered note are taken verbatim from the indicated agency action or actions.


². Stellwagen Bank National Marine Sanctuary Regulations, 56 Fed. Reg. 5282,
NOTE C

This proposed rule, if issued in final form as proposed, would not have takings implications within the meaning of Executive Order 12630 because it would not appear to have an effect on private property sufficiently severe as effectively to deny economically viable use of any distinct legally potential property interest to its owner or to have the effect of, or result in, a permanent or temporary physical occupation, invasion, or deprivation. While the prohibition on the exploration, development, production of oil, gas and minerals from the Sanctuary might have a takings implication if it abrogated an existing lease for OCS [Outer Continental Shelf] tracts within the proposed Sanctuary or an approval of an exploration or development and production plan, no OCS leases have been sold for tracts within the proposed Sanctuary and no exploration or production and development plans have been filed or approved.3

NOTE D

This final rule does not have takings implications within the meaning of Executive Order 12630 because it would not appear to have an effect on private property sufficiently severe as effectively to deny economically viable use of any distinct legally potential property interest to its owner or to have the effect of, or result in, a permanent or temporary physical occupation, invasion, or deprivation.4

NOTE E

These proposed regulations do not have takings implications within the meaning of Executive Order 12630 because they


would not appear to have an effect on private property sufficiently severe as effectively to deny economically viable use of any distinct legally potential property interest to its owner or to have the effect of, or result, [sic] in, a permanent or temporary physical occupation, invasion, or deprivation.⁵

NOTE F

The changes in the process of determining employee rights to inventions made by this rule do not have takings implications sufficient to require preparation of a Takings Implications Assessment under Executive Order 12630.⁶

NOTE G

Executive Order 12630 (53 FR 8859, March 18, 1988) directs that, in proposing a regulation, an agency conduct a “takings” review. Such a review is intended to assist agencies in avoiding unnecessary takings and help such agencies account for those takings that are necessitated by statutory mandate.

For purposes of the Order:

“Policies that have takings implications” refers to Federal regulations, proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, or other Federal policy statements that, if implemented or enacted, could effect a taking, such as rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that required [sic] dedications or exactions from owners of private property.

It appears that there are three parts of the appliance standards program that could conceivably be viewed as having “takings implications.” These are testing (certification) requirements, the impacts of standard levels, and possible DOE testing of products for validation.

This rulemaking is concerned with the first part, namely test-

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The Department believes that such a requirement does not constitute a "taking" of private property. The establishment of test procedures involves no exchange of property. Manufacturers maintain control of the property for all intents and purposes.

Therefore, the Department believes that the requirement of testing and the establishment of test procedures as part of the appliance standards program do not represent a "taking" under the provisions of E.O. 12630.7

NOTE H

Executive Order 12630 (53 FR 8859, March 18, 1988) directs that, in proposing a regulation, an agency conducts a "takings" review. Such a review is intended to assist agencies in avoiding unnecessary takings and help such agencies account for those takings that are necessitated by statutory mandate.

For purposes of the Order:

"Policies that have takings implications" refers to Federal regulations, proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, or other Federal policy statements that, if implemented or enacted, could effect a taking, such as rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property.

It appears that there are three parts of the appliance standards regulatory program that should be reviewed for "takings implications." These are testing and certification requirements, the impacts of standard levels, and possible DOE testing of products for validation.

With regard to the first part, namely, testing and certification, the Department believes that such a requirement, implementing a long-established statutory mandate in a manner calculated to

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minimize adverse economic impacts does not constitute a "taking" of private property. Executive Order 12630 applies to those regulatory actions which are a substitute for the exercise of governmental eminent domain power. This applies to situations where regulations exact a transfer of title, possession, or beneficial use of private property without compensation. The regulations under consideration are simply an exercise of police power and do not exact such a transfer of private property.

Similarly, the Department's possible validation testing does not constitute a "taking," within the limitation described above.

The Department believes that the fact that while an energy conservation standard may limit some manufacturers in the range of appliance efficiencies that they can produce, such narrowing of the energy efficiency range does not constitute a "taking" in the sense described above. Furthermore, this rulemaking simply recites the standards explicitly mandated by the Act.

In short, in none of the three parts of the appliance standards program does the Department believe that the provisions of E.O. 12630 pertain.

NOTE I

Executive Order 12630 (53 FR 8859, March 18, 1988) directs that, in proposing a regulation, an agency conduct a " takings" review. Such a review is intended to assist agencies in avoiding unnecessary takings which might require compensation under the Fifth Amendment to the United States Constitution. For purposes of Executive Order 12630, "policies that have takings implications" refers to Federal regulations, proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, or other Federal policy statements that, if implemented or enacted, could effect a taking, such as rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property.

The test procedure proposed today is required by the Act and will substantially advance the statutory objective of promoting appliance energy efficiency through dissemination of better information in the marketplace. Moreover, the proposed test procedure would have minimal economic impact on manufacturers. Therefore, the Department believes that the establishment of fluorescent lamp ballast test procedures as part of the Program does not represent a “taking” under the provisions of Executive Order 12630 cited above.9

NOTE J

The Department has determined that the promulgation of this rule to authorize the BIA to charge non-Federal users for goods/services delivered to them by the BIA will “not affect the use or value of private property” as contemplated by Executive Order 12630, 3 CFR 554 (1988 Comp.). Therefore, no Takings Implication Analysis is necessary, and none has been prepared.10

NOTE K

The proposed rule has been considered in light of Executive Order 12630 concerning possible impacts on private property rights. Executive Order 12630 exempts from takings implications assessments, activities which are consensual in nature between the United States and non-Federal parties. Exchanges are consensual and, therefore, do not raise taking issues. Accordingly, no further consideration of takings implications was deemed necessary in this proposed rule.11

NOTE L

This proposed rule is not expected to have a potential takings implication under Executive Order 12630 because it would authorize take of walruses and polar bears by oil and gas exploration companies and thereby exempt them from civil and criminal liability.12

NOTE M

Comment: One commenter argued against any interpretation of section 101(a)(5) of the Act that would exempt persons from the criminal provisions of the Act. They cited the following language from the Proposed Rule as reason for their concern:

This proposed rule is not expected to have a potential takings implication under Executive Order 12630 because it would authorize take of walruses and polar bears by oil and gas exploration companies and thereby exempt them from civil and criminal liability. 56 FR 7654, February 25, 1991.

Response: The statement cited by the commenter applies to potential takings implications that are analyzed under Executive Order 12630 of March 15, 1988. This Executive order is entitled “Governmental Actions and Interference With Constitutionally Protected Property Rights,” and is commonly referred to as the “Takings Executive Order.” The Fifth Amendment of the U.S. Constitution provides that private property shall not be taken for public use without just compensation. Government historically has used the formal exercise of the power of eminent domain, which provides an orderly process for paying just compensation, to acquire private property for public use. Recent Supreme Court decisions, however, in reaffirming the fundamental protection of private property rights provided by the Fifth Amendment and in assessing the nature of governmental actions that have a confiscatory impact on constitutionally protected property rights, have also reaffirmed that, under certain circumstances, governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just com-

pensation is required. The purpose of Executive Order 12630 is to assist Federal agencies in undertaking reviews to evaluate the effect of their administrative, regulatory and legislative actions on constitutionally protected property rights. In this regard, the Service has determined that its regulatory action will not result in taking away any operator's oil and gas lease(s). In fact, a contrary argument can be made that this action, as provided for in section 101(a)(5) of the Act, actually enhances oil and gas operators' ability to avail themselves of the property rights that convey with oil and gas lease purchases.13

NOTE N

Because this rule will not affect the use of or the value of private property, the Department certifies that the rule does not represent a governmental action capable of interference with constitutionally protected property rights. Thus, a Takings Implication Assessment need not be prepared pursuant to Executive Order 12630, "Government Action and Interference with Constitutionally Protected Property Rights."14

NOTE O

Because this rule would result in an increase in funds to States and Indian tribes that have entered into a cooperative agreement, the Department certifies that the rule does not represent a governmental action capable of interference with constitutionally protected property rights. Thus, a Takings Implication Assessment need not be prepared pursuant to Executive Order 12630, "Government Action and Interference with Constitutionally Protected Property Rights."15

15. Removal of Federal Funding Limitation for State and Indian Cooperative Agreements, 56 Fed. Reg. 10,510, 10,511 (to be codified at 30 C.F.R. pt. 228); accord Removal of Federal Funding Limitation for State and Indian Cooperative Agree-
NOTE P

This rulemaking clarifies an ambiguity in existing regulations and will result in an increase in interest paid by MMS to the States and Indians. There is no change in the interest rate paid by lessees and other payors for late payment of interest. Therefore, the Department certifies that the rule does not represent a governmental action capable of interference with constitutionally protected property rights. Thus, a Takings Implication Assessment need not be prepared pursuant to Executive Order 12630, "Government Action and Interference with Constitutionally Protected Property Rights."16

NOTE Q

Because there are no additional economic effects, this final rule does not represent a governmental action capable of interference with constitutionally protected property rights. Thus, a Takings Implication Assessment need not be prepared pursuant to Executive Order 12630, "Government Action and Interference with Constitutionally Protected Property Rights."17

NOTE R

Because this rule is a technical correction only and is not a substantive change, the Department certifies that the rule does not represent a governmental action capable of interference with constitutionally protected property rights. Thus, a Takings Implication Assessment need not be prepared pursuant to Executive Order 12630, "Government Action and Interference with Constitutionally Protected Property Rights."18

16. Interest Rate Applicable to Late Payment of Monies Due the Government and Paid on Late Disbursement of Revenues to States and Indians, 55 Fed. Reg. 37,227, 37,229-30 (to be codified at 30 C.F.R. pt. 218).
NOTE S

Because this rulemaking clarifies existing regulations, the Department certifies that the rule does not represent a governmental action capable of interference with constitutionally protected property rights. Thus, a Takings Implication Assessment need not be prepared pursuant to Executive Order 12630, "Government Action and Interference with Constitutionally Protected Property Rights." 19

NOTE T

The National Park Service has reviewed this rule as directed under Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," to determine if this rule has "policies that have taking implications." The Service has determined that the proposed rule does not have taking implications since it regulates activities on federal land. 20

NOTE U

The Service has reviewed this rule as directed by Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights" to determine if this rule has policies that have taking implications. The Service has determined that there are no taking implications because the regulations only describe the means by which the National Park Service awards and administers concession contracts and permits. The proposed rules do not affect private property interests within the meaning of the Executive Order. 21

NOTE V

The Service has reviewed this rule as directed by Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," to determine if this rule has "policies that have taking implications." The Service has determined that the rule does not because the rule is a modification of an existing rule which "lessens interference with the use of private property." The changes in the rule which demonstrate this lessening of interference area [sic]:

1. The reduction in minimum lot size to 4000 square feet for existing lots, which means that many property owners who have variances solely for insufficient lot size will now conform to federal standards;
2. The elimination of the limitation on bathrooms in a private residence;
3. The change in minimum elevation to conform to the FEMA standards;
4. The revision of lot occupancy standards; and
5. The elimination of the prohibition on in-ground swimming pools.

Properties that were previously subject to federal condemnation solely because of the deviations from the rule that these changes effect will now be exempt from federal condemnation. This results in more property conforming to the federal standards than under the previous rule.\(^\text{22}\)

NOTE W

The Department of the Interior has reviewed this rule as directed by Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," to determine if this rule has "policies that have takings implications." The Department has determined that this proposed rule does not have takings implications because it will not have an effect on private property sufficiently severe as to effectively deny economically viable use of any distinct legally protected prop-

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ertainty interest to its owner, or to have the effect of, or result in, a permanent or temporary physical occupation, invasion, or deprivation. National natural landmark designation does not change ownership of property, and does not dictate use of property so designated. The effect of the modifications proposed in this rulemaking are to strengthen and clarify procedures for owner notification that properties are being considered, to explicitly require that no entry onto property for purposes of the program will occur without owner permission, and to require owner consent prior to NNL designation by the Secretary.23

NOTE X

Additionally, no Takings Implication Analysis pursuant to Executive Order 12630 is required. The DOI has determined that the order would not cause a taking of private property inasmuch as leases issued prior to its promulgation would be subject to its provisions only upon the election or consent of the affected lessees.24

NOTE Y

Under Executive Order 12630 (53 FR 8859), FDA considered whether this proposed rule would affect the value, or constitute a taking, of private property (e.g., trade names for juice products that are consistent with law). FDA believes that this proposed rule, if adopted, will not interfere with the use of private property in any way. Therefore, the agency has tentatively concluded that no taking would occur. FDA requests comments on whether this regulation would have an impact on private property. The agency will consider all comments on this issue before issuing a final rule based on this proposal.25

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25. Food Labeling; Declaration of Ingredients; Common or Usual Name for Non-standardized Foods; Diluted Juice Beverages, 56 Fed. Reg. 30,452, 30,464 (codified in final form at 21 C.F.R. pts. 101 & 102 (1996)).
NOTE Z

A rule that requires companies to revise product labels has "takings implications" as defined under Executive Order 12630. Label inventories are private property. Inventories that are not exhausted by an effective date become non-compliant labels that would be essentially worthless and presumably discarded.

Executive Order 12630 requires that before taking private property for the protection of public health, the Department consider (1) the risk created by the property and (2) the potential cost to the government in the event that a court later determines that the action constituted a taking.

In this rulemaking, the relative public health risks and potential costs are both relatively small. The non-compliant labels represent a risk in that consumers would consume unknown levels of fat and cholesterol which could be higher than intended or perceived. Given the uncertainties concerning diet and health and the timeframes over which diet is expected to affect health, the unused inventories present a relatively small risk.

At the same time, the potential costs are relatively small. Based on Table 17 in Chapter IV, the label inventory transition costs for labels that would not be used before a 6-month compliance date would be $22.6 million. Similar costs for a 12-month compliance period would be $11.3 million.

Existing departmental guidance recommends considering feasible alternatives to the proposed action which would reduce the impact upon private property. The costs associated with unused label inventory could be reduced by allowing firms to either (1) use all existing label inventory that was procured prior to the proposal date, or (2) use existing inventory that includes some nutrition information.26

NOTE AA

The General Counsel, as Designated Official under Executive Order 12630, Government Actions and Interference with Constitutionally Protected Property Rights, has determined that this

final rule does not have "takings implications," as defined in HUD's "Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings." The final rule does not deny the owner an economically viable use for the project. Instead, the owner will, at a minimum, maintain ownership of the project with the below market rate mortgage or rental subsidies in place; in addition, the owner may be eligible to receive incentives to enhance the economic benefits of maintaining the project as low income housing. Moreover, the burden imposed by the statute and the final rule is limited by the statute's sunset provision.27

NOTE BB

This rule has been reviewed for its effects on private property rights in accordance with Executive Order 12630 concerning the just compensation clause of the Fifth Amendment and has been found not to have significant takings implications. These rules apply principally to the use of Federal land, not private land. Existing access rights across National Forest lands are not affected. The law requires that owners of non-federally owned land be granted access to such lands, provided, the owner complies with rules and regulations applicable to ingress or egress to or from the National Forest System. This rule provides those terms and conditions.28

NOTE CC

This rule has been reviewed for its effects on private property rights in accordance with Executive Order 12630 concerning the just compensation clause of the Fifth Amendment and has been found not to have significant takings implications. These rules apply principally to the use of Federal land, not private land. Existing access rights across National Forest lands are not affected.

Section 1323(a) of ANILCA and other earlier laws did not create any new property rights, only a mechanism to obtain access. The law requires that owners of non-federally owned land be granted access to such lands, provided the owner complies with rules and regulations applicable to ingress or egress to or from the National Forest System. This rule provides those terms and conditions for the occupancy and use of National Forest land, not private land. Therefore, the rules are not a taking of private rights and do not have significant taking implications.29

NOTE DD

Executive Order 12630 requires agency decisionmakers to consider the effect of proposed agency actions on private property rights. Pursuant to section 501(a)(1) of ANILCA, this final rule provides for a consistency determination of multiple use management activities with the conservation of fish and wildlife and their habitat on National Forest System lands in the Copper River-Rude River and the Copper River-Bering River areas of the Chugach National Forest in Alaska. Since consistency determinations are subject to valid existing rights, including those of Alaska Natives, no private property will be taken as a result of this proposed final rule.

Therefore, this rule presents no risk of takings liability.30

NOTE EE

Loss of trademark names. Both the percent juice labeling document and the nutrient content claim definitions document may cause firms to alter names currently trademarked. Under Executive Order 12630, a “taking” analysis would be necessary if, in fact, this constituted a potential taking. These regulations, however, serve to reemphasize existing regulations as to how products may be named. Thus, any firm which will be forced to change the name of its product is now using terms that mis-

brand its products, and therefore no legal property right exists. Thus, no "takings" analysis is necessary.\textsuperscript{31}

\textsuperscript{31} Regulatory Impact Analysis of the Proposed Rules to Amend the Food Labeling Regulations, 56 Fed. Reg. 60,856, 60,865.