

# William & Mary Law Review

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Volume 38 (1996-1997)  
Issue 3 *Institute of Bill of Rights Symposium:  
Defining Takings: Private Property and the  
Future of Government Regulations*

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Article 2

March 1997

## The Politics of Takings: Choosing The Appropriate Decisionmaker

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# William and Mary Law Review

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VOLUME 38

MARCH 1997

NUMBER 3

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## THE POLITICS OF TAKINGS: CHOOSING THE APPROPRIATE DECISIONMAKER

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Deciding who should define takings, especially regulatory takings,<sup>1</sup> 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.<sup>2</sup> 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<sup>3</sup> 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<sup>4</sup> and on the expectations that an individual has for the takings decision-making process.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> 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.

6. See, e.g., J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* 89 (1995); see also WILLIAM A. FISCHER, *REGULATORY TAKINGS* (1995) (questioning the legitimacy and efficacy of judicial review of regulatory takings issues involving the economic powers of the state); William Michael Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 *WM. & MARY L. REV.* 1151, 1156-58 (1997) (proposing a partial legislative solution).

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.<sup>9</sup> Then, in Part II, the Article addresses each branch's role in defining regulatory takings—a topic of much debate in this Symposium issue.<sup>10</sup> 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.<sup>11</sup> 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.

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9. An in-depth discussion of the nature of the political process concerns addressed by the Takings Clause is beyond the scope of this Article. For a more detailed discussion of the role of the Takings Clause in preventing or minimizing political process failure, see Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279 (1992); William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*, 67 CHI.-KENT L. REV. 865 (1991); Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285 (1990); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

10. See, e.g., Mark Sagoff, *Muddle or Muddle Through? Takings Jurisprudence Meets the Endangered Species Act*, 38 WM. & MARY L. REV. 825 (1997) (discussing the political function of the Supreme Court in endangered species protection); Treanor, *supra* note 6, at 1156-58 (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.<sup>12</sup> As support for this conclusion, he described the morass into which the doctrine had taken the courts,<sup>13</sup> the lack of textual, precedential, or utilitarian support for the doctrine,<sup>14</sup> the failure of the doctrine to promote economic efficiency,<sup>15</sup> and the illegitimate and unwise use of the doctrine to curb environmental protection efforts.<sup>16</sup> He also asserted that federal court enforcement of the doctrine against the states "upsets appropriate notions of federalism"<sup>17</sup> because it impairs the states' "authority to adjust the limits of property interests created by the states themselves . . . ."<sup>18</sup> At the very least, this impairment suggests the "need for a stronger justification for the exercise of national power."<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> 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."<sup>22</sup>

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

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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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

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23. See William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 708 (1985).

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.<sup>26</sup> The concern expressed by the Court in *Pennsylvania Coal Co. v. Mahon*,<sup>27</sup> that government may go too far in regulating property,<sup>28</sup> 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.<sup>29</sup>

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

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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.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>

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

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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).

31. Although scholars and jurists disagree about the principles and standards that should govern takings disputes, they tend to agree on some of the general values and purposes of the clause. See Treanor, *supra* note 6, at 1151-55. For some examples of different theories of takings law, see BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); FISCHER, *supra* note 6; Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752 (1988); C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

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.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup>

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.<sup>38</sup> Many property owners admittedly have significant impact on the political process.<sup>39</sup> That these property owners do not suffer

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34. See ROGER A. CUNNINGHAM ET AL., *THE LAW OF REAL PROPERTY* §§ 6.32-33 (2d ed. 1993).

35. See *id.*

36. See RALPH E. BOYER ET AL., *THE LAW OF PROPERTY* § 3.3 (4th ed. 1991).

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<sup>40</sup> as it is due to the ability of property owners to impact the political process itself.<sup>41</sup> Furthermore, though the class of property owners in the United States may be relatively large, the nature of property interests varies significantly.<sup>42</sup> Although some property owners

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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).

40. 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).

41. 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.

42. *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.<sup>43</sup> 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.<sup>44</sup> 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."<sup>45</sup>

Further, even if majoritarian exploitation of property owners is not a problem now, it could become a problem in the future.<sup>46</sup> 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."<sup>47</sup> 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.<sup>48</sup> Coupling such

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owned. See Carpenter, *supra* note 39, at 69.

43. See Carpenter, *supra* note 39, at 69.

44. See ELY, *supra* note 24, at 155; Michelman, *supra* note 31, at 1216-17. But see Treanor, *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).

45. ELY, *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." *Id.* Such an approach thus would ignore the utilitarian and libertarian need for constitutional protection of property and economic rights. See *id.*

46. Madison's unease about the "future security of property" motivated him to push for greater constitutional protection of property. See *id.* at 53-54.

47. Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1454 (1993).

48. See generally Marty Jezer & Ellen Miller, *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.<sup>49</sup> 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.<sup>50</sup>

Finally, those scholars who reduce the regulatory takings problem to a utilitarian equation<sup>51</sup> miss one of the key points of the private property rights movement. More than mere desire to protect economic interests drives grassroot 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.<sup>52</sup> That this belief

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and the Subversion of American Democracy, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 467 (1994) (arguing that the very wealthy exert disproportionate control over politics); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369 (1994) (describing the inequality and coercion inherent in current campaign finance laws); Bruce B. Auster & David Bowermaster, *Playing the Money Game: The Nation's Campaign Finance Laws Are Full of Loopholes*, U.S. NEWS & WORLD REP., May 20, 1996, at 24-26 (discussing ways in which campaign supporters avoid the campaign finance laws in order to donate to their candidate's election). For examples of recent attempts to amend campaign finance laws, see H.R. 3505, 104th Cong. (1996) (including a bill to amend the Federal Election Campaign Act of 1971 by rewriting the provisions governing spending and benefits in congressional campaigns, among other items); H.R. 3208, 104th Cong. (1996) (including a bill to amend the Federal Election Campaign Act of 1971 to limit contributions and loans to candidates in elections for the House of Representatives, among other changes); H.R. 1427, 104th Cong. (1995) (proposing a bill to amend the Federal Election Campaign Act of 1971 to control House of Representatives campaign spending); S. 1219, 104th Cong. (1995) (including a bill to reform the financing of federal elections by limiting the spending and benefits in Senate elections, among other changes).

49. Cf. Jezer & Miller, *supra* note 48, at 492.

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<sup>53</sup>—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.

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erodes cattle producers' ability to provide for their families and remain an economically viable, productive member of society.

*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 "lead[ing] 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.<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup>

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*.<sup>57</sup> Under this principle, courts

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54. If properly structured, a branch with a judicial-type process also might have a "chance" of providing a principled decision-making process.

55. Cf. Neal Devins, *The Countermajoritarian Paradox*, 93 MICH. L. REV. 1433, 1446 (1995) (book review) (noting that the Supreme Court has been criticized for allowing politics to permeate its abortion jurisprudence).

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).

57. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112-13, 149-52, 158-69 (1921).

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.<sup>58</sup> 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.<sup>59</sup> Additionally, because of constitutional and prudential concerns, federal courts generally limit their decisions to the facts of the case that is before them.<sup>60</sup> Finally, as James Madison explained, the courts act as "independent tribunals of justice"<sup>61</sup> and will, because of the constitutional protections for property and other rights, "consider themselves in a peculiar manner the guardians of those rights."<sup>62</sup> 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.<sup>63</sup>

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

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58. See *id.* For an introduction to the debate over the meaning of "rule of law," see William W. Buzbee, *Remembering Repose: Voluntary Contamination Cleanup Approvals, Incentives, and the Costs of Interminable Liability*, 80 MINN. L. REV. 35, 97-98 (1995).

59. *Lucas*, 505 U.S. at 1062 (Stevens, J., dissenting); *Liverpool, N.Y. & Phila. Steamship Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885).

60. See U.S. CONST. art. III, § 2 (case or controversy requirement); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-41 (1937); 13 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* §§ 3502, 3529 (2d ed. 1984 & Supp. 1996).

61. 1 ANNALS OF CONG. 439 (Washington, Gales & Seaton 1834) (statement of Rep. Madison), reprinted in 12 THE PAPERS OF JAMES MADISON 197, 207 (Charles F. Hobson et al. eds., 1979).

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<sup>64</sup>—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.<sup>65</sup> 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

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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.<sup>66</sup>

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.<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup> A second key assumption is that the decisionmaker is a rational actor and therefore evaluates options based on rational expectations.<sup>70</sup> 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.<sup>71</sup> That is, the decisionmaker will make choices so as to maximize his or her net expected utility.<sup>72</sup>

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66. Cf. Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 33-38 (1984) (discussing the "Court's attention to marginal analysis").

67. See generally WALTER NICHOLSON, MICROECONOMIC THEORY 75-96, 103-21 (4th ed. 1989) (discussing the notion of utility, assumptions of rationality, and the theory of utility maximization); Mark J. Machina, *Choice Under Uncertainty: Problems Solved and Unsolved*, in VALUING HEALTH RISKS, COSTS, AND BENEFITS FOR ENVIRONMENTAL DECISION MAKING 134 (P. Brett Hammond & Rob Coppock eds., 1990) (discussing conventional expected utility theory and challenges to that theory); George A. Quattrone & Amos Tversky, *Contrasting Rational and Psychological Analyses of Political Choice*, 82 AM. POL. SCI. REV. 719 (1988) (contrasting the expected utility model of rational choice theory with the prospect theory model of psychological analysis).

68. See Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747, 750 (1990).

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.

70. See EDWIN MANSFIELD, ECONOMICS 423-24 (7th ed. 1992).

71. See NICHOLSON, *supra* note 67, at 78; Noll & Krier, *supra* note 68, at 750-51.

72. See Quattrone & Tversky, *supra* note 67, at 719; Robert E. Scott, *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

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.<sup>73</sup> Under conventional decision-making theory, this result would occur if the decisionmaker were risk averse and lowered the expected value<sup>74</sup> from the land-use option to reflect the decisionmaker's risk aversion.<sup>75</sup> This adjustment, in turn, could cause the deci-

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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.<sup>76</sup>

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,<sup>77</sup> the fact is that the amount of undeveloped land held by private parties continues to decline.<sup>78</sup> Further, because most privately owned land is subject to some sort of environmental or land-use regulation restricting development,<sup>79</sup> landowners

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*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).

76. See KENNETH R. MACCRIMMON & DONALD A. WEHRUNG, TAKING RISKS 12-13 (1986).

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.

78. From 1982 to 1992, the amount of developed, nonfederal land increased by about 26%. See 1995 CENSUS, *supra* note 39, at 228; BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1990, at 198 (110th ed. 1990); see also STATISTICAL RECORD OF THE ENVIRONMENT 198-202 (Charity Anne Dorgan ed., 3d ed. 1995) (providing additional statistics on land cover and use).

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.<sup>80</sup>

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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.<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup>

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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,<sup>84</sup> 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.<sup>85</sup> Although heuristics can be useful in eval-

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protect their land-use expectations provide evidence of this resistance. The dispute in *Preseault v. United States*, 66 F.3d 1167 (Fed. Cir.) (full opinion available at Nos. 93-5067, 93-5068, 1995 WL 544703 (Fed. Cir. Sept. 14, 1995)), *withdrawn and vacated*, 66 F.3d 1190 (Fed. Cir. 1995), *rev'd en banc*, 100 F.3d 1525 (Fed. Cir. 1996), demonstrates how lengthy this process can be. That dispute began shortly after the state of Vermont leased a railroad right-of-way to the City of Burlington for use as a pedestrian and bike trail in 1985. *See Preseault*, 1995 WL 544703, at \*4. The prior lessee, a railroad, stopped operation in 1970 and tore up the track in 1975. *See id.* After the landowners petitioned the Interstate Commerce Commission (ICC) for a certificate of abandonment, the ICC retroactively approved a request by the state to discontinue, as opposed to abandon, rail service and permit use as a trail under the National Trails Act Amendments. *See id.* Now on its second trip through the courts, *see id.* at \*5, the litigation has taken a tortuous path. In September 1995, the United States Court of Appeals for the Federal Circuit concluded that federal transportation law needed to be considered in defining the landowners' interest in the railroad right-of-way over their property. *See id.* at \*13. Because federal transportation law allowed the ICC to authorize discontinuance and to encourage other public purposes, the court concluded that any interests that the landowners had in the right-of-way had not ripened into possessory rights and that therefore no taking had occurred. *See id.* at \*19. A few months later, the court's opinion was withdrawn and its judgment was vacated because a rehearing *en banc* was granted. *See Preseault*, 66 F.3d at 1190. In November 1996, after the rehearing *en banc*, the Federal Circuit reversed the three-judge panel ruling and held that the railroad right-of-way was never more than an easement, that the easement for railroad operations did not include use for public recreational trails, and that conversion of the abandoned easement to other uses constituted a taking of the landowners' property. *See Presault*, 100 F.3d at 1530, 1537, 1542, 1550-51.

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.

85. Heuristics are judgmental rules that "reduce the complex tasks of assessing probabilities and predicting values [of uncertain events] to simpler judgmental operations." Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3 (Daniel Kahneman et al. eds., 1982) [hereinafter HEURISTICS AND BIASES].

Unlike economic decision-making theory, which has been dominated for decades by

uating options and outcomes, they also can lead to "severe and systematic errors."<sup>86</sup> 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-

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the theory of expected utility, the field of cognitive decision-making research is filled with a variety of approaches and hypotheses. See Scott, *supra* 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, *supra* 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. THALER, *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.<sup>87</sup>

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,<sup>88</sup> to the particular situation that the decisionmaker faced,<sup>89</sup> 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.

heuristic involved.<sup>90</sup> The heuristic could, for example, involve a landowner's belief that constitutionally protected property includes the right to make a profit<sup>91</sup> and that government action that prevents a return on any recognized property interest or that causes a diminution in value constitutes a taking.<sup>92</sup> 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.<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup> A more generalized decision-making process, like

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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.<sup>96</sup>

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.<sup>97</sup> The mini-

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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.

munum level of protection provided by the clause should not be defined through the democratic process. Though that process now appears to protect property owners,<sup>98</sup> the political process fairness 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 governments<sup>99</sup> or if campaign spending rules are changed to alter the incentives placed on legislators.<sup>100</sup> 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;<sup>101</sup> part of that protection includes the regulatory takings doctrine.

Furthermore, although legislators could decide to improve judicial regulatory takings standards or to increase the level of takings protection accorded property owners beyond the constitutional minimum, these initiatives still would not eliminate the need for judicial resolution of regulatory takings issues.<sup>102</sup> 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.<sup>103</sup> To the extent that a legislative initiative increased the protection set by judicial takings standards, the initiative would be making fundamental 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 necessity, more generalized standards—the initiative would risk inherent 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-

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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 legislative 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.<sup>104</sup>

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.<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup> The proposed congressional bills also would encourage landowners to pursue the most environmentally destructive land uses and would have significant fiscal implications.<sup>108</sup>

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(statement of Joseph L. Sax, Counselor to the Secretary and Deputy Assistant Secretary for Policy, U.S. Department of the Interior) [hereinafter Sax Statement]; Schmidt Statement, *supra* note 104, at 66-68.

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.<sup>109</sup> 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.<sup>110</sup> 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.<sup>111</sup>

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.<sup>112</sup> 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 legitimize the development of rules in an area as complex as environmental law.<sup>113</sup>

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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).

113. Edward Keynes, in his 1996 book *Liberty, Property, and Privacy*, argued

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.<sup>114</sup> 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."<sup>115</sup> Empirical and theoretical evidence offered by these scholars supports classifying property owners as such a group.<sup>116</sup> Additionally, the demoralizing psychological effect of takings on victims,<sup>117</sup> 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.<sup>118</sup> 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 Levmore, *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.<sup>119</sup>

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.<sup>120</sup> 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.<sup>121</sup> 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.<sup>122</sup>

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119. See S. 605, 104th Cong. § 204(a)(2)(B)-(D) (1995).

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).

121. See *supra* notes 20-22 and accompanying text.

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,<sup>123</sup> 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<sup>124</sup> and its accompanying guidelines, allow the elected leadership to influence the goals and priorities of federal agencies at the administrative level.<sup>125</sup> 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.<sup>126</sup> 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.

124. 3 C.F.R. 554 (1989), reprinted in 5 U.S.C. § 601 (1994).

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 Env'tl. L. Rep. (Env'tl. 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,<sup>127</sup> 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."<sup>128</sup> 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.<sup>129</sup> 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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*prudence or Political Philosophy?*, 18 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,474 (Nov. 1988); Robin E. Folsom, Comment, *Executive Order 12,630: A President's Manipulation of the Fifth Amendment's Just Compensation Clause to Achieve Control over Executive Agency Regulatory Decisionmaking*, 20 *B.C. ENVTL. AFF. L. REV.* 639 (1993).

127. See, e.g., *Dole v. United Steelworkers*, 494 U.S. 26, 32-40 (1990) (concluding that the Office of Management and Budget (OMB) lacked authority to block the Occupational Safety and Health Administration's (OSHA's) rule requiring businesses to disclose critical health and safety information directly to third parties); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 41-43 (1983) (deciding that revocation of an agency regulation cannot occur without "reasoned analysis" and "satisfactory explanation"); *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 506-13 (1981) (upholding OSHA's cotton dust regulation because Congress required the agency to protect workers to the greatest extent feasible without conducting cost-benefit analysis); cf. *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566, 571 (D.D.C. 1986) (concluding that OMB did not have the authority to delay promulgation of its regulations beyond its statutorily imposed deadlines).

128. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 865-66 (1984); see generally LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 106-10 (3d ed. 1991) (discussing the authority of the executive branch to use executive orders).

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.<sup>130</sup> 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.<sup>131</sup> 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.<sup>132</sup>

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.<sup>133</sup> To achieve this

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130. See Exec. Order No. 12,630, *supra* note 124, § 5(e)(2); Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings (issued June 30, 1988) (unpublished document) (on file with author) [hereinafter Attorney General's Guidelines]; Attorney General's Supplemental Guidelines to Evaluate the Risk and Avoid Unanticipated Takings for the U.S. Department of the Interior (issued Mar. 29, 1989) (unpublished document) (on file with author) [hereinafter Attorney General's Supplemental Guidelines for Interior]; Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings: Environmental Protection Agency (issued Jan. 14, 1993) (unpublished document) (on file with author) [hereinafter Attorney General's Supplemental Guidelines for EPA].

131. See Attorney General's Guidelines, *supra* note 130, at 20-26 & app.; Attorney General's Supplemental Guidelines for Interior, *supra* note 130, at 2-14 & apps. I, II; Attorney General's Supplemental Guidelines for EPA, *supra* note 130, at 3-6, 12-13; Division of Endangered Species, Fish & Wildlife Service, United States Department of the Interior, *Protecting America's Living Heritage: A Fair, Cooperative and Scientifically Sound Approach to Improving the Endangered Species Act* 1-3, 5-9 (Mar. 6, 1995) (unpublished document) (on file with author) [hereinafter FWS Cooperative Approach to ESA].

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 departments and agencies<sup>134</sup> 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."<sup>135</sup> In notices of proposed rulemaking and messages transmitting legislative proposals to Congress, executive departments and agencies also should identify and discuss "[s]ignificant takings implications."<sup>136</sup> 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"<sup>137</sup> and to submit annually an itemized compilation of takings awards entered against the United States.<sup>138</sup>

The potentially broad scope of the order is seen in its provisions 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 dedications by or exactions from private property owners.<sup>139</sup> Further, in addition to adhering to some general principles guiding

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*supra* note 124, § 1(b).

134. For further discussion of federal departments and agencies affected by the Executive Order, see Attorney General's Guidelines, *supra* note 130, at 8-9.

135. Exec. Order No. 12,630, *supra* note 124, § 5(b).

136. *Id.*

137. *Id.* § 5(c).

138. *See id.* § 5(d).

139. *Id.* § 2(a).

The phrase "[p]olicies that have takings implications" does not include[:]

(1) [a]ctions . . . that lessen [] interference with the use of private property; (2) [a]ctions [relating] to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations; (3) [l]aw enforcement actions involving seizure . . . of property for forfeiture or as evidence in criminal proceedings; (4) [s]tudies or similar efforts or planning activities; (5) [c]ommunications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property . . . ; (6) [t]he placement of military facilities or military activities involving the use of Federal property alone; or (7) any military or foreign affairs functions . . . but not including the U.S. Army Corps of Engineers civil works program.

*Id.* § 2(a)(1)-(7). For further discussion of the scope of the Executive Order, see Attorney General's Guidelines, *supra* note 130, at 4-9.

the formulation or implementation of policies that have takings implications,<sup>140</sup> 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.<sup>141</sup> Two key criteria include the requirement that the action "[s]ubstantially advance" the appropriate public purpose<sup>142</sup> 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.<sup>143</sup> 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.<sup>144</sup>

Although a takings implication assessment (TIA)<sup>145</sup> is classified as "internal" under the Executive Order<sup>146</sup> and the accompanying Attorney General's Guidelines,<sup>147</sup> and therefore is generally not published or made available to the public,<sup>148</sup> 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<sup>149</sup> 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

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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,<sup>150</sup> the agency actions cover a wide range of topics, including, among others, onshore and offshore oil and gas exploration,<sup>151</sup> use of public lands,<sup>152</sup> timber sales,<sup>153</sup> wild free-roaming horses and burros,<sup>154</sup> financial guarantee policies,<sup>155</sup> patent rights,<sup>156</sup> testing procedures for certain appliances,<sup>157</sup> designation of marine sanctuaries,<sup>158</sup>

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

151. See Onshore Oil and Gas Operations; Federal and Indian Oil and Gas Leases; Onshore Oil and Gas Order No. 8; Well Completions/Workovers/Abandonments, 56 Fed. Reg. 20,568 (1991) (codified at 43 C.F.R. pt. 3160 (1995)); Oil and Gas and Sulphur Operations in the Outer Continental Shelf, 55 Fed. Reg. 8485 (1990) (codified at 30 C.F.R. pt. 250 (1995)); Cordell Bank National Marine Sanctuary Regulations, 54 Fed. Reg. 52,342 (1989) (to be codified at 15 C.F.R. pt. 942).

152. See Permits, Leases and Trespass on Land Use Authorizations, 55 Fed. Reg. 48,810 (codified at 43 C.F.R. pts. 2920 & 9230); Grazing Administration Exclusive of Alaska, 54 Fed. Reg. 31,484 (codified at 43 C.F.R. pt. 4100); Land Uses; Wilderness, 53 Fed. Reg. 37,795 (1988) (codified in final form at 36 C.F.R. pts. 251 & 293 (1996)) (proposed Sept. 28, 1988).

153. See, e.g., Sales Administration: Contract Modification-Extension-Assignment, 56 Fed. Reg. 28,850 (codified at 43 C.F.R. pts. 5460 & 5470); Sale and Disposal of National Forest System Timber; Administration of Timber, Export and Substitution Restrictions, 56 Fed. Reg. 3354 (codified at 36 C.F.R. pts. 223 & 261); Sales of Forest Products; General, and Conduct of Sales, 55 Fed. Reg. 22,916 (codified at 43 C.F.R. pts. 5400 & 5440).

154. See Protection, Management, and Control of Wild Free-Roaming Horses and Burros; Prohibited Acts, Administrative Remedies, and Penalties; Administrative Remedies, 56 Fed. Reg. 30,372 (codified at 43 C.F.R. § 4770); Protection, Management, and Control of Wild Free-Roaming Horses and Burros; Prohibited Acts, Administrative Remedies, and Penalties; Administrative Remedies, 56 Fed. Reg. 786 (codified at 43 C.F.R. § 4770); Protection, Management, and Control of Wild Free-Roaming Horses and Burros; Private Maintenance; Supporting Information and Certification for Private Maintenance of More Than 4 Wild Horses or Burros, 55 Fed. Reg. 39,151 (codified at 43 C.F.R. § 4750); Protection, Management, and Control of Wild Free-Roaming Horses and Burros; Supporting Information and Certification for Private Maintenance of More Than 4 Wild Horses or Burros, 55 Fed. Reg. 3989 (codified at 43 C.F.R. pt. 4700).

155. See Mining Claims Under the General Mining Laws; Surface Management, 56 Fed. Reg. 31,602 (codified at 43 C.F.R. pt. 3800).

156. See Uniform Patent Policy for Domestic Rights in Inventions Made by Government Employees, 53 Fed. Reg. 39,734 (codified at 37 C.F.R. pt. 501 (1995)).

157. See Energy Conservation Program for Consumer Products; Test Procedures for Refrigerators, Refrigerator-Freezers and Freezers, 54 Fed. Reg. 36,238 (to be codified at 10 C.F.R. pt. 430); Energy Conservation Program for Consumer Products; Notice of Proposed Rulemaking and Public Hearing Regarding Test Procedures for Refrigerators, Refrigerator-Freezers and Freezers, 53 Fed. Reg. 37,416 (to be codified at 10 C.F.R. pt. 430) (proposed Sept. 26, 1988).

158. See, e.g., Stellwagen Bank National Marine Sanctuary Regulations, 56 Fed.

TABLE 1  
AGENCY ACTIONS ADDRESSING EXECUTIVE ORDER 12,630  
FOR MAR. 15, 1988 THROUGH DEC. 31, 1991

Dep't/Agency	# of Actions	Final Rules	Proposed Rules	Notice of Rulemaking	Interim Rules
DOC, NOAA, NOS, OCRM	12	2	5	5	0
DOC, Tech. Admin.	2	1	1	0	0
DOC, Travel & Tourism	2	1	0	1	0
DOC, Under Sec. for Econ. Affairs	1	1	0	0	0
DOD, Corps	4	2	1	1	0
DOE, Off. of Conserv. & Renewable Energy	5	3	0	2	0
DOI, Bureau of Indian Affairs	2	0	0	1	1
DOI, Bureau of Land Mgm't.	32	9	20	0	3
DOI, Fish & Wildlife Serv.	19	10	9	0	0
DOI, Minerals Mgm't. Serv.	39	21	16	2	0
DOI, National Park Serv.	7	2	5	0	0
DOI, Off. of Hearings & Appeals	4	1	3	0	0
DOI, Off. of Sec.	1	0	1	0	0
DOI, Off. of Surface Min. & Reclamation	3	1	2	0	0
DOI, DOI	1	1	0	0	0
DOT, Off. of Sec.	3	2	0	1	0
DOT, Res. & Special Programs	4	2	0	2	0
HSS, FDA	2	0	1	1	0
HUD, Off. of Sec.	1	1	0	0	0
USDA, Food Safety & Inspection Serv.	1	0	1	0	0
USDA, Forest Serv.	10	4	4	0	2
USDA, Off. of Sec.	1	1	0	0	0
<b>TOTALS</b>	<b>156</b>	<b>65</b>	<b>69</b>	<b>16</b>	<b>6</b>

**TABLE 2**  
**TYPE OF LANGUAGE USED IN**  
**AGENCY ACTIONS ADDRESSING EXECUTIVE ORDER 12,630**  
**FOR MAR. 15, 1988 THROUGH DEC. 31, 1991**

Dep't/Agency	# of Actions	Generic Language*	# Using Only Generic Language	# Using Special Explanation**
DOC, NOAA, NOS, OCRM	12	no takings	3	5 (see notes A-C)
		wouldn't have TI	3	
		no TIA prepared	1	
DOC, Tech. Admin.	2	no significant TI w/i meaning of EO	2	0
DOC, Travel & Tourism	2	no TI w/i meaning of EO	0	2 (see notes D & E)
DOC, Under Sec. for Econ. Affairs	1	no TI sufficient to require prep. of TIA	0	1 (see note F)
DOD, Corps of Engineers	4	doesn't require TIA b/c won't affect use/value	4	0
DOE, Off. Conserv. & Renewable Energy	5	no taking	0	4 (see notes G-I)
		has been reviewed	1	
DOI, Bureau of Indian Affairs	2	no TIA necessary; won't affect use/value	0	2 (see note J)
DOI, Bureau of Land Mgm't.	32	not a taking	30	1 (see note K)
		TIA not prepared	1	
DOI, Fish & Wildlife Serv.	19	no TI; no significant TI	5	2 (see notes L & M)
		no taking	11	
		no impacts subj. to EO	1	
DOI, Minerals Mgm't. Serv.	39	not capable of interference; TIA not prepared	31	8 (see notes N-S)
DOI, National Park Serv.	7	no TI under EO	1	4 (see notes T-W)
		not require TIA	2	
DOI, Off. of Hearings & Appeals	4	no TI requiring prep. of TIA	4	0
DOI, Off. of Sec.	1	would not cause a taking	0	1 (see note X)
DOI, Off. of Surface Min. & Reclamation	3	TIA prepared	2	0
		excluded from coverage	1	
DOI, DOI	1	no TI	1	0
DOT, Off. of Sec.	3	does not pose risk of taking of constitutionally protected prop.	3	0
DOT, Res. & Special Programs	4	same lang. as DOT, Off. of Sec.	4	0
HSS, FDA	2	will not interfere w/ use of prop.; no taking	0	2 (see notes Y & EE)
HUD, Off. of Sec.	1	no takings implications	0	1 (see note AA)
USDA, Food Safety & Inspection Serv.	1	has takings implications	0	1 (see note Z)
USDA, Forest Serv.	10	no risk of taking	3	4 (see notes K, BB-DD)
		no TI; no sign. TI	3	
USDA, Off. of Sec.	1	same lang. as DOT, Off. of Sec.	1	0
<b>TOTALS</b>	<b>156</b>	<b>N/A</b>	<b>118</b>	<b>38</b>

\*"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

Dep't/Agency	# of Actions	Generic Language				# & Type of Conclusion in Special Explanation Actions**
		# Cat. A*	# Cat. B	# Cat. C	Inconclusive	
DOC, NOAA, NOS, OCRM	12	3	3	1	0	4/ cat. A, 1/ inconcl.
DOC, Tech. Admin.	2	2	0	0	0	0
DOC, Travel & Tourism	2	0	0	0	0	2/ cat. A
DOC, Under Sec. for Econ. Affairs	1	0	0	0	0	1/ cat. A
DOD, Corps	4	0	0	4	0	0
DOE, Off. Conserv. & Renewable Energy	5	0	0	0	1	4/ cat. B
DOI, Bureau of Indian Affairs	2	0	0	0	0	2/ cat. C
DOI, Bureau of Land Mgm't.	32	0	30	1	0	1/ cat. C
DOI, Fish & Wildlife Serv.	19	5	11	1	0	1/ cat. A 1/ cat. B
DOI, Minerals Mgm't. Serv.	39	0	0	31	0	8/ cat. C
DOI, National Park Serv.	7	1	0	2	0	4/ cat. A
DOI, Off. of Hearings & Appeals	4	4	0	0	0	0
DOI, Off. of Sec.	1	0	0	0	0	1/ cat. B
DOI, Off. of Surface Min. & Reclamation	3	0	0	1	2	0
DOI, DOI	1	1	0	0	0	0
DOT, Off. of Sec.	3	0	3	0	0	0
DOT, Res. & Special Programs	4	0	4	0	0	0
HSS, FDA	2	0	0	0	0	2/ cat. B
HUD, Off. of Sec.	1	0	0	0	0	1/ cat. A -
USDA, Food Safety & Inspection Serv.	1	0	0	0	0	1 possible taking
USDA, Forest Serv.	10	3	3	0	0	2/ cat. A 1/ cat. B 1/ cat. C
USDA, Off. of Sec.	1	0	1	0	0	0
TOTALS	156	19	55	41	3	38

\* 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.<sup>159</sup> 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.<sup>160</sup>

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).<sup>161</sup> In almost seventy-five percent of the actions (115 out of 156), the agency typically used its own boilerplate or generic language<sup>162</sup> to conclude that one of the following existed: (A) the action did not raise significant or potential takings implications,<sup>163</sup> (B) the ac-

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Reg. 5282 (to be codified at 15 C.F.R. pt. 940); Monterey Bay National Marine Sanctuary Regulations, 55 Fed. Reg. 31,786 (to be codified at 15 C.F.R. pt. 944); Flower Garden Banks National Marine Sanctuary Regulations, 54 Fed. Reg. 7953 (to be codified at 15 C.F.R. pt. 943).

159. See Food Labeling; Declaration of Ingredients; Common or Usual Name for Nonstandardized Foods; Diluted Juice Beverages, 56 Fed. Reg. 30,452 (codified in final form at 21 C.F.R. pts. 101 & 102 (1996)).

160. See Attorney General's Supplemental Guidelines for EPA, *supra* note 130, at 2-3, 6-11. In addition to the exclusions identified in the Executive Order and the Attorney General's Guidelines, the Supplemental Guidelines for EPA provide numerous categorical exclusions for policies and actions that the courts have concluded "create no risk of takings liability." *Id.* at 2. These include EPA actions taken under a number of environmental statutes. See *id.* at 8-10.

161. See *supra* p. 788 tbl.3.

162. The Attorney General's Guidelines allow each agency to determine the form and manner of the takings implications assessments, as well as the ways in which the obligations imposed by the takings Executive Order are to be integrated into agency decision making. See Attorney General's Guidelines, *supra* note 130, at 3, 21, 23 & app. at 1. For a definition of "generic language," see *supra* p. 787 tbl.2.

163. Some of the actions put in category A stated that the action raised no significant takings implications and therefore that no TIA was prepared. These actions were put in category A, instead of category C, because the main focus of my review of the agency actions was whether the agency reached a conclusion about takings risks or implications in response to Executive Order 12,630. Thus, the key factor distinguishing categories A and C is that the actions in category A clearly indicated that the agency affirmatively found no significant or potential takings implications. For more information about the generic language typically used to state

tion did not pose a takings risk,<sup>164</sup> or (C) the action did not require a TIA.<sup>165</sup> 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.<sup>166</sup> Only a few indicated that a TIA had been done, but even those then stated that the TIA revealed no significant takings.<sup>167</sup> 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.

167. See, e.g., Federal Lands Program; Areas Unsuitable for Mining; Areas Designated by Act of Congress; Requirements for Coal Exploration, 56 Fed. Reg. 33,152, 33,163 (1991) (to be codified at 30 C.F.R. pts. 740, 761 & 772) (proposed July 18, 1991); Regulations for the Management of Cabins on National Wildlife Refuges in Alaska, 56 Fed. Reg. 19,074, 19,075 (codified at 50 C.F.R. pt. 36 (1995)); Areas Unsuitable for Mining, Areas Designated by Act of Congress; Applicability of the Prohibitions of the Surface Mining Act to the Surface Impacts of Underground Coal Mining, 53 Fed. Reg. 52,374, 52,383 (1988) (codified at 30 C.F.R. pt. 761 (1996)).

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;<sup>168</sup> subsequent actions relating to this "possible taking" action, however, ignore the takings Executive Order altogether.<sup>169</sup> 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.<sup>170</sup> For the most part, even the specialized explanations were concise, usually consisting only of a few sentences, though a few contained several paragraphs.<sup>171</sup> Four of these published actions, for instance, explained that the relevant action would not have a severe enough effect to deny economically viable use,<sup>172</sup> and one of the

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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.*

169. See Nutrition Labeling of Meat and Poultry Products; Codification; Correction, 60 Fed. Reg. 10,304 (1995) (codified at 9 C.F.R. pts. 317 & 381); Nutrition Labeling of Meat and Poultry Products, 59 Fed. Reg. 30,875 (1994) (codified at 9 C.F.R. pts. 317 & 381) (notice of extension of compliance date); Nutrition Labeling of Meat and Poultry Products, 58 Fed. Reg. 632 (1993) (codified at 9 C.F.R. pts. 317, 320 & 381); Intended Implementation Date of Rulemaking for Nutrition Labeling of Meat and Poultry Products, 57 Fed. Reg. 10,298 (1992); Nutrition Labeling of Meat and Poultry Products, 57 Fed. Reg. 10,298 (codified in final form at 9 C.F.R. pts. 317, 320 & 381).

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.<sup>173</sup> A number of the published actions containing specialized explanations stressed that the particular agency action at issue either would enhance existing rights and interests<sup>174</sup> or would not affect them.<sup>175</sup> 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.<sup>176</sup> 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.<sup>177</sup>

Because the TIA process is intended to be internal<sup>178</sup> and

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Fed. Reg. 11,116, 11,119 (to be codified at 15 C.F.R. pt. 1201) (proposed Mar. 15, 1991); Stellwagen Bank National Marine Sanctuary Regulations, 56 Fed. Reg. 5282, 5289 (to be codified at 15 C.F.R. pt. 940); Monterey Bay National Marine Sanctuary Regulations, 55 Fed. Reg. 31,786, 31,793 (to be codified at 15 C.F.R. pt. 944); Flower Garden Banks National Marine Sanctuary Regulations, 54 Fed. Reg. 7953, 7957 (1989) (to be codified at 15 C.F.R. pt. 943).

173. See Monterey Bay National Marine Sanctuary Regulations, 55 Fed. Reg. 31,786, 31,793 (to be codified at 15 C.F.R. pt. 944).

174. See, e.g., 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); Marine Mammals; Incidental Take During Specified Activities, 56 Fed. Reg. 7645, 7654 (to be codified at 50 C.F.R. pt. 18) (proposed Feb. 25, 1991).

175. See Concession Contracts and Permits, 56 Fed. Reg. 41,894, 41,896 (codified in final form at 36 C.F.R. pt. 51 (1996)); Food Labeling; Declaration of Ingredients; Common or Unusual Name for Nonstandardized Foods; Diluted Juice Beverages, 56 Fed. Reg. 30,452, 30,464 (codified in final form at 21 C.F.R. pts. 101 & 102 (1996)); 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); Coal Product Valuation, 55 Fed. Reg. 35,427, 35,433 (codified at 30 C.F.R. pt. 206 (1996)); Charges for Goods and Services Provided to Non-Federal Users, 55 Fed. Reg. 19,637, 19,637 (codified at 25 C.F.R. pt. 143 (1996)); Land Uses; Wilderness, 53 Fed. Reg. 37,795, 37,796 (1988) (codified in final form at 36 C.F.R. pts. 251 & 293) (proposed Sept. 28, 1988).

176. For critiques of Executive Order 12,630, see Jackson & Albaugh, *supra* note 126; McElfish, *supra* note 126; and Folsom, *supra* note 126.

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).

178. See *supra* notes 146-47 and accompanying text.

does not require the preparation of lengthy documents,<sup>179</sup> 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.<sup>180</sup> 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<sup>181</sup> and disclosed in response to a Freedom of Information Act request,<sup>182</sup> the compilations reveal that no regulatory takings awards were made against the government in those years.<sup>183</sup> 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."<sup>184</sup> Thus, at least for

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179. See Attorney General's Supplemental Guidelines for Interior, *supra* note 130, at 3.

180. See *supra* notes 161-70 and accompanying text.

181. See Exec. Order No. 12,630, *supra* note 124, § 5(c).

182. See McElfish, *supra* note 126, at 10,478.

183. See *id.*

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.<sup>185</sup>

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.<sup>186</sup> 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,<sup>187</sup> in particular on designated agency officials who generally are not the agency program personnel drafting the action.<sup>188</sup> In addition, the general guidelines developed by the Attorney General, as well as the more specific guidelines developed for particular departments, provide for numerous

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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).

185. McElfish, *supra* note 126, at 10,478.

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.

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").

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).

exclusions.<sup>189</sup> Finally, the guidelines tend to limit the TIA process to facial challenges because of the absence of actual factual settings.<sup>190</sup>

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"<sup>191</sup> and examining the economic impact of the action on the "property interest involved"<sup>192</sup> and "each property interest recognized by the applicable law."<sup>193</sup> The Guidelines also take an expansive view of regulatory takings, interpreting some Supreme Court cases more broadly than may be necessary.<sup>194</sup> The Guidelines therefore err on the side of property rights in defining regulatory takings.<sup>195</sup>

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-

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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).

191. Attorney General's Guidelines, *supra* note 130, at 9.

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*,<sup>196</sup> 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.<sup>197</sup> A second decision, *Dolan v. City of Tigard*,<sup>198</sup> 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.<sup>199</sup> 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.<sup>200</sup> First developed by the Court in *Pennsylvania Coal Co. v. Mahon*,<sup>201</sup> 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.<sup>202</sup> 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."<sup>203</sup> 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"<sup>204</sup> in order to secure the "average reciprocity of advantage."<sup>205</sup> 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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196. 505 U.S. 1003 (1992).

197. *See id.* at 1015-19.

198. 512 U.S. 374 (1994).

199. *See id.* at 386, 391 & n.8.

200. *See Lucas*, 505 U.S. at 1015-19.

201. 260 U.S. 393 (1922).

202. *See Lucas*, 505 U.S. at 1014-15.

203. *Id.* at 1017.

204. *Id.* (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

205. *Id.* at 1018 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

uations.<sup>206</sup> 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.”<sup>207</sup>

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,<sup>208</sup> 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.<sup>209</sup> According to Justice Scalia, the answer may be found:

[I]n 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.<sup>210</sup>

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”<sup>211</sup> 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.”<sup>212</sup> 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."<sup>213</sup>

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.<sup>214</sup> 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."<sup>215</sup> 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.<sup>216</sup> 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.<sup>217</sup> 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."<sup>218</sup> Further, these background principles must be based on "an *objectively reasonable application* of relevant precedents."<sup>219</sup> 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.<sup>220</sup> Judicial opinions that

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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.

216. *See Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 643-44 (1993); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497-502 (1987); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978).

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.<sup>221</sup> Furthermore, the Court's burden "alters the long-settled rules of review,"<sup>222</sup> particularly the presumption of legislative validity.<sup>223</sup> Thus, when considered in light of the Court's suggestion that the regulated portion may be the appropriate property benchmark,<sup>224</sup> the Court's disagreement with some of its prior takings cases,<sup>225</sup> and the Court's limited view of the qualifications to the per se rule,<sup>226</sup> 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*,<sup>227</sup> 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.<sup>228</sup> 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]."<sup>229</sup> Under the second prong, the Court must, after determining that the essential nexus test is met, decide whether the "required degree of connection"<sup>230</sup>—a "rough proportionality"<sup>231</sup>—exists "between the exactions and the projected impact of the proposed development."<sup>232</sup> Although the Court pointed out that this standard did not require a "precise mathematical calculation,"<sup>233</sup> the Court then stressed that

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tional power to revise the law governing the rights and uses of property.").

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.

227. 512 U.S. 374 (1994).

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 [restriction] is related both in nature and extent to the impact of the proposed development."<sup>234</sup> 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 involving an adjudicative decision affecting a particular property owner, as opposed to land-use cases involving generally applicable regulations.<sup>235</sup>

After *Lucas* and *Dolan*, agency officials conducting takings implications assessments of proposed agency actions are more likely to undervalue the public interest supporting more stringent regulation of private property and the probability that more stringent regulatory options would prevail under the Takings Clause.<sup>236</sup> This discounting might be seen in decisions to withdraw proposed agency actions, in the adoption of less stringent regulatory options, or in the more favorable application of agency rules and regulations to property owners.<sup>237</sup> Though the takings Executive Order provides the formal vehicle for consideration of takings implications,<sup>238</sup> judicial decisions are providing

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234. *Id.* (footnote omitted).

235. See *id.* at n.8. In his dissenting opinion, Justice Stevens described the majority as making a "serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly 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." Attorney General's Guidelines, *supra* note 130, at 2. 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 after 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 Cooperative 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.<sup>239</sup>

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<sup>240</sup> and have incorporated consideration of takings implications into their administrative process.<sup>241</sup> 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.<sup>242</sup> 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.<sup>243</sup> 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.<sup>244</sup> The Executive Order, in other words, provides a number of opportunities for political manipulation.<sup>245</sup> Thus, the processes available to the executive branch

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239. See *supra* notes 196-236 and accompanying text.

240. See *supra* note 195.

241. See McElfish, *supra* note 126, at 10,475 (discussing the agencies' implementation of the TIA requirements).

242. See *supra* notes 125-29 and accompanying text.

243. Cf. SHANLEY, *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).

244. See *id.* at 83 ("[Executive orders] are . . . amended or sometimes revoked by succeeding presidents of different partisan or ideological outlook.").

245. The definitions, standards, exclusions, TIA process, and degree of agency

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,<sup>246</sup> the role of the majoritarian political process in resolving

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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,<sup>247</sup> the value of ad hoc determinations of takings,<sup>248</sup> and the need for resolving debates over theory or principle.<sup>249</sup> 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*,<sup>250</sup> 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.<sup>251</sup> 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-

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*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.

249. See Kmiec, *supra* note 246, at 995; James E. Krier, *The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143 (1997); Sagoff, *supra* note 10, at 825.

250. 38 WM. & MARY L. REV. 825 (1997).

251. *Id.* at 845.

mine its overall direction."<sup>252</sup> 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.<sup>253</sup> For these reasons, Dr. Sagoff believes that "[a] clear theory of regulatory takings is not needed."<sup>254</sup>

Doug Kmiec, in his article *Inserting the Last Remaining Pieces into the Takings Puzzle*,<sup>255</sup> 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."<sup>256</sup> Professor Kmiec has no problem making this distinction because of what he describes as the "objective, natural law basis of common law property rights."<sup>257</sup> 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."<sup>258</sup> 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*,<sup>259</sup> 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).

255. 38 WM. & MARY L. REV. 995 (1997).

256. *Id.* at 997.

257. *Id.* at 998 (footnote omitted).

258. *Id.* at 998-99 (footnote omitted).

259. 38 WM. & MARY L. REV. 1047 (1997).

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."<sup>260</sup> 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 . . . ." <sup>261</sup>

In his essay *Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases*,<sup>262</sup> 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."<sup>263</sup> 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."<sup>264</sup> 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.<sup>265</sup> 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.<sup>266</sup> 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*,<sup>267</sup> 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.”<sup>268</sup> 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*,<sup>269</sup> 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.”<sup>270</sup> Ignoring this regulatory takings problem would be a serious political mistake because it would make more attractive the overly

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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*,<sup>271</sup> 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.

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271. 38 WM. & MARY L. REV. 1177 (1997).



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.<sup>1</sup>

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.<sup>2</sup>

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

1. Style Guide, Regional Fishery Management Councils, Other Applicable Law, Guidelines for Council Operations and Administration, 54 Fed. Reg. 1700, 1711 (1989) (to be codified at 50 C.F.R. pts. 600, 601, 604 & 605).

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.<sup>3</sup>

## 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.<sup>4</sup>

## NOTE E

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

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5289 (1991) (to be codified at 15 C.F.R. pt. 940); *accord* Flower Garden Banks National Marine Sanctuary Regulations, 54 Fed. Reg. 7953, 7957 (to be codified at 15 C.F.R. pt. 943).

3. Olympic Coast National Marine Sanctuary Regulations, 56 Fed. Reg. 47,836, 47,843 (to be codified at 15 C.F.R. pt. 925); *accord* Monterey Bay National Marine Sanctuary Regulations, 55 Fed. Reg. 31,786, 31,793 (1990) (to be codified at 15 C.F.R. pt. 944).

4. United States Travel and Tourism Administration Facilitation Fee, 56 Fed. Reg. 176, 179 (to be codified at 15 C.F.R. pt. 1201).

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.<sup>5</sup>

#### 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.<sup>6</sup>

#### 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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5. United States Travel and Tourism Administration Facilitation Fee, 56 Fed. Reg. 11,116, 11,119 (to be codified at 15 C.F.R. pt. 1201) (proposed Mar. 15, 1991).

6. Uniform Patent Policy for Domestic Rights in Inventions Made by Government Employees, 53 Fed. Reg. 39,734, 39,735 (1988) (codified at 37 C.F.R. pt. 501 (1995)).

ing. 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.<sup>7</sup>

#### 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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7. Energy Conservation Program for Consumer Products; Test Procedures for Refrigerators, Refrigeration-Freezers and Freezers, 54 Fed. Reg. 36,238, 36,239-40 (to be codified at 10 C.F.R. pt. 430); *accord* Energy Conservation Program for Consumer Products; Notice of Proposed Rulemaking and Public Hearing Regarding Test Procedures for Refrigerators, Refrigerator-Freezers, and Freezers, 53 Fed. Reg. 37,416, 37,420 (to be codified at 10 C.F.R. pt. 430) (proposed Sept. 26, 1988).

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.<sup>8</sup>

#### 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.

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8. Energy Conservation Program for Consumer Products: Final Rulemaking Regarding Regulations Related to Energy Conservation Standards for Consumer Products, 54 Fed. Reg. 6062, 6073-74 (to be codified at 10 C.F.R. pt. 430).

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.<sup>9</sup>

#### 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.<sup>10</sup>

#### 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.<sup>11</sup>

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9. Energy Conservation Program for Consumer Products; Test Procedures for Fluorescent Lamp Ballasts, 55 Fed. Reg. 7719, 7723 (1990) (to be codified at 10 C.F.R. pt. 430) (proposed Mar. 5, 1990).

10. Charges for Goods and Services Provided to Non-Federal Users, 55 Fed. Reg. 19,637, 19,637 (codified at 25 C.F.R. pt. 143 (1996)); *accord* Charges for Goods and Services Provided to Non-Federal Users, 55 Fed. Reg. 19,620, 19,621 (codified at 25 C.F.R. pt. 143).

11. Exchanges—General Procedures, 56 Fed. Reg. 49,962, 49,968 (1991) (to be codified at 43 C.F.R. pts. 2090 & 2200) (proposed Oct. 2, 1991); *accord* Land Exchanges, 56 Fed. Reg. 49,948, 49,954 (to be codified at 36 C.F.R. pt. 254) (proposed Oct. 2, 1991).

## 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.<sup>12</sup>

## 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-

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12. Marine Mammals; Incidental Take During Specified Activities, 56 Fed. Reg. 7645, 7654 (to be codified at 50 C.F.R. pt. 18) (proposed Feb. 25, 1991).

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.<sup>13</sup>

#### 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."<sup>14</sup>

#### 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."<sup>15</sup>

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13. Marine Mammals; Incidental Take During Specified Activities, 56 Fed. Reg. 27,443, 27,462 (to be codified at 50 C.F.R. pt. 18).

14. Coal Product Valuation, 55 Fed. Reg. 35,427, 35,433 (codified at 30 C.F.R. pt. 206 (1996)); *accord* Revision of Coal Product Valuation Regulations, 55 Fed. Reg. 5024, 5028 (to be codified at 30 C.F.R. pt. 206).

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."<sup>16</sup>

## 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."<sup>17</sup>

## 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."<sup>18</sup>

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ments, 55 Fed. Reg. 32,448, 32,449 (to be codified at 30 C.F.R. pt. 228) (proposed Aug. 9, 1990).

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).

17. Serving of Official Correspondence Issued By the Royalty Management Program, 56 Fed. Reg. 5946, 5949 (to be codified at 30 C.F.R. pt. 243).

18. Outer Continental Shelf Oil and Gas Leasing, 56 Fed. Reg. 23,647, 23,647-48 (to be codified at 30 C.F.R. pt. 260).

## 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."<sup>19</sup>

## 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.<sup>20</sup>

## 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.<sup>21</sup>

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19. Amendment of Valuation Benchmarks in Gas Regulations, 56 Fed. Reg. 64,724, 64,726 (to be codified at 30 C.F.R. pt. 206) (proposed Dec. 12, 1991).

20. Sequoia and Kings Canyon National Parks; Fishing Regulations, 55 Fed. Reg. 45,619, 45,620 (to be codified at 36 C.F.R. pt. 7) (proposed Oct. 30, 1990).

21. Concession Contracts and Permits, 56 Fed. Reg. 41,894, 41,896 (codified in final form at 36 C.F.R. pt. 51 (1996)).

## 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.<sup>22</sup>

## 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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22. Fire Island National Seashore, New York; Federal Zoning Regulations, 56 Fed. Reg. 42,788, 42,790 (to be codified at 36 C.F.R. pt. 28).

erty 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.<sup>23</sup>

#### 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.<sup>24</sup>

#### 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.<sup>25</sup>

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23. National Natural Landmarks Program, 56 Fed. Reg. 58,790, 58,792-93 (to be codified at 36 C.F.R. pt. 62) (proposed Nov. 21, 1991).

24. Oil, Gas, and Potash Leasing and Development Within the Designated Potash Area of Eddy and Lea Counties, NM, 56 Fed. Reg. 5697, 5698 (proposed Feb. 12, 1991).

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.<sup>26</sup>

## 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

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26. 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)).

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.<sup>27</sup>

#### 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.<sup>28</sup>

#### 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.

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27. Prepayment of a HUD-Insured Mortgage by an Owner of Low Income Housing, 55 Fed. Reg. 38,944, 38,952 (1990) (to be codified at 24 C.F.R. pts. 50, 221, 236, 241 & 248).

28. Land Uses; Wilderness, 53 Fed. Reg. 37,795, 37,796 (1988) (codified in final form at 36 C.F.R. pts. 251 & 293 (1996)).

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.<sup>29</sup>

#### 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.<sup>30</sup>

#### 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 "takings" 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-

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29. Land Uses; Wilderness, 56 Fed. Reg. 27,410, 27,417 (codified in final form at 36 C.F.R. pts. 251 & 293).

30. Conservation of Fish and Wildlife and Their Habitat, 56 Fed. Reg. 63,461, 63,463 (to be codified at 36 C.F.R. pt. 241).

brand its products, and therefore no legal property right exists. Thus, no "takings" analysis is necessary.<sup>31</sup>

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