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EXECUTIVE ORDER 12,630: A PRESIDENT'S MANIPULATION OF THE FIFTH AMENDMENT'S JUST COMPENSATION CLAUSE TO ACHIEVE CONTROL OVER EXECUTIVE AGENCY REGULATORY DECISIONMAKING

Robin E. Folsom

In a highly technological society such as ours, it is inconceivable to think of lessening regulatory burdens at a time when private industry has the power to alter our genes, invade our privacy, and destroy our environment. Only the government has the power to create and enforce social regulations that protect citizens from the awesome consequences of technology run amuck.  

I. INTRODUCTION

One of President Ronald Reagan's most important political agendas was the elimination of the burdens that environmental and other social regulations place on American businesses. He did this by attempting to paralyze the very agencies responsible for implementing social regulations. By immobilizing agencies such as the United States Environmental Protection Agency (EPA), President Reagan attempted to stop the promulgation of new regulations and prevent enforcement of existing ones. In his first term, he set in motion a program explicitly designed to stop the EPA and other...

* Executive Editor, 1992–1993, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.
3 See id. at 8.
4 See infra notes 65–87 and accompanying text.
5 See infra notes 65–87 and accompanying text.
agencies in their tracks. When Congress and the courts thwarted his plan, Mr. Reagan launched a more subtle attack on federal regulations. Part of this attack was to use the Fifth Amendment’s Just Compensation Clause to prevent federal agencies from regulating in ways that restrict the use of private property. President Reagan did this by petitioning the United States Supreme Court to expand the definition of a regulatory taking and finally, in his waning days, by issuing Executive Order 12,630, designed to chill agency actions that burden private property owners.

Throughout his tenure, President Reagan took a series of actions designed to exercise an unprecedented degree of control over the executive agencies that were carrying out Congress’s mandates. The early phase of Mr. Reagan’s scheme can be traced through his political appointments; the power he delegated to the Office of Management and Budget (OMB) through Executive Order 12,291 to review, delay, and even block proposed actions through a cost-benefit analysis; and the creation of his Task Force on Regulatory Relief to do the same for existing regulations. The later and more subtle phase of President Reagan’s program culminated in the 1988 issuance of Executive Order 12,630, entitled Governmental Actions and Interference with Constitutionally Protected Property Rights (Takings Order).

The Takings Order, which purports to address fiscal responsibility, requires executive agencies and departments (agencies) to review

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6 See infra notes 59–147 and accompanying text.
7 See infra notes 148–300 and accompanying text.
8 U.S. CONST. amend. V. “[N]or shall private property be taken for public use, without just compensation.” Id.
9 See infra notes 151–63 and accompanying text.
11 See Oliver A. Houck, Presidential Oversight Of Regulatory Decisionmaking: President X And The New (Approved) Decisionmaking, 36 AM. U. L. REV. 535, 536 (1987). President Reagan was not the first president to try to control federal agencies, but his was the most comprehensive and intrusive attempt. See Morrison, OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation, 99 HARV. L. REV. 1059, 1061 (1986). Centralized control over the agencies began with President Nixon’s Quality of Life Review, was followed by President Ford’s requirement that agencies consider the inflationary impact of major rulemaking proposals, and continued with President Carter’s establishment of the Regulatory Analysis Review Group (RARG), requiring a detailed regulatory analysis of every “major” rule before it was issued. See id. The programs initiated by Presidents Nixon, Ford, and Carter are referred to as quality checks, rather than outright manipulation of executive agencies. See HARRIS, supra note 2.
13 See infra notes 99–105 and accompanying text.
14 Exec. Order No. 12,630, supra note 10.
all of their proposed actions that might reduce the use or value of private property to determine whether those actions have takings implications. An action with takings implications is one that, if reviewed under criteria provided by the Takings Order, fits the Order's description of a Fifth Amendment taking. The Takings Order restricts, and sometimes eliminates completely, an agency's ability to implement actions that have takings implications.

The Takings Order came on the heels of two Supreme Court cases that expanded, somewhat, the definition of a regulatory taking. A regulatory taking is a government regulation that restricts the use of private property so much that the government has effectively appropriated the property from its owner. In the Takings Order, President Reagan purported to be concerned about the effect that an expanded definition of a regulatory taking would have on the public purse. The broader the definition of a regulatory taking, the more governmental actions it will encompass. This will result in an increase in the number of successful takings claims brought against the government and more government expense to compensate those claims.

President Reagan falsely premised the Takings Order on concern for the public fisc. First, very few of the many takings claims brought against the federal government are successful. Of those claims that are successful, most are the more conventional claims of physical appropriation of private property, rather than claims of regulatory taking of private property. While the Takings Order addresses governmental appropriation or occupation of private property, the bulk of the Order addresses regulatory actions. Second,

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16 Exec. Order No. 12,630, supra note 10, at § 2.
17 See id. at § 4.
18 The two cases are: First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) and Nollan v. California Coastal Commission, 483 U.S. 825 (1987).
20 See Exec. Order No. 12,630, supra note 10, at § 1(b) & (c).
21 See infra note 172 and accompanying text.
22 See infra note 172 and accompanying text.
23 See infra notes 475–556 and accompanying text.
24 See infra notes 286–89 and accompanying text.
25 Id.
26 See Exec. Order No. 12,630, supra note 10, at § 3(b).
27 See generally id. at §§ 3 & 4.
in reality the definition of a regulatory taking, as it was articulated by the United States Supreme Court in 1988, was not as expansive as the Takings Order professes and did not encompass the vast quantity of regulatory actions which President Reagan warned of. Therefore, the risk was low that an increasing number of government actions would be deemed to be compensable takings.

This Comment will explain how President Reagan manipulated then-current takings jurisprudence, in order to restrain agency actions through the Takings Order, by significantly overstating the threat that takings law posed to the public fisc. By fictionalizing the threat that the Fifth Amendment poses to the public purse, President Reagan created an entire category of regulations deemed to have takings implications that would never be held to constitute a taking by a court of law. By doing this, President Reagan could assign a cost to those regulations with takings implications. That cost can then be factored into the cost-benefit analysis that must be performed on the regulation, pursuant to Executive Order 12,291. Executive Order 12,291 prohibits agencies from implementing regulations if the regulations’ costs outweigh their benefits to society. By adding to the cost-side of the cost-benefit analysis, the Takings Order amounts to nothing more than a President’s attempt to control executive agency decisionmaking by claiming that certain regulations are simply too costly to implement.

Section II of this Comment looks at the tools President Reagan used to implement his deregulation agenda, beginning with strategic political appointments designed to render the regulatory agencies inactive, continuing with his centralization of regulatory oversight power in the OMB through Executive order 12,291, and ending with the Takings Order. An overview of the President’s deregulation program will help to place the Takings Order in its appropriate context. Section III examines the Takings Order itself as well as a bill currently before Congress that attempts to codify the Takings Order into public law. Section IV reviews the status of takings law as it existed in 1988; the law upon which President Reagan purports to have based his Takings Order. Section IV examines the present

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28 See infra notes 475–556 and accompanying text.
29 See infra notes 475–556 and accompanying text.
30 See infra notes 475–556 and accompanying text.
31 See infra note 573 and accompanying text.
32 See infra notes 573–74 and accompanying text.
33 See infra notes 108–09 and accompanying text.
34 See infra notes 557–75 and accompanying text.
day changes in takings jurisprudence, relative to the language of the Takings Order. Section V argues that the Takings Order was not, and is not, supported by the law upon which it is purportedly based. Instead, the Takings Order was an attempt to manipulate the Fifth Amendment’s Just Compensation Clause in an effort to stop executive agencies from regulating businesses. By assigning an estimated cost to all agency actions having takings implications, the cost-side of the cost-benefit analysis becomes much greater and thus, may prohibit implementation of the actions. This Comment argues that Congress should reject Republican legislators’ attempts to codify the Takings Order because their bill would perpetuate the regulatory inactivity program created during the Reagan Administration. Finally, this Comment argues that the Clinton Administration should repeal the Order because it subjects regulatory agencies to unnecessary and unfounded regulatory review that can prevent agencies from implementing environmental and other social regulations.

II. PRESIDENT REAGAN’S DEREGULATION SCHEME

Until the late 1960s, governmental interference with private property was relatively minimal and companies benefited from the government’s hands-off approach. Unregulated, a company could dispose of the hazardous by-products of its manufacturing processes by dumping those hazardous materials into the air, the ground, or the water. This is known as externalizing the company’s pollution costs. While it costs the company little or nothing to dispose of its wastes in this manner, the costs to the public health and the environment are huge. With the 1960s and early 1970s, however, came a positive governmental commitment to public health and the environment featuring many new environmental regulations that restricted the use of private property. New environmental laws restricted companies’ ability to unload pollution into the environment.

36 See id.
37 See id. When a manufacturer dumps its pollutants into the air or into a passing stream it is externalizing the cost of disposing of these pollutants onto its neighbors, through illness or polluted air and water, rather than spending the necessary money to install equipment that will treat and neutralize the pollutants. See id.
38 See id.
39 For an overview of the upsurge of environmental regulations, see generally TOLCHIN, supra note 1, at 225–51.
The new environmental regulations forced companies to internalize the costs of disposing of their wastes by using lawful, and often expensive, disposal methods.\textsuperscript{41} The cost of complying with environmental regulations can have a large impact on a company's net profit.\textsuperscript{42}

By the mid-1970s, companies were fighting back. Industrial interests began mounting campaigns against governmental intervention in private industry, particularly against environmental regulations.\textsuperscript{43} Industrial lobbyists claimed environmental laws were a major source of America's economic deficiencies, because the capital investments required by many environmental laws diverted money away from industrial productivity and thereby retarded economic growth, resulting in high inflation, double digit interest rates, the exodus of manufacturing plants from this country, and thousands of lost jobs.\textsuperscript{44}

Leaders of industrial initiatives, such as the western and mountain states' Sagebrush Rebellion,\textsuperscript{45} mounted a major political campaign that culminated in the election of President Ronald Reagan in 1980.\textsuperscript{46} As promised, the Reagan Administration ushered in a thinly veiled campaign of dismantling many of the social regulations implemented during the preceding decade, including environmental regulations.\textsuperscript{47} Ronald Reagan was not the first president to recognize the burden that regulations can place on industry.\textsuperscript{48} Presidents Richard Nixon, Gerald Ford, and Jimmy Carter each sought to reform misdirected or arbitrary regulations, however, these presidents did not seek to eliminate social regulations, but instead merely sought to streamline and make the regulatory system more efficient.\textsuperscript{49} In sharp contrast,
the Reagan Administration sought to eliminate, rather than reform, many environmental regulations and to retard the process by which federal agencies promulgate new environmental regulations.\textsuperscript{50}

President Reagan's approach to deregulation, particularly regarding environmental laws, was to render the federal agencies inactive and thus incapable of fulfilling their congressional mandates.\textsuperscript{51} He approached this task from two different angles. He began by setting forth an unambiguous policy explicitly designed to remove the regulatory burdens from the backs of American industries.\textsuperscript{52} First, he appointed agency chiefs who were hostile to the mission of their agency\textsuperscript{53} while simultaneously slashing the budgets of those agencies.\textsuperscript{54} Second, President Reagan attempted to weaken the influence of public interest groups, including groups lobbying Congress as advocates of the public interest, while providing industrial interests with greater ability to influence governmental decisionmaking.\textsuperscript{55} And third, he exerted tremendous control over agency decision making by requiring all agencies to perform cost-benefit analyses on their regulatory programs and subjecting the analyses to review and approval by OMB.\textsuperscript{56}

When Congress, the courts, and the American public reacted adversely to his deregulation program, President Reagan changed tack and took a more subtle approach to deregulation in his second term in office.\textsuperscript{57} Instead of openly controlling the federal agencies policies, President Reagan employed the Fifth Amendment’s Just Compensation Clause to retard the government’s ability to regulate private property uses.\textsuperscript{58}

\textit{A. Deregulation During President Reagan’s First Term}

President Reagan’s deregulation program was much more direct and explicit in his first term in office than it was in his second term.\textsuperscript{59}

Analysis and Review Group (RARG) and charged the group with comparing the costs and benefits of various federal programs. \textit{Id.} Unlike the Reagan Administration’s Task Force on Regulatory Relief, RARG did not have formal authority over other executive branch agencies. \textit{See id.}

\textsuperscript{50} \textit{See id.} at 7–8. To illustrate this point, President Reagan referred to his program as “regulatory relief” rather than regulatory reform.

\textsuperscript{51} \textit{See id.} at 253–58.

\textsuperscript{52} \textit{See infra} notes 65–124 and accompanying text.

\textsuperscript{53} \textit{See} Houck, \textit{supra} note 11, at 538 n.15.

\textsuperscript{54} \textit{See} HARRIS, \textit{supra} note 2, at 255.

\textsuperscript{55} \textit{See infra} notes 88–105 and accompanying text.

\textsuperscript{56} \textit{See infra} notes 106–24 and accompanying text.

\textsuperscript{57} \textit{See infra} notes 150–52 and accompanying text.

\textsuperscript{58} \textit{See infra} notes 150–291 and accompanying text.

\textsuperscript{59} \textit{See infra} notes 60–291 and accompanying text.
His blatant gestures included strategically chosen political appointments, substantial budget cuts, shifts in access to governmental ears from public interest lobbyists to industrial lobbyists, and implementation of a regulatory cost-benefit requirement.

1. Attempting Agency Inactivity Through Political Appointments and Budget Cuts

An important part of President Reagan's deregulation scheme was to appoint agency chiefs who were hostile to their agencies' mission. One such appointment was President Reagan's choice for EPA Administrator, Ann Gorsuch Burford. In Ann Burford, President Reagan found an appointee with a track record that was generally anti-environmentalist, pro-business, and hostile to EPA's objectives. She believed EPA was enforcing regulations too stringently and that this policy undermined the health of the economy. In her short term in office, Ms. Burford created a far less active EPA that failed to enforce many of its own regulations. Under her control, EPA became less active for two reasons: Ann Burford created an unproductive, hostile work environment and significantly slashed the agency's budget. Ms. Burford coupled hostility and animosity toward her staff with a policy that required decisions that were once made by EPA regional directors to be channeled, instead, through

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60 See Houck, supra note 11, at 538 n.15.
61 See Harris, supra note 2, at 255.
62 See id. at 8.
63 See Houck, supra note 11, at 542 n.42. OMB, which oversaw, influenced, and often prohibited agency actions became a channel through which industry influenced agency decisionmaking. See infra notes 96–147 and accompanying text.
64 See Exec. Order No. 12,291, supra note 12.
65 See Houck, supra note 11, at 538 n.15. Professor Houck identifies many of President Reagan's initial appointees who, before being appointed, held policies or views that were in direct contravention to the policy of the agency or department they would be charged with running. He lists Richard Harris, Director of Office of Surface Mining; James Watt, Secretary of Interior; Thorne Auchter, Administrator of the Occupational Safety and Health Administration; Robert Burford, Director of Bureau of Land Management; Ann Gorsuch Burford, EPA Administrator and John Crowell, Chief of United States Forest Services. Id. Additionally, agencies that were targets of Mr. Reagan's deregulation program were staffed with mediocre appointees. See Charles Fried, Order and Law Arguing the Reagan Revolution—A Firsthand Account 230 n.12 (1991).
66 See Tolchin, supra note 1, at 100.
67 See id.
68 See id.
69 See Harris, supra note 2, at 255.
70 See id. at 254.
71 See id. at 255.
This program resulted in the regional directors’ reluctance to develop or implement new programs because of the hostility many regional directors felt from Ann Burford.  

The second reason EPA became less active under Ann Burford was because of significant cuts to the agency’s budget. At a time when EPA desperately needed resources to implement the new regulations that resulted from environmental laws passed in the 1970s, Ann Burford, herself, called for a substantial reduction of EPA’s budget. After only two years, Ms. Burford, together with the efforts of Secretary of the Interior James Watt and OMB Director David Stockman, reduced EPA’s overall budget by $308 million, a drop of nearly 23 percent from the Agency’s budget in 1980. The two areas most affected by these cuts were research and enforcement. In Ms. Burford’s first year with the Agency, budget cuts in EPA’s research department totaled $60 million. By targeting the research budget, Ms. Burford could weaken the base of knowledge upon which the country’s environmental policies were to be made. Without sufficient knowledge, or the resources necessary to gain that knowledge, EPA cannot effectively implement environmental regulations.  

In addition to research, budget cuts also affected the area of environmental enforcement. In 1980, EPA filed forty-three lawsuits to clean up hazardous waste sites. Nine months into 1982, the agency had filed only three similar suits. The agency failed to

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72 See id. at 254.  
73 See id. The effects of Ms. Burford’s actions were “immediate and significant: fewer rules were written, enforcement actions declined, workforce decreased dramatically, morale and initiative among staff plummeted, institutional memory was destroyed, and implementation of newer, more complex statutes was delayed.” See id. at 258.  
75 See id.  
76 See HARRIS, supra note 2, at 255.  
77 EPA’s budget dropped from $1.347 million to $1.039 million. See id.  
78 See id. at 258.  
79 See id.  
80 See Mosher, supra note 74, at 1466.  
81 See id.  
82 Enforcement efforts were reduced particularly in the areas of toxic substances and air pollution. See HARRIS, supra note 2, at 260. EPA’s enforcement division suffered from more than budget cuts. For instance, Mr. Reagan strategically left some positions unfilled. See Houck, supra note 11, at 539 n.13. The EPA Assistant Administrator for Enforcement position remained open for more than a year. See id.  
84 See id.
enforce other environmental programs, as well. Rather than enforce the sulfur dioxide standards required by the Clean Air Act, EPA relaxed these standards.\textsuperscript{85}

Ann Burford was forced to resign in 1983 when a congressional committee investigating EPA's failure to enforce environmental laws threatened to charge her with criminal contempt.\textsuperscript{86} The product of her tenure was an EPA that was in a state of disarray and lacked the respect it once commanded.\textsuperscript{87}

2. Reduction of Public Awareness Programs

President Reagan's second approach to deregulation involved reducing the effectiveness of public interest groups, while simultaneously providing industry with greater access to governmental ears.\textsuperscript{88} Public interest groups were instrumental in rallying public support for much of the environmental laws passed in the 1970s.\textsuperscript{89} The public received word of environmental hazards from public interest groups and from EPA, itself.\textsuperscript{90} Prior to 1981, EPA was engaged in informing the public about environmental issues.\textsuperscript{91} The public awareness office, staffed by forty people, used television, radio, and other methods to inform the public of the need for pollution control.\textsuperscript{92} The Reagan Administration discontinued this function by eliminating the public awareness office entirely.\textsuperscript{93} Additionally, President Reagan attempted to reduce the effectiveness of public interest lobbying groups by cutting both direct and indirect subsi-

\textsuperscript{85} See The Relaxations Were Pretty Stupid, NAT'L J., Mar. 13, 1982, at 458. Sulfur dioxide is a major contributor to the acid rain problem. The United States Government, by entering into the U.S.-Canadian acid rain treaty talks, had committed itself to vigorously promoting emission standards related to the reduction of acid rain. Id. Nevertheless, EPA allowed thirteen states to raise their sulfur dioxide emissions by more than a million tons per year. Id. These reductions compromised the commitment to this treaty by the United States. Id.

\textsuperscript{86} See Thomas Riehle & Deborah Galembo, Washington's Movers and Shakers, NAT'L J., July 7, 1984, at 1325. See also FRIED, supra note 65, at 135. Ms. Burford claimed executive privilege, refusing to disclose the contents of open criminal investigations of environmental offenders, claiming that disclosure would interfere with the government's ability to prosecute these offenders. See FRIED, supra note 65, at page 229–30 n.9. Her associate in charge of toxic-waste-site cleanups, Ms. Rita Lavelle, was jailed for perjury. See id. at 230 n.12.

\textsuperscript{87} See HARRIS, supra note 2, at 265.

\textsuperscript{88} See id. at 8.

\textsuperscript{89} See id. at 37.

\textsuperscript{90} See Mosher, supra note 74, at 1466.

\textsuperscript{91} See id.

\textsuperscript{92} See id.

\textsuperscript{93} See id. In addition to eliminating the public awareness office, the Reagan Administration significantly cut the size of EPA's press office staff and severely limited the number of publications it produced. Id.
dies. For instance, he eliminated the low postal rates for non-profit organizations which public interest groups relied upon when fund raising.

While attempting to reduce the influence of public interest groups, Mr. Reagan simultaneously made the government much more accessible to industrial interests. For instance, it is believed that the OMB, which exerts enormous influence over agency actions, was attentive primarily to industrial interests. Additionally, in his first days in office, Mr. Reagan created the Task Force on Regulatory Relief, headed by Vice-President George Bush. The Task Force worked together with American industries to determine which regulations were overly burdensome to those industries and needed to be relaxed. The Task Force made these determinations by soliciting advice from industry and then performing a cost-benefit analysis on the regulations that industry leaders identified as troublesome. Then, in conjunction with the OMB, the Task Force exerted tremendous control over the development or enforcement of those regulations. The EPA was one of the Task Force's major targets.

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94 See HARRIS, supra note 2, at 8. President Reagan set in motion a program designed to "defund the left." Id. at 125. Although public interest lobbyists lost much of their funding, the "defund the left" program did not disable the public interest lobby. See id.
95 See id.
96 During President Reagan's tenure, the OMB, the Vice-President's Task Force on Regulatory Relief, and the agencies themselves were more accessible to industrial representatives than to public interest groups. For instance, when taking action toward implementing gasoline lead standards in 1981, EPA held 32 meetings with representatives of the petroleum industry and no such meetings with health experts. See Editorial Backroom Deals at EPA, (hereinafter Backroom Deals) WASH. POST, May 27, 1982, at A26.
97 See infra notes 118-24 and accompanying text.
98 See TOLCHIN, supra note 1, at 77.
99 Id. The Task Force was given Cabinet-level status and was comprised of the Vice-President; the Attorney General; the Secretaries of the Treasury, Commerce, and Labor Departments; the Director of OMB; the Chairman of the Council on Economic Advisers; and the President's Assistant for Policy Planning. See Meyer v. Bush, 1993 U.S. App. LEXIS 228, at *2 (D.C.Cir. Jan. 8, 1993).
100 See HARRIS, supra note 2, at 100.
102 See HARRIS, supra note 2, at 100.
104 Robert A. Leone, Why Anne Burford Got the Lead Out, 18 WASH. MONTHLY, Apr. 1986,
3. OMB’s Cost-Benefit Regulatory Review

President Reagan’s third approach to disabling the agencies was to implement a comprehensive policy of regulatory review, one that could delay regulations indefinitely by tying them up in bureaucratic “red tape.”106 His first major review initiative was Executive Order 12,291, issued on February 17, 1981.107 The Order requires federal agencies108 to conduct a cost-benefit analysis of new and existing regulations and to refrain from implementing any new regulatory program unless the program’s potential benefits to society outweigh its potential costs to society.109 Given several alternatives, the agency must implement the least costly action.110 OMB’s Office of Information and Regulatory Affairs (OIRA) is charged with the regulatory oversight of Executive Order 12,291.111 Under the Executive Order, OMB may intercede at two different points in the agency’s rulemaking process: before the agency asks for public comment112 and before publication of the final rule.113 After conducting a cost-benefit assessment, called a Regulatory Impact Analysis

at 50. When asked to prioritize a deregulation wish list, industries ranked environmental regulations, especially hazardous waste management and pollution control regulations, at the top. See Kriz, supra note 101, at 2965.

106 See Tolchin, supra note 1, at 74. Regulatory review was not a novel concept. See Marc L. Landy et. al., THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS 248 (1990). President Nixon required an economic impact analysis to be prepared for all proposed regulations that might have a substantial economic impact. See id. This was called the “Quality and Life” review process. See id. President Carter used RARG to study the economic impact of government actions. See id. These review groups worked with the agencies to determine the most efficient way to achieve the stated purpose of the regulation. See id. The Reagan reviews, on the other hand, served to implement an anti-regulation ideology. See id.


108 The term “agency” in this Order refers to any agency under 44 U.S.C. 3502(1), excluding those agencies specified in 44 U.S.C. 3502(10), the so-called “independent” agencies, such as the Federal Trade Commission, the Securities and Exchange Commission, and the Nuclear Regulatory Commission. See Exec. Order No. 12,291, supra note 12, at § 1(d).

109 Exec. Order No. 12,291, supra note 12, at § 2(b). In January of 1985, President Reagan issued Executive Order 12,498 as an “early warning system” requiring agencies to obtain OMB approval before undertaking any significant step toward researching or gathering information on potential problems needing federal action. Exec. Order No. 12,498, 3 C.F.R. 323 (1986) reprinted in 5 U.S.C. § 601 (Supp. III 1985). Some critics claim that this Order was designed to prevent agencies from compiling a record that would justify taking action on a particular problem. See Morrison, supra note 11, at 1063. Executive Order 12,498 also requires agencies to indicate how the proposed action is consistent with the executive’s regulatory policy. See Harris, supra note 2, at 101.

110 See Exec. Order No. 12,291, supra note 12, at § 2(d).

111 See Harris, supra note 2, at 252.

112 See Exec. Order No. 12,291, supra note 12, at § 3(c)(2).

113 See id.
(RIA), the agency must submit the RIA to the Director of OMB if the action would constitute a "major rule."114 The Order authorizes the Director to delay agency action until he or she has reviewed the proposed regulation and until the agency incorporates the Director's views, together with the agency's response to those views, in the agency's rulemaking file.115 Executive Order 12,291 grants OMB authority to delay and review proposed actions only "to the extent permitted by law."116 For instance, OMB may not delay a proposed regulation past a statutorily mandated deadline.117

Under President Reagan, the OMB became a vehicle for influencing and coercing agency actions.118 Critics charge that the OMB frequently teamed up with the Task Force on Regulatory Relief119 to intimidate the EPA and other agencies into not implementing new regulations and not enforcing existing ones.120 Although OMB has no official authority to affect agency action, proposed regulations could be dropped into a "black-hole" at OMB and not released until the agency in question and OMB reached a compromise.121 Despite

114 See id. at § 3. A "major rule" is any regulation that is likely to result in
(1) An annual effect on the economy of $100 million or more; (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) Significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. 
Id. at § 1(b). Additionally, the Director has the authority, subject to the direction of the Task Force on Regulatory Relief, to order any rule to be treated as a major rule. See id. at § 3(b).
115 See id. at § 3(f)(2).
118 Regulatory Reform, supra note 104.
119 The Task Force on Regulatory Relief had supervisory power over OMB's actions under Executive Order 12,291. See Exec. Order No. 12,291, supra note 12, at § 3(e)(1). The Task Force had authority to settle any disputes arising between OMB and the agencies over matters relevant to the executive order. See id.
120 Regulatory Reform, supra note 104.
121 See Tolchin, supra note 1, at 74. One OMB official stated
[w]e can recommend but we can't do anything. Technically, OMB has no authority, but uses bribery and blackmail instead. The executive order says we can consult, but the agency can't do anything while we consult. We can drop it into a black hole while the politicians decide what to do with it. It is just window-dressing to a power grab. We're not doing heavy analysis. The economic analysis is just window-dressing for the executive order.

Id.
the Order’s express limitation on OMB’s authority, OMB often delayed proposed regulations well past their statutorily mandated deadlines.\textsuperscript{122} In a three year period, the EPA missed the deadline for publishing 86 out of approximately 169 proposed regulations that the Agency submitted for OMB review because OMB held these regulations past those dates.\textsuperscript{123} After the issuance of Executive Order 12,291, there was a significant decrease in the number of regulations issued.\textsuperscript{124}

These abuses by OMB created considerable debate about the President’s authority to influence executive agency policy making.\textsuperscript{125} Much has been written on the President’s authority to influence, or even dictate, agency policy making decisions in those instances where Congress leaves decisionmaking up to the discretion of the agency administrator, or when Congress leaves room for agency interpretation of the statute.\textsuperscript{126} Because it involves separation of powers, the courts have avoided the question of whether the President’s general exercise of control over executive agencies through Executive Order 12,291 is constitutional.\textsuperscript{127} The Supreme Court, however, has addressed the issue of agency inaction in the face of nondiscretionary congressional mandates, even when the President, himself, caused that inaction.\textsuperscript{128} In the 1975 case, \textit{Natural Resources

\textsuperscript{122} See Environmental Defense Fund v. Thomas, 627 F.Supp. 566, 571 (D.D.C. 1986). The average delay for each regulation EPA submitted to OMB in 1986 was 91 days. See id.

\textsuperscript{123} See id.

\textsuperscript{124} See Harris, supra note 2, at 107. Within five months of the issuance of Executive Order 12,291, the executive branch reported a 50% reduction in proposed rulemaking compared to the same time period in 1980. Vice-President George Bush announced that 180 regulations had been withdrawn, modified, or delayed. See Tolchin, supra note 1, at 70.


\textsuperscript{127} See e.g., Public Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1507 (D.C.Cir. 1986) (court would not decide the legality of OMB’s participation in agency rulemaking, which presented “difficult constitutional questions concerning the executive’s proper role in administrative proceedings and the appropriate scope of delegated power from Congress to certain agencies.”).

Defense Council v. Train,\textsuperscript{129} the United States Court of Appeals for the District of Columbia Circuit set a strict standard for agency compliance with nondiscretionary statutory mandates.\textsuperscript{130} The Court stated that it could provide injunctive relief to a plaintiff seeking agency compliance only when the agency official did not “in good faith employ[] the utmost diligence in discharging his statutory responsibilities.”\textsuperscript{131} Lower courts have construed the term “good faith” as qualifying the more critical term, “utmost diligence.”\textsuperscript{132} In State v. Gorsuch,\textsuperscript{133} the United States District Court for the Southern District of New York examined Ann Gorsuch Burford’s failure to publish proposed regulations under the Clean Air Act within the nondiscretionary timetable set by Congress.\textsuperscript{134} The court stated that when an administrator fails to perform a nondiscretionary congressional mandate, such as meeting a deadline, the administrator “must be able to demonstrate that he is completely unable to fulfill his duties. . . .”\textsuperscript{135} If the administrator’s failure to comply with the mandate was due to “competing concerns or other decisions on his part,” rather than a complete inability to perform the task, the administrator did not act in good faith.\textsuperscript{136}

In 1986, the United States District Court for the District of Columbia reviewed another challenge to EPA for failure to meet statutorily mandated deadlines in the case, Environmental Defense Fund v. Thomas.\textsuperscript{137} This time, EPA was unable to meet deadlines for promulgating final permitting standards for underground storage tanks, pursuant to Congress’ Hazardous and Solid Waste Amendments of 1984, because OMB had not yet reviewed the standards.\textsuperscript{138} The court recognized that the President must be granted some room to control and supervise executive policy making.\textsuperscript{139} The President’s

\textsuperscript{129} 510 F.2d 692, 712 (D.C.Cir. 1975).
\textsuperscript{130} See id.
\textsuperscript{131} Id. at 713.
\textsuperscript{133} See State v. Gorsuch, 554 F. Supp. at 1065 n.4.
\textsuperscript{134} See id.
\textsuperscript{135} Id. (emphasis added).
\textsuperscript{136} Id.
\textsuperscript{138} See id. at 569.
\textsuperscript{139} See id. at 569; see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844–45(1984) (court should give executive branch considerable weight in administering the law); see also Sierra Club v. Costle, 657 F.2d 298 (D.C.Cir. 1981) (recognizing the need for the President to monitor executive agency decisionmaking for consistency with administration policies).
supervisory powers, however, do not permit him to issue directives
to executive agencies or to otherwise permit agency action that is
in direct contravention to Congress's will. In this instance, Con­
gress explicitly stated that EPA was to promulgate the final per­mitting standards by March 1, 1985. When the Environmental
Defense Fund (EDF) brought this suit on May 30, 1985, EPA had
not published the standards. EPA submitted the standards for
OMB review, but OMB did not begin its review until March 4, three
days after EPA's deadline expired. Executive Order 12,291 pro­
hibited EPA from publishing the standards until it responded to
OMB's comments but by April 10, 1985, EPA still had not received
the comments.

Because an agency administrator must comply with statutory man­
dates, including deadlines, the court in Thomas held that OMB has
no authority to cause an administrator to miss a statutory deadline.
The court did not declare Executive Order 12,291 unconstitutional,
but merely stated that OMB's review may not interfere with the
Administrator's congressionally mandated, nondiscretionary du­
ties. OMB may review proposed actions, but must cease its review
at the time the action's deadline "is about to expire."

President Reagan's deregulation program during his first term in
office was not as successful as he planned. Congress and the courts
thwarted many of his efforts, and much of the American public
opposed his program. In light of the plan's unpopularity, Mr. Rea­
gan shifted his deregulation plan from open and obvious manipulation
to a much more subtle approach. The focus of deregulation in Pres­
ident Reagan's second term was on the courts' ability to prevent
agency action through the Just Compensation Clause.

B. Deregulation During President Reagan's Second Term

President Reagan's deregulation scheme during his second term
focused, in part, on the Fifth Amendment Just Compensation

141 See id. at 567.
142 See id. at 569.
143 See id. at 568.
144 See id.
145 See id. at 571.
146 See id.
147 See supra note 1, at 104–05. A 1983 public poll showed that a majority of the
American public believed that President Reagan was more interested in protecting companies
that pollute than he was in protecting the environment. Id. at 105.
148 See infra notes 151–68 and accompanying text.
Clause. First, the government petitioned the Supreme Court to expand the definition of a regulatory taking, a move which would make some regulations too expensive to enforce. Second, the President issued Executive Order 12,630, the Takings Order, to sensitize agencies to the financial burdens imposed upon the government when agency actions amount to regulatory takings.

The typical takings claim features a private property owner as plaintiff and the government, either federal, state, or local, as defendant. The property owner argues that the regulation amounts to a taking of private property while the government defends, claiming instead that the Just Compensation Clause was not meant to cover the type of regulation at issue. President Reagan’s deregulation program changed the alignment of the parties, somewhat. In three takings claims heard by the Supreme Court during the first half of President Reagan’s second term, the federal government filed amicus curiae briefs supporting the landowners’ claims that state governmental actions amounted to unconstitutional takings.

The Reagan Administration embarked on an effort to use the Takings Clause as a “severe brake” upon governmental regulation of business and property uses by pressing the Supreme Court to expand the scope of the Just Compensation Clause. For instance, the federal government filed an amicus curiae brief supporting the position that the government should be responsible for compensating affected landowners in situations amounting to temporary takings in the case First English Evangelical Lutheran Church of Glendale v. County of Los Angeles. First English Evangelical was a case in which a private property owner was temporarily denied the right to reconstruct its buildings after they were destroyed by a devastating flood. In an earlier case, the California Supreme Court had limited the remedies available for a regulatory taking to mandamus

\[150\] See infra notes 151–68 and accompanying text.

\[151\] See FRIED, supra note 65, at 183–85.

\[152\] See Exec. Order 12,630, supra note 10, at § 1.


\[154\] See, e.g., id.

\[155\] See FRIED, supra note 65, at 185.

\[156\] See id. at 185. These cases were: First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987), Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987), and MacDonald v. Yolo County, 477 U.S. 340 (1986).

\[157\] See FRIED, supra note 65, at 183. Charles Fried was Solicitor General for the Reagan Administration from 1985 to 1989. Id. at 13.

\[158\] See id. at 185.


\[160\] Id. at 307–08.
and declaratory judgment.\textsuperscript{161} The federal government, in \textit{First English Evangelical}, petitioned the Court to rule that property owners whose property is taken, even only temporarily, by government regulation are entitled to monetary compensation.\textsuperscript{162} This was an expansion of the scope of regulatory takings law because it means that the government must compensate individuals every time a regulation takes private property, even temporarily, rather than permitting the government to repeal the offending regulation and formulate a less-intrusive alternative.\textsuperscript{163}

In addition to advocating a broader definition of a regulatory taking, President Reagan issued the Takings Order.\textsuperscript{164} The Takings Order requires agencies to be sensitive to the strain that the Fifth Amendment’s Just Compensation Clause places on the public purse.\textsuperscript{165} The Just Compensation Clause requires the government to compensate landowners when regulations are so overly burdensome that the regulations effectively take the property away from that owner.\textsuperscript{166} The more types of government actions the courts include within the purview of a regulatory taking, the more often the government has to pay compensation to private landowners. The Takings Order requires all executive agencies to review their actions to determine whether those actions might constitute a taking for which the government will be financially responsible.\textsuperscript{167} Any costs that are likely to be incurred because of successful takings claims can be calculated into the cost-benefit analysis that OMB reviews.\textsuperscript{168} The Takings Order places restrictions on the implementation of government actions that have takings implications.\textsuperscript{169}

\section*{III. Executive Order 12,630: The Takings Order}

President Reagan enacted the Takings Order on the heels of two Supreme Court cases\textsuperscript{170} that expanded the definition of a regulatory

\begin{footnotes}
\item[161] See \textit{Agins v. City of Tiburon}, 598 P.2d 25, 32 (Cal. 1979). On appeal, the United States Supreme Court did not reach the question whether a state could limit remedies for a regulatory taking because it determined that no taking had actually occurred. See \textit{Agins v. City of Tiburon}, 447 U.S. 255, 263 (1980).
\item[162] See \textit{Fried}, \textit{supra} note 65, at 185.
\item[164] Exec. Order No. 12,630, \textit{supra} note 10.
\item[165] See \textit{id.} at § 1(b).
\item[166] See U.S. Const. amend. V.
\item[167] Exec. Order No. 12,630, \textit{supra} note 10, at § 1.
\item[168] See \textit{supra} notes 108–09 and accompanying supra text.
\item[169] See generally Exec. Order No. 12,630, \textit{supra} note 10, at § 4.
\item[170] The two cases are: \textit{First English Evangelical Lutheran Church of Glendale v. County of
taking. A regulatory taking is a government regulation that restricts the use of private property so much that the government effectively has appropriated the property from its owner. Pursuant to the Fifth Amendment, the government must compensate the property owner for a regulatory taking. As the Supreme Court expands the definition of a regulatory taking, the logical result is that more governmental actions should fall within the scope of takings law. If this happens, the government is responsible for a greater number of compensation payments. President Reagan purports to have intended the Takings Order to address this concern.

The Takings Order contains two stated purposes. One of those purposes is to protect the public fisc from unnecessary expenditures. If the Constitution requires the government to pay compensation for many of its regulatory action, the government should choose its regulatory programs very carefully or risk draining the public purse. The second purpose asserted in the Takings Order is to make executive agencies and departments sensitive to "constitutionally protected property rights."

A. A Brief Look At Regulatory Takings

Before examining the Takings Order itself, it may be best to understand the thing we call a "taking." The Fifth Amendment requires that the government pay "just compensation" to a property owner whenever it takes his or her property for public use. Los Angeles, 482 U.S. 304 (1987) and Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). In an address to Congress in early 1988, President Reagan stated that his Administration would take action in response to these cases. See Roger J. Marzulla, The New "Takings" Executive Order and Environmental Regulation—Collision or Cooperation?, 18 Envtl. L. Rep. (Envtl. L. Inst. 10,254, 10,257–58 (July, 1988)).


172 Exec. Order No. 12,630, supra note 10, at preamble & § 1.

173 See id. at § (1)(c).

174 Id. at § 1(c).

175 See id. An examination of whether constitutionally protected property rights exist is beyond the scope of this Comment. Therefore, this Comment will focus only on the first stated purpose of the Takings Order, a concern for the public purse.

176 See infra notes 303–469 and accompanying text for a more detailed examination of regulatory takings jurisprudence.

177 The term property includes not only the tangible property itself, but also the group of rights that an owner holds in that property, such as the right to use the property or to sell it. See Penn Centr. Transp. Co. v. City of New York, 438 U.S. 104, 143–44 (1978) (Rehnquist, J., dissenting); see also United States v. General Motors Corp., 323 U.S. 373, 377–78 (1945).

Initially, the definition of a “taking” was limited to the government’s physical appropriation or invasion of private land. In the 1922 landmark case Pennsylvania Coal Co. v. Mahon, Justice Holmes expanded the definition of a taking to include overly burdensome regulations which have the effect of physically appropriating the regulated property. Justice Holmes instructed that a regulation that goes “too far” is tantamount to a taking, but failed to define what he meant by “too far.”

Similar to a physical taking, a regulatory taking—often referred to simply as a taking—requires the government to pay just compensation to the property owner. The money used to compensate the property owner comes from the public fisc.

B. The Takings Order

The Takings Order has two main components. First, the Order instructs executive agencies and departments to determine whether those actions have takings implications.

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180 260 U.S. 393 (1922).
181 See id. at 414–15. Justice Holmes explained that one factor to look at when assessing the regulation is the extent of the diminution of “values incident to property.” He instructed that when those diminutions reach a “certain magnitude, in most if not in all cases” this constitutes a taking. Id.
182 Id. at 415.
185 Although this Comment uses the terms “executive agencies and departments,” or often merely “agencies,” the Takings Order also applies to military departments of the United States Government, and to any United States Government corporation, United States Government controlled corporation, or other establishment in the Executive Branch of the United States Government other than those entities defined as ‘independent regulatory agencies’ in 44 U.S.C. § 3502(10).
186 Attorney General’s Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings, supra note 15, at § III.
187 By “actions,” the Takings Order refers to proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, applications of Federal regulations to specific property, or Federal governmental actions physically invading or occupying private property, or other policy statements or actions related to federal regulations or direct physical invasion or occupancy, but does not include: (1) Actions in which the power of eminent domain is formally exercised; (2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations; (3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings; (4) Studies or similar efforts of planning activities; (5) Communications between Federal agencies or de-
tions. If a proposed action has takings implications, the agency must explore alternatives that would be less intrusive to property owners and must estimate the dollar amount that the action might cost the government, should a court later hold that the action constitutes a taking. The agency must use this information when it makes decisions about implementing the action. Furthermore, the agency must notify OMB that proposed actions have takings implications. The second component of the Takings Order restricts an agency's ability, to the extent permitted by law, to implement a program once the agency determines that the program has takings implications.

1. Takings Implications

The Takings Order requires agencies to review their actions for "takings implications." All actions—administrative, regulatory, or

parts and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority; (6) The placement of military facilities or military activities involving the use of Federal property alone; or (7) Any military or foreign affairs functions (including procurement functions thereunder), but not including the U.S. Army Corps of Engineers civil works program.

Exec. Order No. 12,630, supra note 10, at § 2(c).
188 See id. at § VI(A)(2)(c) & (d).
189 See id. at § VI(A)(2).
190 Exec. Order No. 12,630, supra note 10, at § 5(b).
191 See id. at § 4.
192 See id. at § 2(a). The Order states that an action with takings implications is one that "if implemented or enacted, could effect a taking." Id. For example, "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." Id. The following are examples of agency actions that do not have takings implications:

(1) Actions abolishing regulations, discontinuing governmental programs, or modifying regulations in a manner that lessens interference with the use of private property; (2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations; (3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings; (4) Studies or similar efforts of planning activities; (5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority; (6) The placement of military facilities or military activities involving the use of Federal property alone; or (7) Any military
legislative—that may have an effect on "the use or value" of private property must be reviewed for takings implications.\cite{note6} The phrase "takings implications" is a term of art used in the Takings Order. It does not mean that a court would find that the agency's action constitutes a taking but instead, means that the action fits the definition of a taking provided by the Takings Order and its accompanying guidelines. Specifically, the Guidelines for the Risk and Avoidance of Unanticipated Takings (the Guidelines),\cite{note7} promulgated pursuant to the Takings Order, state:

> [w]hen an agency decisionmaker, in applying the criteria of Section V(D) [of the Guidelines], determines that a policy or action appears to have an effect on private property sufficiently severe as to effectively deny economically viable use of any distinct legally protected property interest to its owner, or to have the effect of, or result in, a permanent or temporary physical occupation, invasion, or deprivation, that appearance shall be deemed to give rise to a taking implication for purposes of the Executive Order and these Guidelines. . . .\cite{note8}

Actions that pose a *substantial risk* that a taking may occur are deemed to have "significant takings implications."\cite{note9}

The Guidelines were intended to assist the agencies in evaluating their actions for takings implications.\cite{note10} The Guidelines provide specific criteria for the agencies to use when evaluating their actions for takings implications.\cite{note11} These criteria should form the basis of the agency’s determination of whether its action has takings implications.\cite{note12} These criteria are meant to reflect the principles of takings law.\cite{note13}

The Guidelines contain three main criteria for evaluating proposed actions. These criteria are: the character of the government action;\cite{note14}

\begin{itemize}
  \item or foreign affairs functions (including procurement functions thereunder), but not including the U.S. Army Corps of Engineers civil works program.
\end{itemize}

\begin{itemize}
  \item See id.
  \item Id. at § V(D)(3).
  \item Id. at § V(D)(3)(b)(1). A significant takings implication also exists when "insufficient information as to facts or law exists to enable an accurate assessment of whether significant takings consequences may result from the proposed policy or action." Id. at § V(D)(3)(b)(2).
  \item See Exec. Order No. 12,630, *supra* note 10, at § 11(c).
  \item The criteria are found in the Attorney General’s Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings, *supra* note 15, at § V(D)(1) & (2).
  \item Id. at § V(D).
  \item See Exec. Order No. 12,630, *supra* note 10, at § 11(c).
\end{itemize}
the economic impact of the proposed action;\textsuperscript{202} and the action's interference with reasonable investment-backed expectations.\textsuperscript{203} The Guidelines provide more specific guidance for applying these criteria to actions taken for health and safety purposes.\textsuperscript{204} Additionally, the Guidelines contain special criteria for regulatory programs that involve permits or that may cause an undue delay.\textsuperscript{205}

\textit{a. The Character of the Government's Action}

The first thing an agency must do when evaluating its proposed action is to examine the action's character.\textsuperscript{206} The action's 'character' relates to the purpose the action is meant to serve, including the legitimacy of that purpose and the likelihood that the purpose will be substantially advanced; the harm the action is meant to correct; and the effect the action will have on one or more of the owner's property interests.\textsuperscript{207}

Examining an action's character involves several steps. First, the agency must examine the purpose the action is meant to serve.\textsuperscript{208} If the agency's action is conducted pursuant to an enabling statute passed by Congress, the agency must examine the congressional purpose behind that statute.\textsuperscript{209} A legitimate public purpose must be identified within the statute's text.\textsuperscript{210} The agency should examine the text of the statute, together with the statute's legislative history, to determine whether the asserted legitimate public purpose is actually the true purpose of the statute.\textsuperscript{211} Once the agency is satisfied that a legitimate public purpose exists, the agency must determine that its proposed action has the purpose of, and does, substantially advance the statute's legitimate public purpose.\textsuperscript{212} Second, after identifying the harm that the statute was designed to redress, the agency must examine the degree to which the regulated property contributed to that harm.\textsuperscript{213} The harder it is to establish a nexus between the regulated property use and the harm, the more likely

\textsuperscript{202} Id. at § V(D)(2)(b).
\textsuperscript{203} Id. at § V(D)(2)(c).
\textsuperscript{204} Id. at § V(C)(2).
\textsuperscript{205} Id. at § V(C)(1) & (3).
\textsuperscript{206} Id. at § V(D)(2)(a)(i).
\textsuperscript{207} Id. at § V(D)(2)(a).
\textsuperscript{208} Id. at § V(D)(2)(a)(i).
\textsuperscript{209} Id.
\textsuperscript{210} Id.
\textsuperscript{211} Id.
\textsuperscript{212} Id. at § V(D)(2)(a)(ii).
\textsuperscript{213} Id. at § V(D)(2)(a)(iii).
it is that the action has takings implications.\textsuperscript{214} Third, the agency must examine the extent to which its action "totally abrogates a property interest which has been historically viewed as an essential stick in the bundle of property rights."\textsuperscript{215}

After examining the character of the action, the agency must then consider the action's economic impact on individual property owners.\textsuperscript{216} This requires an inquiry into the losses the property owner will suffer because of the restrictions the action places on the owner's right to use his or her own land.\textsuperscript{217}

\textit{b. Economic Impact of the Proposed Action}

There are several factors to be considered when an agency examines the economic impact of a proposed action.\textsuperscript{218} The agency must identify the individual economic and property interests that are likely to be affected,\textsuperscript{219} the degree to which the action will have an adverse economical impact on each property interest,\textsuperscript{220} and whether any benefits will flow to the property owner and mitigate or offset these adverse economic impacts.\textsuperscript{221} The agency also must approximate the duration of the adverse impact.\textsuperscript{222} To approximate the duration of the action's impact on a property owner, the agency must first determine whether the action is intended to permanently restrict property use, or whether the action will do so only temporarily. Additionally, the agency must consider the character and present use of the property.\textsuperscript{223} Finally, when evaluating the economic impact of its actions, the agency must investigate alternative actions to determine whether there is another way to achieve the statute's legitimate public purpose that will have less of an economic burden on the property owner.\textsuperscript{224}

\textit{c. Interference with Reasonable Investment-Backed Expectations}

The third criteria that an agency must consider when reviewing its actions for takings implications is the degree to which those

\textsuperscript{214} Id.

\textsuperscript{215} Id. at § V(D)(2)(a)(iv).

\textsuperscript{216} Id. at § V(D)(2)(b).

\textsuperscript{217} See id.

\textsuperscript{218} Id.

\textsuperscript{219} Id. at § V(D)(2)(b)(i).

\textsuperscript{220} Id. at § V(D)(2)(b)(ii).

\textsuperscript{221} Id. at § V(D)(2)(b)(iv).

\textsuperscript{222} Id. at § V(D)(2)(b)(iii).

\textsuperscript{223} Id.

\textsuperscript{224} Id. at § V(D)(2)(b)(v).
actions may interfere with the reasonable investment-backed expectations of the property owner.\textsuperscript{225} While the Guidelines do not define "reasonable investment-backed expectation," it is a term that is often used by courts in determining whether a regulation amounts to a taking and refers to the expectation an individual may have that his or her private investment will reap future profits.\textsuperscript{226} Not all such expectations are legally recognized as property interests.\textsuperscript{227} Nevertheless, the agency must consider interferences with any reasonable, investment-backed expectation, regardless of its status as a property interest.\textsuperscript{228}

Although the Guidelines provide general principles to follow whenever an agency reviews an action, the Guidelines also provide additional criteria for evaluating particular actions.\textsuperscript{229} These actions involve regulations that were promulgated for health and safety purposes,\textsuperscript{230} governmental actions that will cause undue delays,\textsuperscript{231} and permitting programs that make the granting of a permit conditional upon some other event taking place.\textsuperscript{232}

2. Additional Criteria For Certain Types of Actions

In addition to following the Guidelines' general criteria, agencies must follow more specific directives when implementing health and safety programs, when using permitting programs that utilize permit conditions, and when the agency actions will cause undue delays.\textsuperscript{233} Unlike the general criteria discussed above, these directives restrict an agency's ability to implement actions that have takings implications if those actions involve health and safety regulations, cond-

\textsuperscript{225} Id. at § V(D)(2)(c).


\textsuperscript{228} Id.

\textsuperscript{229} See generally id. at § V(C).

\textsuperscript{230} See id. at § V(C)(2).

\textsuperscript{231} See id. at § V(C)(3).

\textsuperscript{232} See id. at § V(C)(1).

\textsuperscript{233} See id. at § V(C).
tional permits, or undue delays. Additionally, the Takings Order restricts an agency's ability to implement any type of action by limiting the scope of the action relative to the harm the action addresses.

a. Public Health and Safety

Agencies must evaluate their actions taken to protect the public health and safety for takings implications. Although in takings jurisprudence courts give greater deference to health and safety regulations than to other types of regulations, an agency cannot escape takings scrutiny merely by claiming that an action was proposed for health and safety purposes. The Guidelines provide specific instructions on how an agency should apply the evaluative criteria to health and safety actions.

The Guidelines require an examination of both the harm that the agency intends to address and the actions the agency proposes to take to address that harm. The government must have designed the action for the purpose of preventing or mitigating a specifically identified health and safety risk; the action must substantially advance that purpose; and the action must not be disproportionate to the actual risk presented by the harmful property use.

The harm addressed in health and safety regulations must be both "real and substantial." The Guidelines elaborate on this standard by stating that the harm to the public, should the risk materialize, must be genuine and not merely speculative. The agency is asked to estimate the severity of injury that the public would suffer, basing its estimation on the best available technology in the field. Additionally, the agency must be able to support, by "meaningful evi-

234 See generally id. at § V(C).
235 Exec. Order No. 12,630, supra note 10, at § 4(b).
237 See infra notes 312-22 and accompanying text.
238 See infra notes 312-22 and accompanying text.
240 Id. at § V(C)(2).
241 Id. at § V(C)(2)(a) & (b).
242 Id. at § V(C)(2)(b).
243 Id.
244 Id. at § V(C)(2)(a).
245 Id.
246 Id. at § V(C)(2)(c)(ii).
In addition to restricting an agency's ability to implement health and safety regulations, the Takings Order restricts an agency's ability to use permitting programs. Specifically, the Takings Order requires a substantial nexus between any conditions placed upon a permit and the public purpose behind the permitting program.

b. Permitting Programs

One way that agencies restrict harmful or undesirable private property uses is to employ permitting programs that restrict the number of people putting property to such a use or require that certain conditions be fulfilled before the applicant can receive a permit. For instance, before a hazardous waste management facility can obtain an operator's license, the regulations require that the applicant must meet certain conditions, such as the placement of monitoring wells around the facility. Both the Takings Order and Guidelines address permit conditions. While the Guidelines lay out the criteria for determining whether these conditions have takings implications, the Takings Order affirmatively restricts the agency from implementing the conditions if they do have takings implications. To determine whether a permit condition has takings implications, the agency must question whether, constitutionally, it

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247 Id. at § V(C)(2)(a). The Guidelines do not define “meaningful evidence,” but they do qualify the term with the words, “in light of available technology and information.” Id.
248 Id. at § V(C)(2)(b).
249 Id. at § V(C)(2)(c).
250 See Exec. Order No. 12,630, supra note 10, at § 4(a).
251 See id.
253 See id.
256 See Exec. Order No. 12,630, supra note 10, at § 4(a).
could deny the permit altogether and, if so, for what legitimate public purpose.\textsuperscript{257} If any conditions placed upon the permit do not serve the same purpose that would be served by denying the permit altogether, or if the conditions do not substantially advance that purpose, the permitting program may have takings implications.\textsuperscript{258} The Takings Order restricts agencies from using permit conditions that have takings implications by stating that the agencies shall not impose such conditions unless they substantially advance the same purpose that would be served by denying the permit altogether.\textsuperscript{259}

c. Undue Delay

The Guidelines instruct that undue delays in an agency’s decision-making process may amount to a taking, regardless of whether the government intended to cause such a delay.\textsuperscript{260} Any delay that interferes with the property owner’s use of his or her property may increase the compensation award.\textsuperscript{261} In light of these takings risks, agencies must keep the length of their decisionmaking process to the minimum time period necessary.\textsuperscript{262}

d. Restrictions on the Scope of the Regulation

In addition to restricting the agencies' ability to implement actions involving health and safety regulations, permitting programs, and delays, the Takings Order also restricts the scope of the proposed action.\textsuperscript{263} Proposed actions that restrict private property use “shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress.”\textsuperscript{264} This requirement is mentioned twice in the Takings Order: once when the Takings Order discusses health and safety regulations and a second time when the Takings Order refers to all types of regulations.

An examination of the action’s takings implications is only one part of an agency’s examination of its actions that affect the use or value


\textsuperscript{258} See \textit{id.} at § V(C)(a) & (b).

\textsuperscript{259} See Exec. Order No. 12,630, \textit{supra} note 10, at § 4(a).


\textsuperscript{261} \textit{Id.}

\textsuperscript{262} Exec. Order No. 12,630, \textit{supra} note 10, at § 4(c).

\textsuperscript{263} See \textit{id.} at § 4(b).

\textsuperscript{264} \textit{Id.}
of property. The agency must also identify any less-intrusive alternatives and must estimate the dollar amount that the action would cost the government if the action were found to be a taking by a court.

C. The Takings Impact Assessment

When an agency determines that its proposed action has takings implications, it must complete a Takings Impact Assessment (TIA). In addition to an exploration of the action’s takings implications, the TIA also must identify any alternative actions that would be less restrictive on private property uses and must include an estimate of the potential compensation costs that the government will have to pay to affected landowners should a court find the proposed action to constitute a taking. The agency must then incorporate the TIA into the agency’s normal decisionmaking process. The Guidelines instruct the decisionmaker to make “meaningful use” of the TIA when deciding whether to implement an action that has takings implications.

The TIA is not meant to be an internal document, exclusively. The Guidelines require that the agency disclose any takings implications in major rules submitted to OMB and, if OMB requests, make the TIA available to OMB.

D. Reporting Requirements

The Takings Order imposes reporting requirements on the agencies. Pursuant to Executive Order 12,291, agencies must submit proposed actions to OMB for a cost-benefit review. The Takings Order requires agencies to identify the takings implications, if any, of certain proposed actions and discuss the merits of those actions,

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265 See Attorney General’s Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings, supra note 15, at § VI(A)(2)(c). Of course, the requirement that a TIA must be completed is subject to the exceptions listed in the Takings Order. See Exec. Order No. 12,630, supra note 10, at § 2(a)(1)–(7).


267 See id. at § VI(A)(2).

268 See id. at § VI(A)(2)(c).

269 See id. at § VI(A)(2)(a).

270 Id. at § VI(A)(2).

271 See id. at § VI(B)(1).

272 See id.

273 Exec. Order No. 12,630, supra note 10, at § 5(b).

274 Exec. Order No. 12,291, supra note 12, at § 5(c).
in light of the takings implications, in any submissions it must make to OMB regarding that action. At OMB's request, the agency must also submit a copy of the TIA to OMB.

The Guidelines do not require the agency to report takings implications in all circumstances. When submitting a proposed action to OMB for review, the agency must identify the action's takings implications only if the action constitutes a "major" rule under Executive Order 12,291, or in all circumstances if the action has "significant takings implications." At its discretion, however, OMB may require identification of takings implications for any proposed rule. In those actions where reporting of takings implications is required, the agency must also discuss the merits of the action, in light of the takings implications. The reporting requirement means that OMB will be notified that a proposed action has takings implications and, upon its own request, OMB will be supplied with an estimation of the potential cost of any proposed action that has takings implications.

In addition, agencies must notify OMB of all past takings awards rendered against one of the agency's existing rules or regulations and of all takings claims currently pending. Agencies were to submit to OMB a compilation of all such awards for the years 1985 through 1987, and were to submit, annually, a report of any such awards for each year thereafter. No agency reported any takings awards levied against one of their regulations for the fiscal years 1985 through 1987.

The annual reports submitted to OMB regarding successful takings claims establish that although many takings claims are filed

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276 See id.
277 See id.
278 Id. at § VI(B)(1)(a). For a definition of "major" rule, see supra note 114.
281 Id. at § VI(B)(1).
282 Exec. Order No. 12,630, supra note 10, at § 5(c).
283 Id. at § 5(d).
284 In this instance, the term "agency" is limited to actual executive agencies and does not include other executive branch departments and entities.
285 McElfish, supra note 252, at 10,478. Some executive branch departments, however, did report successful takings claims against their regulatory actions. Id.
against the federal government each year, very few are successful. For example, examine the takings claims against the Land and Natural Resources Division (the Division) of the United States Department of Justice. In 1988, Roger Marzulla, then-head of the Division, claimed there were $1 billion worth of takings claims pending against his division. Yet the Division's submission to OMB pursuant to the Takings Order indicate that for the years 1985, 1986, and 1987 successful takings awards amounted to only $23.1 million, $5.5 million, and $20.2 million, respectively. Of those awards, most were the result of physical appropriation or occupation of private property and not a result of regulatory activities.

E. OMB Oversight of The Takings Order

The Takings Order gives the Director of OMB oversight authority to ensure compliance with the operative directives of the Takings Order. In addition to ensuring compliance, the Director of OMB may also take action to ensure that each agency has properly accounted for any successful takings claim rendered against it, in the agency's budget submissions to OMB.

F. Current Status of the Takings Order and the Private Property Rights Act

The Takings Order remains effective today, although members of Congress have urged President Clinton to review the order to determine whether it is detrimental to regulations promulgated for health and safety or environmental purposes. On January 21, 1993 Senator Bob Dole (R. Kan.) reintroduced the Private Property Rights Act of 1993 (the Act), originally introduced by Senator

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286 See id.
287 See Marzulla, supra note 170, at 10,257. Mr. Marzulla claims that the heavy takings docket was an impetus for the creation of the Takings Order. See id.
288 McElfish, supra note 252, at 10,478.
289 See id. For the years 1985, 1986, and 1987 nonregulatory takings made up at least 90.9%, 74.6%, and 69.8%, respectively, of takings awards against the Land and Natural Resources Division of the United States Department of Justice. See id.
290 See Exec. Order No. 12,630, supra note 10, at § 5(e)(1).
291 Id.
293 S. 177, 103rd Cong., 1st Sess. (1993), in 139 CONG.REC. S610 (daily ed. Jan. 21, 1993). The bill was introduced as S. 177 and is cosponsored by many Republican senators. A similar bill is pending in the House of Representatives, as H.R. 385, sponsored by two Republicans and no Democrats.
Steve Symms (R. Idaho).\textsuperscript{294} The bill attempts to codify the Takings Order into public law, thus eliminating the possibility that President Clinton, or future presidents, may revoke the Order.\textsuperscript{295}

The Act requires executive agencies and departments to comply with the directives of the Takings Order.\textsuperscript{296} If enacted, the Act would block the implementation of any new regulations until the Attorney General has certified that the agency acted in compliance with the Takings Order when promulgating the regulation.\textsuperscript{297} Unlike the Takings Order, the Act creates a private cause of action against agencies for noncompliance and those persons adversely affected by the agency's action will have standing to bring suit.\textsuperscript{298} Judicial review is limited to a procedural issue, whether the agency received certification of compliance with Executive Order 12,630 from the Attorney General and "similar procedures."\textsuperscript{299} Supporters of the Act claim that it will safeguard property owners, protect Fifth Amendment property rights, and will promote the interests of the business community.\textsuperscript{300}

IV. REGULATORY TAKINGS JURISPRUDENCE

The Takings Order was enacted on the heels of two Supreme Court cases which expanded the definition of a regulatory taking.\textsuperscript{301} The Order, purportedly, was modeled on then-current takings law.\textsuperscript{302} This Section, therefore, will focus on regulatory takings jurisprudence as the state of the law existed in March of 1988, when the Takings


\textsuperscript{297} See S. 177, supra note 293.

\textsuperscript{298} Id. The operative language of the Act reads:

No regulation . . . shall become effective until the issuing agency is certified to be in compliance with Executive Order 12630, as in effect in 1991, the language of which is hereby incorporated by reference and enacted into public law, to assess the potential for the taking of private property in the course of federal regulatory activity, with the goal of minimizing such where possible.

\textsuperscript{299} Id.


\textsuperscript{301} See supra note 18.

\textsuperscript{302} Exec. Order No. 12,630, supra note 10, at § 1(a).
Order was drafted. This Section will then examine new developments in takings law.

A. The Character of the Action and its Impact on the Property Owner

In 1988, no case had announced a set formula or rule for determining when a regulation went so far as to constitute a taking of private property. While the Court had identified two important criteria for determining when a government action constitutes a taking, the weight it gave each criterion varied, depending upon the facts of each particular case. The two criteria that the Court examined in regulatory takings claims were the nature of the government's action and the adverse impact the action had on the property owner. An oft-cited rule of thumb, articulated in *Agins v. City of Tiburon*, is that a regulation may affect a taking if the regulation "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." The *Agins* Court proposed that courts should balance the public interest against the property owner's private harm.

One factor courts examined in takings claims were whether the regulation in question substantially advances a legitimate state interest. To make this determination, the courts examined the regulation itself, including its purpose and the likelihood that it will achieve that purpose. The regulation must have been implemented for the purpose of serving a legitimate state interest. The United

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304 See id.


308 See *Agins v. City of Tiburon*, 447 U.S. at 262.


States Supreme Court has not articulated a standard for determining what constitutes a legitimate public interest. Instead, the responsibility for determining what constitutes a public purpose falls to the legislature, with very little room for review by the courts. The Court in *Hawaii Housing Authority v. Midkiff*, asserted that “subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”

Although courts generally defer to a legislature’s determination of what constitutes a public purpose, courts may inquire into whether the asserted purpose is the government’s true purpose for acting. In *Pennsylvania Coal v. Mahon*, for instance, although the identified purpose of a coal mining regulation was safety, an examination of the regulation’s operative language revealed that safety was not the true goal behind the State’s action. A court, however, should not reject a regulation merely because the regulation is somewhat overinclusive or underinclusive.

Despite its inability to define the phrase “legitimate state interest,” the Court in 1987, made it clear that “a broad range of governmental purposes” satisfied this requirement. One such legitimate public purpose was regulating for health and safety reasons. Under the umbrella of health and safety regulations, the government, amongst other things, may condemn unsafe structures, may close unlawful business operations, may destroy infected trees, and surely may restrict access to hazardous areas—for example, land on which radioactive materials have been discharged, land in the path of a lava flow, or land in the path of a potentially life-threatening flood.

In addition to having a legitimate public purpose, the regulation must “substantially advance” that purpose. As in the Court’s han-

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312 Nollan v. California Coastal Comm’n, 483 U.S. at 834.
315 Id. at 239 (quoting Berman v. Parker, 348 U.S. 26 (1954)).
316 See Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. at 487 n.16.
317 260 U.S. 393 (1922).
318 See id. at 413–14 (clear from statute that public purpose was limited); accord Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. at 487 n. 16.
319 See Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. at 487 n.16; see also Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926).
320 Nollan v. California Coastal Comm’n, 483 U.S. at 834–35.
322 Id.
323 See, e.g., Nollan v. California Coastal Comm’n, 483 U.S. at 834 n.3; Agins v. City of
dling of the definition of "legitimate state interest," the Court has not defined what connection is necessary between a regulation and its corresponding public purpose to constitute substantially advancing that purpose. The only help the Court has provided is that "substantially advance" is a higher level of review than the "rationally related" standard of judicial review. The Court, however, has given obvious illustrations of what does substantially advance a legitimate public purpose and what does not substantially advance a legitimate public purpose. Cutting down infected trees does substantially advance the public purpose of quelling the spread of infection amongst the local tree population. A public easement along the seashore, however, does not substantially advance the public purpose of repairing psychological harm to citizens whose view of the ocean is obstructed by a wall of houses.

The second factor that courts must examine in a takings analysis is the action's impact on the private property owner. There are several variations to this theme. The Court may ask to what degree the action denied the owner use of his or her property, to what extent the action denied the owner "viable economic use" of the property, to what degree the action interfered with a reasonable investment-backed expectation of the owner, or to what degree the regulation caused a diminution of the property's value. In 1988, while the economic impact a property owner suffered was relevant

Tiburon, 477 U.S. 255, 260 (1980). The "substantially advance" requirement subjects the regulation to a higher level of scrutiny than that suggested by Justice Brennan. In his dissent, Justice Brennan argued that the standard of review was, and had long been, whether the governmental body "could rationally have decided that the measure adopted might achieve the State's objective." Nollan v. California Coastal Commission, 483 U.S. at 843 (Brennan, J., dissenting) (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981)) (emphasis in original).

324 Nollan v. California Coastal Comm'n, 483 U.S. at 834.
325 See id. at 834 n.3.
326 See Miller v. Schoene, 276 U.S. 272, 280 (1928).
327 See Nollan v. California Coastal Comm'n, 483 U.S. at 837.
328 See Miller v. Schoene, 276 U.S. at 280.
329 See Nollan v. California Coastal Comm'n, 483 U.S. at 837.
331 See Agins v. City of Tiburon, 477 U.S. at 260.
333 See Pennsylvania Coal v. Mahon, 260 U.S. 393, 413 (1922). When the diminution in value "reaches a certain magnitude, . . . there must be an exercise of eminent domain and compensation to sustain the act." Id.
to the Court's determination of whether a taking occurred, it was not definitive.\textsuperscript{334}

\section*{B. The 1987 Takings Cases}

The Supreme Court heard three well-known regulatory takings cases in 1987.\textsuperscript{335} Two of these cases purportedly expanded the scope of a regulatory taking. These cases are \textit{First English Evangelical Lutheran Church of Glendale v. County of Los Angeles},\textsuperscript{336} and \textit{Nollan v. California Coastal Commission}.\textsuperscript{337} The third case, \textit{Keystone Bituminous Coal Association v. DeBenedictis},\textsuperscript{338} neither expanded nor contracted the definition of regulatory taking, but instead reaffirmed that the government's purpose for passing regulations is a critical criterion for determining whether the regulation constitutes a taking.\textsuperscript{339}

1. \textit{Keystone Bituminous}: The Nature of The Government's Action

In \textit{Keystone Bituminous Coal Ass'n v. DeBenedictis},\textsuperscript{340} the majority implied that regulations passed for legitimate health and safety purposes, such as regulations controlling public nuisances, do not constitute a taking regardless of the regulation's impact on the private property owner.\textsuperscript{341} Because there was no evidence that the property owners in this case suffered an adverse impact sufficient to constitute a taking, the Court did not reach the question whether the nature of the government's action alone is sufficient to sustain a regulation against a taking claim.\textsuperscript{342} \textit{Keystone Bituminous}, therefore, stands for the concept that the government's purpose in regulating land-use is a critical element in a regulatory takings analysis; one that should not be dismissed lightly.\textsuperscript{343}

\begin{itemize}
  \item \textsuperscript{334} See \textit{Keystone Bituminous Coal Ass'n v. DeBenedictis}, 480 U.S. at 490; see also \textit{Goldblatt v. Hempstead}, 369 U.S. 590, 594 (1962). \textit{But see Lucas v. South Carolina Coastal Council}, 112 S.Ct. at 2899 (in 1992, complete denial of economically beneficial use of property is sufficient to constitute a taking unless the government acted to eradicate a common law nuisance).
  \item \textsuperscript{336} 482 U.S. 304 (1987).
  \item \textsuperscript{337} 483 U.S. 825 (1987).
  \item \textsuperscript{338} 480 U.S. 470 (1987).
  \item \textsuperscript{339} See id. at 492.
  \item \textsuperscript{340} 480 U.S. 470 (1987).
  \item \textsuperscript{341} See id. at 492.
  \item \textsuperscript{342} See id.
  \item \textsuperscript{343} See id.
In 1966, the Pennsylvania legislature determined that coal mine subsidence—the sinking of the strata and land surface above a coal mine—posed a safety threat to the public, to the environment, and to the physical structure of houses and other buildings above the mine.\textsuperscript{344} In response to this threat, the State legislature authorized the Pennsylvania Department of Environmental Resources (DER) to implement a program designed to prevent or minimize coal mine subsidence.\textsuperscript{345} To minimize subsidence danger, DER’s program required that approximately 50\% of the subsurface coal be left in place as surface support.\textsuperscript{346} In a 1982 facial challenge to the constitutionality of the 50\% rule, an association of coal mine operators claimed that the rule constituted an unconstitutional taking of private property without payment of compensation.\textsuperscript{347} In their suit, the petitioners never claimed that the 50\% rule rendered their mines unprofitable, but rather alleged that the rule extinguished all of the value of the coal that the operators were required to leave behind, thereby denying them all economically viable use of that portion of their coal.\textsuperscript{348}

The trial court made no findings of fact but, instead, the parties stipulated the facts as follows. The petitioners owned or operated thirteen mines that contained, cumulatively, over 1.46 billion tons of coal.\textsuperscript{349} The 50\% rule required the petitioners to leave almost 27 million tons, or approximately 2\% of the coal in the ground to prevent subsidence.\textsuperscript{350} The 50\% rule is not the sole reason coal is left behind in a mine.\textsuperscript{351} Regardless of DER’s rule, only 75\% of the petitioners’ coal could be profitably mined\textsuperscript{352} because the physical process of underground coal mining does not permit all of the coal to be re-

\textsuperscript{344} See id. at 477. Coal mine subsidence weakens the ground, causing sinkholes that make land development or farming impossible; damages the foundations, walls, and physical integrity of buildings; cracks underground oil, gas, and electric lines; sinks roads; and drains ponds and other groundwater. Water drained from the surface, as well as oil from severed lines, may enter and fill the mine itself. See id. at 476 n.2.

\textsuperscript{345} See id. at 477.

\textsuperscript{346} See id. The petitioners complained also about § 6 of the statute that authorized the DER to revoke the mining license of any mining operation that caused damage to a structure protected by § 4 when “the operator has not within 6 months either repaired the damage, satisfied any claims arising therefrom, or deposited a sum equal to the reasonable cost of repair with the DER as security.” See id.

\textsuperscript{347} See id.

\textsuperscript{348} See id. at 496.

\textsuperscript{349} See id.

\textsuperscript{350} See id.

\textsuperscript{351} See id. at 500.

\textsuperscript{352} See id.
moved. Some coal must be left behind to support the structure of the mine.

Applying the two-part analysis announced in Agins v. City of Tiburon, the Court first examined the nature of DER’s action. The purpose behind the 50% rule was to prevent or mitigate the harm that coal mine subsidence can cause to the public’s safety, the environment, and the structures on the land. The Court, accepting as true the trial court’s determination that the 50% rule was intended to serve a legitimate public purpose, distinguished the landmark case Pennsylvania Coal v. Mahon, in which a similar regulation was found to be a taking because it was passed for private economic reasons, rather than public safety purposes.

The Keystone Bituminous Court underscored the long-followed principle that the nuisance exception, which allows the government to prevent harmful uses of private property without paying compensation, encompasses regulations passed for public health and safety purposes. The nuisance exception, articulated one hundred years earlier in Mugler v. Kansas, had foundations in the canon that all property in this country is held subject to the maxim sic utere tuo ut alienum non laedas, which means that property owners should not use their property in ways that harm others. Although this maxim is the principle behind the common law tort of nuisance, the Mugler Court did not limit its exception to common law nuisances. Instead, the nuisance exception extended to “nuisance-like”

353 See id. at 496.
354 See id.
357 See id.
358 See id. at 486.
359 260 U.S. 393 (1922).
360 See Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. at 485–86.
361 See id. at 488–92.
362 123 U.S. 623 (1887). Although Mugler was decided 35 years before Justice Holmes articulated the concept of a regulatory taking in Pennsylvania Coal, the latter case did not overturn the nuisance exception. In fact, the Court in Miller v. Schoene reaffirmed the nuisance exception five years after Pennsylvania Coal. See Miller v. Schoene, 276 U.S. 272, 279–80 (1928).
364 See Plater et. al., supra note 35, at 103 n.1.
activities. The Mugler Court stated that the government's authority to prevent a landowner from using his or her land in ways that are harmful to others cannot be burdened by requiring the government to compensate the landowner for any economic losses that he or she may have suffered as a result of not being able to use the land in a harmful way. The relevant issue is whether the regulated property use is dangerous to the public safety, health, or welfare.

Many cases between Mugler and Keystone applied the nuisance exception to regulations that were promulgated to protect the public health, safety, or welfare. In a footnote, the Keystone Bituminous Court acknowledged Justice Rehnquist's limitation on the nuisance exception: "[t]he nuisance exception . . . is not coterminous with the police power itself." Five years later, however, the Court in Lucas v. South Carolina Coastal Council stated it was abundantly clear that at the time Keystone Bituminous was decided, the nuisance exception was coterminous with the police power. Consistent with the public protection offered by the nuisance exception is the idea that we all benefit from health and safety regulations. Although an individual may feel unfairly burdened by land-use restrictions, that individual benefits when the same regulation

366 See id.; accord Atlantic Coastline R.R. Co. v. City of Goldsboro, 232 U.S. 548, 558 (1914) (the State's police powers permit the State to extend the nuisance exception as far as is necessary to protect the public).
367 See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. at 489.
371 Id. at 2897. The Court supported this statement with quotes from Penn Centr. Transp. Co. v. City of New York, 438 U.S. 104, 125 (1978)("where State 'reasonably conclude[s] that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land,' compensation need not accompany prohibition"); and Nollan v. California Coastal Comm'n, 483 U.S. 825, 834–35 (1987) ("[o]ur cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest[,] [b]ut [t]hey have made clear . . . that a broad range of governmental purposes and regulations satisfy these requirements."). The Lucas Court, implying that the exception had swallowed the rule, limited the nuisance exception to uses that the common law of nuisance and property principles prohibit. See Lucas v. South Carolina Coastal Council, 112 S.Ct. at 2898–99.
prevents a neighbor from using his or her property in a harmful way.\textsuperscript{373} Known as "reciprocity of advantage," this principle is based on the idea that the burden of the regulation will be shared by many property owners and each will benefit from the other's burden.\textsuperscript{374} A good example is a zoning ordinance, where each individual in a neighborhood is burdened by building restrictions but simultaneously benefits because the zoning ordinance prevents a neighbor from erecting a mini-mall. Reciprocity of advantage is an exception to the Takings Clause.\textsuperscript{375}

The second half of the \textit{Keystone Bituminous} decision, examining the economic impact of the 50\% rule, is procedurally inconsistent with the first half of that decision.\textsuperscript{376} Because the petitioners' claim amounted to a facial challenge, the majority, in the second part of the decision, stated that it should follow the facial challenge test for constitutionality,\textsuperscript{377} laid out in \textit{Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.}\textsuperscript{378} \textit{Hodel} established that when adjudicating a facial challenge to a taking on constitutional grounds, the Court need only inquire whether the governmental action "denies an owner economically viable use of his land. . . ."\textsuperscript{379} Nevertheless, the Court went ahead and looked at the nature of the government's action in the first part of its opinion.\textsuperscript{380}

The question of whether the 50\% rule denied the mine owners economically viable use of their property turned on how the Court defined the property interest subject to the rule.\textsuperscript{381} The majority and dissent differed sharply on this point.\textsuperscript{382} The rule, as set out in \textit{Penn Central Transportation Co. v. New York},\textsuperscript{383} was that the Court should not divide a parcel of property into discrete segments, but instead should examine the regulation's impact on "the parcel as a whole."\textsuperscript{384} The \textit{Keystone Bituminous} Court determined that although

\textsuperscript{373} \textit{See id.}  
\textsuperscript{374} \textit{See id.}  
\textsuperscript{375} \textit{See Penn Centr. Transp. Co. v. City of New York, 438 U.S. at 147 (Rehnquist, J., dissenting).}  
\textsuperscript{376} \textit{See generally Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1978).}  
\textsuperscript{377} \textit{Id. at 494.}  
\textsuperscript{378} \textit{452 U.S. 264 (1981).}  
\textsuperscript{380} \textit{See generally Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. at 485–83.}  
\textsuperscript{381} \textit{Id. at 497.}  
\textsuperscript{382} \textit{See generally id.}  
\textsuperscript{383} \textit{498 U.S. 104, 124 (1978).}  
\textsuperscript{384} \textit{Id. at 130–31 (emphasis added); accord Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. at 497; Andrus v. Allard, 444 U.S. 51, 65–66 (1979).}
the 50% rule destroyed nearly all value in the 27 million tons of coal, this loss was minimal relative to the petitioners' entire quantity of coal.\footnote{Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. at 496.} One year after Penn Central, the Court in Andrus v. Allard,\footnote{444 U.S. 51 (1979).} echoed this rule when it stated that, although the government action prohibited the most profitable use of the owner's property, "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."\footnote{Id. at 65–66.}

Dissenting, Justice Rehnquist argued that there was no bundle of property rights in the Keystone Bituminous case, but instead there was only one property right to the 27 million tons of coal—the right to mine the coal—and that the owners were denied this right altogether.\footnote{Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. at 517 (Rehnquist, J., dissenting).} Unlike the owners in Andrus who, although they could no longer sell their Native American artifacts containing protected bird feathers, retained the right to possess and transport their property, to display the artifacts for profit, or to donate them,\footnote{Andrus v. Allard, 444 U.S. at 66.} the coal mine operators retained very few rights in their coal.\footnote{See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. at 517 (Rehnquist, J., dissenting).} Unlike Native American artifacts, unmined coal cannot be transported, displayed, or donated.\footnote{See id.} Thus, Justice Rehnquist argued, the only right one has in underground coal is "the right to mine it."\footnote{See id. at 497.} He further asserted that because the DER's rule completely abrogated petitioners' only right to this segment of the coal, this segment constitutes a discrete and separate property interest.\footnote{See id.} Justice Rehnquist likened the government's action to a physical appropriation of the coal, for which the government must pay compensation.\footnote{See id.} The majority rejected his assertions that the action amounted to a physical appropriation and that the 27 million tons constituted a separate, discrete property interest.\footnote{See id. at 497.} Instead, the majority held that the diminution of value would be based upon the entire quantity of coal and not on merely the 27 million tons.\footnote{See id.}
2. First English Evangelical: Temporary Takings

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, a local ordinance temporarily prohibited all construction in an area of land recently devastated by a flood. The First English Evangelical Lutheran Church of Glendale (the Church) owned twenty-one acres of this land, located at the bottom of a canyon in the Angeles National Forest. On its property, the Church operated a retreat center for handicapped children. The retreat center was situated along the banks of a creek and was located downstream of a natural watershed—an area of trees and other vegetation that slows the advancement of any water spilling over the river’s banks, allowing the ground time to absorb the water, thus helping to prevent floods. In 1977, a fire destroyed nearly three thousand acres of the upstream watershed, leaving the banks of the creek vulnerable to flooding. One year later, a storm dropped eleven inches of rain in the Angeles National Forest, causing water to spill over the banks of the creek and, with no watershed to slow its pace, rage through the canyon destroying buildings and drowning ten people. Luckily, the retreat center was closed for the week. The Church sustained no loss of life, but the flood did destroy the bunkhouses, dining hall, and other buildings of the retreat center.

In response to the flood, Los Angeles County passed an ordinance temporarily prohibiting all construction, including reconstruction, in the area while the County studied safe uses to which the land might be put, given the area’s propensity to flood. One month later, the

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398 *Id.* at 307.
399 *Id.*
400 *Id.*
401 *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 210 Cal. App. 3d 1353, 1357 (1989). The vegetation of a watershed slows the movement of the water which allows the water to then percolate into the soil or to be “carried away by streams.” *See id.* at 1357 n.1.
403 *Id.*
404 *Id.*
405 *Id.*
406 *Id.*
407 *Id.* The ordinance, Interim Ordinance No. 11,855 stated, in pertinent part, [a] person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon... *Id.*
Church filed suit for compensation, claiming, among other things, that the ordinance constituted an uncompensated taking.\(^{408}\) The Superior Court of California dismissed the case, stating that in California a property owner could not sue the state for compensation but instead only could file an action for mandamus or for declaratory relief.\(^{409}\)

The issue before the Supreme Court in *First English Evangelical* was limited to whether the government must pay compensation when it temporarily, rather than permanently, denies an owner all use of his or her property, or whether the owner is merely entitled to injunctive relief.\(^{410}\) Because no determination was made at trial regarding if, and to what extent, the ordinance advanced a legitimate public purpose or to what degree the ordinance interfered with the owner's use of its property,\(^{411}\) the Supreme Court could not reach the question of whether the ordinance amounted to a taking.\(^{412}\) Instead, for the purposes of its inquiry into the ordinance's limited remedies, the Court assumed that the ordinance constituted a taking.\(^{413}\) The Court likened the ordinance's eight-year effect on the property owner—for which the government was being asked to pay compensation—to a situation where the government repeals a regulation after a court holds that regulation to constitute a taking.\(^{414}\) The question amounted to whether, if a court holds a regulation to be a taking and the government, in response, repeals the regulation, the government nevertheless must pay compensation for the period of time when the regulation was effective.\(^{415}\)

Drawing on cases where the government was held responsible for compensating the owner when the government temporarily physically appropriated the owner's property,\(^{416}\) the Court held that if the

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\(^{408}\) Id. at 308.

\(^{409}\) Id. at 308–09.

\(^{410}\) See id. at 321.

\(^{411}\) See id. at 308–09.

\(^{412}\) Earlier cases stated that a court should not determine the constitutionality of a regulation as it applies to a particular case without examining the facts of that particular case. See, e.g., Socialist Labor Party v. Gilligan, 406 U.S. 583, 588 (1972).

\(^{413}\) *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 322 (1987). The Court assumed that the ordinance "has denied appellant all use of its property for a considerable period of years. . . ." Id.

\(^{414}\) See id. at 317–18.

\(^{415}\) See id.

ordinance were to constitute a taking, then the same ordinance, if effective only temporarily, would constitute a temporary taking. The government cannot avoid paying compensation by repealing the regulation. If, however, the government does choose to repeal the regulation, it is responsible for compensating the affected owner only for the period of time during which the regulation was effective. The government need not pay compensation for a permanent taking. In First English, if the lower court, on remand, were to find that the ordinance did amount to a taking, the County could not merely invalidate the ordinance, but instead would have to compensate the Church for the period during which the ordinance denied the Church all use of its property.

The First English holding was limited to the Court's pronouncement about the remedies available for temporary takings. Temporary takings do not include the economic impact suffered by private property owners during governmental decisionmaking. Sometimes, governmental decisionmaking regarding a particular piece of land may cause the value of that land to fluctuate. Diminution in property value during governmental decisionmaking, however, is an "incident of ownership," and not a Fifth Amendment taking. Additionally, restricted use of the property during governmental decisionmaking does not necessarily implicate a taking. As the Court pointed out in Agins v. City of Tiburon, although landowners may have been unable to sell their land during a condemnation proceeding, this did not prevent them from selling the land when the proceeding was over. Delays in decisionmaking, which

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417 On remand, the California Court of Appeals determined that no taking had occurred because the ordinance substantially furthered the legitimate state interest of health and safety and also because the ordinance did not deny the Church all use of its property. See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 210 Cal. App. 3d 1353, 1365–74 (1989).
418 See id.
419 See id. at 319.
420 See id.
421 See id. at 321.
422 See id.
423 See id. Examples include "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like. . . ." Id.
425 See id.
426 See id.
427 See id.
428 Id.
the First English Court explicitly distinguished, are different from temporary takings.\footnote{See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321 (1987).}

3. Nollan: Conditional Permits

In \emph{Nollan v. California Coastal Commission},\footnote{483 U.S. 825 (1987).} the Court examined the constitutionality of conditions imposed upon land-use permits.\footnote{See id.} The Nollans, wishing to tear down an ocean-side bungalow and replace it with a much larger house, requested a building permit from the California Coastal Commission (the Commission).\footnote{Id. at 827-28.} The Commission agreed to grant the permit on the condition that the Nollans grant an easement allowing the public to pass across the ocean side of their property.\footnote{Id. at 828.} The easement was to run parallel with the ocean, bordering the ocean's high tide line on one side and the Nollans' seawall on the other.\footnote{Id.} The Nollans brought suit on the grounds that the permit condition violated the Takings Clause.\footnote{See id. at 831.}

By agreeing to the condition, the Nollans would forfeit their right to exclude people from the portion of their property that would be subject to the easement.\footnote{Id.} The right to exclude people from one's property is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."\footnote{Id. at 832.} Additionally, the public's presence in the Nollans' back yard would amount to a physical occupation of that portion of the property.\footnote{Id.} The government cannot physically occupy a piece of property, nor can they take land by proxy through the public, without compensating the property owner.\footnote{See id.} Having settled this, the Court asked the following question. If an outright demand by the government to grant a public easement would require the payment of just compensation, does conditioning a land-use permit on such a demand similarly constitute a taking? The Court held that it does.\footnote{See id. at 837.}
For purposes of its analysis, and without making a determination of its own, the Court accepted as legitimate the public purpose asserted by the Commission.\textsuperscript{442} In short, the Nollans' new house would be harmful to the public because it would contribute to a "wall" of houses that blocked the public's view of the ocean, diminish the public nature of the beach, and interfere with the public's ability to go to the ocean from the street and to walk along the ocean's shore.\textsuperscript{443} The easement of passage along the Nollans' property was meant to offset the damage that the construction of the Nollans' new house would cause to the public.\textsuperscript{444}

The \textit{Nollan} Court, established a nexus requirement between the permit condition and the public purpose justifying the permitting program, itself.\textsuperscript{445} In the \textit{Nollan} case, the public harm that the permit program addressed flowed directly from the public's inability to see or reach the ocean from the street in front of the Nollan's house.\textsuperscript{446} It was unlikely that an easement allowing the public to walk along the beach in front of the Nollan's home would serve the interests of those people who found themselves on the street in front of the Nollan's home and could not see the beach.\textsuperscript{447} Because the grant of an easement would not substantially advance the Commission's attempts to eradicate the public harm, the nexus requirement was not satisfied.\textsuperscript{448} Several commentators believe that this is the extent of the \textit{Nollan} Court's holding.\textsuperscript{449} They believe the Court only states in dictum that permit conditions must substantially advance the same purpose that would be served by denying the permit altogether.\textsuperscript{450}

\textsuperscript{442} See id. at 835. The Court, however, did note that if the Commission's purpose was to provide a continuous strip of beach along the length of the shore for public passage, this would require an exercise of the State's power of eminent domain. \textit{Id.} at 841.

\textsuperscript{443} \textit{Id.} at 828–29. The Commission stated that the wall of houses, to which the Nollan's house would contribute, would prevent the public "psychologically...from realizing a stretch of coastline exists nearby that they have every right to visit," and the house would "burden the public's ability to traverse to and along the shorefront." \textit{Id.}

\textsuperscript{444} \textit{Id.}

\textsuperscript{445} See id. at 837.

\textsuperscript{446} \textit{Id.} at 828.

\textsuperscript{447} See id. at 838.

\textsuperscript{448} See id. at 837.

\textsuperscript{449} See, e.g., Jerry Jackson & Lyle D. Albaugh, \textit{A Critique of the Takings Executive Order in the Context of Environmental Regulations}, 18 Envtl. L. Rep. at 10,468 (Nov. 1988); see also McElfish, \textit{supra} note 252, at 10,475–76.

\textsuperscript{450} See, e.g., Jackson & Albaugh, \textit{supra} note 449, at 10,468; see also McElfish, \textit{supra} note 252, at 10,475–76.
C. Current Developments in Takings Jurisprudence

The most significant changes made to takings law after 1988 came in the recent case *Lucas v. South Carolina Coastal Council*.\(^\text{451}\) Justice Scalia, writing for the majority, abolished the *Agins* balancing test for certain situations.\(^\text{452}\) The Court created, for the first time, a categorical rule that any time the government deprives an owner of all economically beneficial use of his or her land, this act amounts to a taking regardless of the public purpose the restriction serves.\(^\text{453}\) In creating a categorical rule, the *Lucas* Court eliminated the nuisance exception as previously understood and replaced it with a very narrow exception.\(^\text{454}\) If a regulation prohibits property uses that are impermissible under common law nuisance and property principles, then the regulation does not take the property even if the regulation denies the owner all economically beneficial use.\(^\text{455}\)

Mr. Lucas, a residential developer, claimed that he was denied all economically feasible use of his beachfront property when a regulation passed two years after he purchased the property prohibited him from erecting any “permanent habitable structures”\(^\text{456}\) on the property. Mr. Lucas owned two parcels of land and each was subject to the restrictions of this regulation, the Beachfront Management Act.\(^\text{457}\) The most profitable use for these properties would be to build luxury homes on the land, but the Beachfront Management Act denied him this use.\(^\text{458}\) The trial court found that the building restrictions rendered the land “valueless” and the Supreme Court accepted this as true.

Despite its pronouncements, the *Lucas* Court left several areas of takings law untouched. Two of them are relevant to this analysis as it relates to President Reagan's Taking Order. First, *Lucas*'s cate-

\(^\text{452}\) 112 S.Ct. at 2899. *Agins* required courts to weigh the private harm against the public's interest in the land use restriction. See *Agins* v. City of Tiburon, 447 U.S. 255, 261 (1980).
\(^\text{453}\) See *Lucas* v. South Carolina Coastal Council, 112 S.Ct. at 2899. The Court's pronouncement applies only to real, and not to personal, property. See id. at 2899–2900.
\(^\text{454}\) See id. at 2900–01.
\(^\text{455}\) See id. The Court’s analysis in reaching this new test is beyond the scope of this Comment. Briefly, however, the Court stated that property uses that the common law or property principles forbid are not part of an owner's title to the land and, thus, when the government proscribes these uses, it is not taking anything that belongs to the owner. See id.
\(^\text{456}\) See id.
gorical rule applies only when the owner is denied all economically beneficial use of his or her property.\textsuperscript{459} Such a deprivation, the Court stated, is "relatively rare."\textsuperscript{460} In situations where the restriction denies the owner less than all economically beneficial use of the property, the \textit{Agins} balancing test would seem to apply still.\textsuperscript{461} In fact, the Court stated a regulation that denies an owner ninety percent of the property's economically beneficial use and does not compensate the owner for that loss may still be constitutional.\textsuperscript{462} It was interesting, therefore, that the Court accepted as true the lower court's ruling that the Beachfront Management Act denied Mr. Lucas all economically beneficial use of his property, even though the regulation only eliminated the most profitable use of the land.\textsuperscript{463}

Second, the \textit{Lucas} Court left open the question of whether to look at the parcel as a whole or to look only at the affected portions of the property when examining the regulation's adverse economic impact on the property owner.\textsuperscript{464} Because the Beachfront Management Act affected both parcels of land, the Court had no reason to examine this issue, but, nevertheless, mentioned it in dicta.\textsuperscript{465} In a footnote, the Court stated that the rule—that the Court should examine the diminution in value of the property as a whole—was "extreme—and \ldots unsupportable.\ldots\"\textsuperscript{466} The Court suggested, again in a footnote, that if state law affords legal recognition to the adversely affected property interest, the owner's reasonable expectations in that interest might warrant limiting the Court's examination to the affected interest and not to the parcel as a whole.\textsuperscript{467}

The cases discussed above contain the principles upon which takings jurisprudence, as it exists now and as it existed in 1988, rests.\textsuperscript{468} While \textit{Lucas} changed takings law to some degree, many of the takings principles remain unchanged from 1988.\textsuperscript{469} Next, this Comment will discuss the extent to which the Takings Order reflected

\textsuperscript{459} Id. at 2894.
\textsuperscript{460} Id. The Court accepted as true the trial court's determination that the regulation did deny the owner all economically beneficial use. \textit{See id.}
\textsuperscript{461} \textit{See id.}
\textsuperscript{462} \textit{See id.}
\textsuperscript{463} Id. at 2890. In \textit{Andrus v. Allard}, however, the Court held that elimination of the property's most profitable use by the government did not necessarily constitute a taking. \textit{See 444 U.S. 51, 66 (1979).}
\textsuperscript{465} \textit{See id.}
\textsuperscript{466} \textit{See id.}
\textsuperscript{467} \textit{See id.}
\textsuperscript{468} \textit{See supra} notes 303–467 and accompanying text.
\textsuperscript{469} \textit{See supra} notes 459–67 and accompanying text.
takings law as it existed in 1988 and the extent to which it reflects current takings law.

V. THE TAKINGS ORDER WAS DESIGNED AS A TOOL TO FURTHER PRESIDENT REAGAN'S DEREGRULATION SCHEME

President Reagan attempted to exercise an unprecedented degree of control over federal agency decisionmaking. He implemented a comprehensive program to achieve that control, including staffing the agencies with administrators who were both responsive to his deregulation agenda and hostile to the objectives of their individual agencies. In addition, President Reagan created a bureaucratic review system to scrutinize, influence, and even prevent the promulgation of new regulations.

When viewed in the context of President Reagan's entire deregulation program, it is clear that the Takings Order was an effort to extend presidential control over executive agency decisionmaking in two ways. First, the Order explicitly restricts an agency's ability to promulgate certain types of regulations, including those designed to protect public health and safety. Second, the Order adds weight to the cost-side of OMB's cost-benefit review of proposed regulations that have takings implications. This allows an opportunity for OMB to prevent agencies from implementing any regulations with takings implications because they will be too costly under Executive Order 12,291. If the Takings Order remains effective, or if it is codified into law by the Private Property Rights Act of 1993, the result will be a perpetuation of President Reagan's scheme to deactivate the regulatory agencies.

A. The Takings Order Is Not Supported By Takings Law

The Takings Order is falsely premised on concern for the public fisc. For the three year period before the Takings Order was issued, no successful takings claims were brought against federal regulations promulgated by executive agencies. The Order signif-

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470 See supra notes 11–14 and 47–50 and accompanying text.
471 See supra notes 65–87 and accompanying text.
472 See supra notes 96–210 and accompanying text.
473 See supra notes 233–64 and accompanying text.
474 See infra notes 557–75 and accompanying text.
475 See supra notes 185–469 and accompanying text.
476 See supra notes 286–89 and accompanying text.
icantly overstates the status of takings law as it existed in 1988,\textsuperscript{477} and even as it exists today,\textsuperscript{478} meaning that the threat posed by the Just Compensation Clause to the public fisc does not exist to the extent proposed by the Reagan Administration. Areas of the Takings Order that are particularly troublesome include the Order's directives regarding the legitimacy of the government's purpose for acting,\textsuperscript{479} the economic impact that property owners must suffer,\textsuperscript{480} the degree of impact on each property interest making up the owner's bundle of rights,\textsuperscript{481} reciprocity of advantage,\textsuperscript{482} health and safety regulations,\textsuperscript{483} undue delays,\textsuperscript{484} and permit conditions.\textsuperscript{485}

The Guidelines direct agencies to examine the purpose behind their actions very carefully.\textsuperscript{486} The Guidelines go so far as to require an agency to investigate the congressional intent behind the agencies' enabling statute's legislative history to determine whether a legitimate purpose for acting exists and whether the action will serve that purpose.\textsuperscript{487} It is unlikely that a court hearing a takings case would examine a statute's purpose so closely. First, under 1988 takings law no judicial standards existed for determining what constituted a legitimate public purpose.\textsuperscript{488} Instead, courts gave great deference to legislative declaration of what constituted both a public threat and a legitimate response to that threat.\textsuperscript{489} Even today, it is unlikely that a court would scrutinize a governmental purpose as strictly as the Takings Order requires. While the Court in \textit{Lucas v. California Coastal Commission}\textsuperscript{490} restricted the scope of the nuisance exception, it did not abrogate the legislature's authority to declare a public threat to be a 'legitimate public interest.'\textsuperscript{491}

\textsuperscript{477} See supra notes 303-450 and accompanying text.
\textsuperscript{478} See supra notes 450-68 and accompanying text.
\textsuperscript{479} See supra notes 208-11 and accompanying text.
\textsuperscript{480} See supra notes 218-24 and accompanying text.
\textsuperscript{481} See supra notes 219-20 and accompanying text.
\textsuperscript{482} See supra note 221 and accompanying text.
\textsuperscript{483} See supra notes 236-51 and accompanying text.
\textsuperscript{484} See supra notes 260-62 and accompanying text.
\textsuperscript{485} See supra notes 252-59 and accompanying text.
\textsuperscript{486} Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings, \textit{supra} note 15, at § V(D)(2)(a). The agency should look both to legislative history and the operative language of the statute to determine legislative intent. See id.
\textsuperscript{487} See id. at § V(D)(2)(a)(i).
\textsuperscript{488} See supra notes 312-22 and accompanying text.
\textsuperscript{489} See supra notes 312-15 and accompanying text.
\textsuperscript{490} See 112 S.Ct. 2886 (1992).
\textsuperscript{491} See id.
In addition to examining the action’s purpose, the Takings Order limits the scope of an agency’s action, relative to the public purpose the action is meant to address.\(^{492}\) The agency’s response to a harm must be specifically tailored to counter, but not exceed, the degree to which the property use will contribute to the harm.\(^{493}\) Takings jurisprudence does not require that a regulation be specifically tailored.\(^{494}\) In fact, the Supreme Court stated in 1987 “[t]hat a land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it.”\(^{495}\)

Next the Takings Order requires an extensive inquiry into the action’s economic impact on the property owner.\(^{496}\) This requirement has two major faults. First, the Guidelines instruct the agencies to consider the economic impact on each discrete property interest, rather than looking at the diminution in value of the property as a whole.\(^{497}\) Second, the Order mandates that agencies consider economic impact,\(^{498}\) but under takings law, if the government’s action falls within the nuisance exception, economic impact need not always be considered.\(^{499}\)

The Guidelines explicitly state that agencies should not consider the action’s affect on the property as a whole but, rather, should break the property down into many separate and discrete economic and property interests.\(^{500}\) The agencies should look separately at the degree of economic impact on each property interest recognized by law.\(^{501}\) In *Keystone Bituminous Coal Ass’n v. DeBenedictis*,\(^{502}\) the Court examined whether it should define the affected property interest as one entire package or as many discrete bundles.\(^{503}\) Although Justice Rehnquist disagreed sharply,\(^{504}\) the majority held that the


\(^{493}\) See *Exec. Order No. 12,630, supra* note 10, at § 4(b).

\(^{494}\) See *supra* note 319 and accompanying text.


\(^{497}\) See id. at § V(D)(2)(b)(i) & (ii).

\(^{498}\) See id. at § V(D)(2)(b).

\(^{499}\) See *supra* notes 360–70 and accompanying text.


\(^{501}\) See id.


\(^{503}\) See id. at 497.

\(^{504}\) See *supra* notes 388–94 and accompanying text.
Court should consider the action's economic impact on the property as a whole and not its impact on the separate property interests that make up the whole.\textsuperscript{505} Thus, a court in 1988 probably would have followed the rule laid out in \textit{Keystone Bituminous} and not the rule that the Takings Order articulates. Even today, under \textit{Lucas}, a court may follow the \textit{Keystone Bituminous} rule. While \textit{Lucas} suggested that the proper inquiry is the effect on each individual property interest, it only did so in dictum.\textsuperscript{506} The separate and discrete property interests rule, as stated in the Takings Order, is far more encompassing than the rule the courts actually employ. This Takings Order directive is likely to result in a finding that many actions, which a court would not hold to constitute a taking, have takings implications, nevertheless.

The Takings Order's directive regarding economic impact is faulty in a second way. The Order requires an analysis of economic impacts for all regulations subject to review under the Order, regardless of the public purpose behind the government's actions.\textsuperscript{507} Under both 1988 and current takings law, the economic impact is not always relevant.\textsuperscript{508} Both in 1988 and today, if the regulation falls within the scope of the nuisance exception, the government need not compensate the owner, regardless of the degree of economic harm.\textsuperscript{509} In 1988, the nuisance exception was very broad.\textsuperscript{510} The exception encompassed legislation designed to eradicate dangers to the public health, safety, and welfare.\textsuperscript{511} Courts gave a great amount of deference to governmental actions taken in response to these dangers.\textsuperscript{512} Although Justice Rehnquist insisted that the "nuisance exception . . . is not coterminous with the police powers,"\textsuperscript{513} five years later Justice Scalia assured us that in 1987 it was abundantly clear that the nuisance exception did extend to the full scope of the police powers.\textsuperscript{514} Today, the nuisance exception is far more limited, extending only to common law nuisances.\textsuperscript{515} Regardless of how the

\textsuperscript{508} See \textit{supra} notes 361–67 and accompanying text.
\textsuperscript{509} See \textit{supra} notes 361–67 and 455 and accompanying text.
\textsuperscript{510} See \textit{supra} notes 361–71 and accompanying text.
\textsuperscript{511} See \textit{supra} notes 361–71 and accompanying text.
\textsuperscript{512} See \textit{supra} notes 313–15 and accompanying text.
\textsuperscript{515} See \textit{supra} note 455 and accompanying text.
nuisance exception is defined, when a governmental action falls within the scope of that exception, the economic harm to the property owner is not a factor relevant to a court’s determination of the constitutionality of that action.\footnote{See supra notes 361 and 455 and accompanying text.}

When assessing economic harm, the Order permits the agency to consider whether any benefits flowing from the action might offset or mitigate the owner’s economic damage.\footnote{See Attorney General’s Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings, supra note 15, at § V(D)(2)(b)(iv).} This may be a reference to the Court’s use of the reciprocity of advantage doctrine.\footnote{See Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 491 (1987).} If so, it is misguided. The reciprocity of advantage doctrine was a recognition that the regulatory burden was being spread out amongst many, and not heaped onto one individual.\footnote{See supra notes 372-75 and accompanying text.} The benefits flowing to those whose property uses were restricted by the action were not necessarily economic, but included nonquantifiable health, safety, and welfare benefits.\footnote{See supra notes 372-75 and accompanying text.} If one property owner felt slighted because he or she could not use the land in a potentially harmful way, he or she at least benefited by similar restrictions on a neighbor’s land.\footnote{See supra notes 372-75 and accompanying text.}

The Takings Order warns that undue delays in decisionmaking could amount to a taking.\footnote{See Attorney General’s Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings, supra note 15, at § V(C)(3).} Additionally, if the decisionmaking process “interferes with the use of private property pending the decision,” the compensation award could increase.\footnote{Id.} In light of these assertions, the Takings Order states that the time allowed for decisionmaking shall be kept to a minimum.\footnote{See Exec. Order No. 12,630, supra note 10, at § 4(c).} These assertions are contrary to takings law.

In First English Evangelical, the Court acknowledged that the government was responsible for compensating landowners whenever it took private property, even if it did so only temporarily.\footnote{See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321 (1987).} The Court stressed, however, that its holding was limited to situations where the government denied the owner all use of his or her property.\footnote{See id. at 322.} This is a far cry from the “interference” with property use
suggested by the Takings Order.\textsuperscript{527} The Court's holding did not extend to interferences with property owners' ability to use their land caused by delays in decisionmaking.\textsuperscript{528} Earlier cases addressed delays in decisionmaking. In 1980, the Court advised that delays in governmental decisionmaking, even if those delays restrict an owner's ability to build upon or sell property during pendency of the decision, generally do not amount to a taking.\textsuperscript{529} The Court in \textit{Agins v. City of Tiburon}\textsuperscript{530} pointed out that an owner, restricted by such an action, would be free to develop or sell the property once the governmental decisionmaking process was over and, thus, the restriction did not amount to a taking.\textsuperscript{531}

The Takings Order prohibits, to the extent permitted by law, an agency from placing conditions on land-use permits unless those conditions substantially advance the same purpose that the permitting program itself serves.\textsuperscript{532} The Supreme Court addressed permit conditions in \textit{Nollan v. California Coastal Commission}.\textsuperscript{533} The \textit{Nollan} Court required that there be a nexus between the permit's condition and the public purpose justifying the permitting program.\textsuperscript{534} The Court's requirement that the condition serve the same purpose as the permitting program was dictum.\textsuperscript{535} Yet, the Takings Order based its mandate on this dictum.\textsuperscript{536} Additionally, the Takings Order requires that the condition substantially advance the permitting program's purpose.\textsuperscript{537} The \textit{Nollan} Court, however, did not articulate how substantial the nexus must be, it only stated that any nexus that might have existed between the taking of a public easement across the Nollan's beach and the ability to see the ocean from the street was not sufficient to meet the requirement.\textsuperscript{538} The Order's misstatement of takings law is significant because the Takings Order does not merely advise agencies how to evaluate their permit conditions for takings implications but, rather, restricts an agency's

\textsuperscript{527} See \textit{supra} notes 260–61 and accompanying text.

\textsuperscript{528} See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. at 321.

\textsuperscript{529} See \textit{Agins v. City of Tiburon}, 447 U.S. 255, 263 n.9 (1980).

\textsuperscript{530} 447 U.S. 255 (1980).

\textsuperscript{531} See \textit{id}.

\textsuperscript{532} See Exec. Order No. 12,630, \textit{supra} note 10, at § 4(a).

\textsuperscript{533} 483 U.S. 825 (1987).

\textsuperscript{534} See \textit{id}. at 839.

\textsuperscript{535} See \textit{Agins v. City of Tiburon}, 447 U.S. 255, 263 n.9 (1980).

\textsuperscript{536} See \textit{supra} notes 449–50 and accompanying text.

\textsuperscript{537} See \textit{supra} notes 257–59 and accompanying text.

\textsuperscript{538} See Exec. Order No. 12,630, \textit{supra} note 10, at § 4(a).

ability to implement permit conditions, altogether. Many environmental regulations use permitting programs and some of these programs involve multiple permitting conditions. Thus, if agencies are forced to comply with the Takings Order, as they will be if the Private Property Rights Act of 1993 is enacted, agencies may be prohibited from using many of the permitting programs that they now use to achieve their goals.

The Takings Order demands the most exacting review when agencies act for health and safety purposes, even though courts typically give more deference to health, safety, and welfare regulations than to regulations promulgated for other purposes. When regulating for health and safety purposes, the Guidelines require that agencies be able to establish, and support by meaningful evidence, that a clearly identified health or safety risk is both "real and substantial." Next, the Order imposes a certainty requirement on the agency's assertion that the particular property-use it wishes to regulate actually will contribute to the health or safety risk if the agency does not act to prevent that harm. Additionally, the agency must estimate the severity of injury to the public if the property use goes unregulated.

In 1988, a regulation promulgated for health and safety purposes would have received a great deal of deference from the courts. While courts inquired into the veracity of an asserted purpose, they generally left the legislature to determine what does and does not constitute a threat to the public health, safety, and welfare and to determine how best to eradicate those threats. In light of the law, as it existed in 1988, there was no basis for the Takings Order's requirements that the agency identify so explicitly the nature of the harm it intends to correct. Today, even if we assume that Lucas removed health and safety regulations from the nuisance exception completely, the Takings Order's restrictions are unfounded. A court would engage in the balancing test, articulated in *Agins v. City of*

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540 McElfish, *supra* note 252, at 10,476.
542 See *supra* notes 312–22 and accompanying text.
544 See id. at § V(C)(2)(c)(i).
545 See id. at § V(C)(2)(c)(ii).
546 See *supra* notes 312–22 and accompanying text.
547 See *supra* notes 312–22 and accompanying text.
which weighs the public interest against the private economic harm. The standard of judicial scrutiny of the legitimate public purpose, under the *Agins* test, is much lower than the scrutiny of the public purpose demanded by the Takings Order. The Takings Order requires that the harm addressed by the agency action be specifically identified, while the *Agins* test only requires that the harm be deemed a public harm by the government.

Two commentators point out the fallacy of the “real and substantial” requirement. The real and substantial requirement does not exist in takings law. While courts require that a regulation substantially advance a legitimate public purpose, they have never stated that the legitimate public purpose itself, must be substantial. Instead, “substantial” qualifies the degree to which the action eradicates the harm; the term does not qualify the extent of the harm itself.

When analyzing a proposed regulation under the criteria that the Guidelines provide, it is clear that many more regulations would have “takings implications” than actually would have been found to constitute a taking by a court in 1988. By broadly overstating the principles of takings jurisprudence, President Reagan reached significantly more proposed regulations than he would have if the Takings Order had stated takings law principles accurately.

**B. The Connection Between the Takings Order and Executive Order 12,291**

Executive Order 12,291 restricts an agency’s ability to implement regulations by requiring that the agency choose the least costly alternative and that the agency implement a program only if the program’s benefits to society outweigh its costs. By weighing the benefits of each program against each program’s respective costs, the agency can determine which program is the least costly. The

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549 See id. at 262.
550 See supra notes 241–49 and 306–15 and accompanying text.
551 See supra notes 241–47 and accompanying text.
552 See supra notes 306–15 and accompanying text.
553 See supra notes 241–47 and accompanying text.
554 See id.
555 See id.
556 See id.
557 Exec. Order No. 12,291, supra note 12, at § 2(b) & (d).
558 See id. at § 2(b).
Takings Order works on the premise that if a proposed action has takings implications, it may be ruled to be a compensable taking, which would cost the government money.\textsuperscript{559} We have already seen that this often is unlikely.\textsuperscript{560} Nevertheless, by requiring agencies to estimate the potential cost to the government for each program with takings implications, and to submit those estimations to OMB,\textsuperscript{561} the Takings Order increases the likelihood that the potential cost may render the action too costly to implement.\textsuperscript{562} The cost-estimation adds weight to the cost-side of the Executive Order 12,291 cost-benefit analysis. Thus, the Takings Order can be used as a tool to perpetuate the coercive powers of OMB over executive agency decisionmaking.

By passing the Private Property Rights Act (the Act),\textsuperscript{563} a bill proposed to codify the Takings Order into public law, Congress would ensure the perpetuation of these coercive and disruptive powers.\textsuperscript{564} Even if OMB were to forego review or to cooperate with the implementation of social and environmental regulation, the Act creates a procedural cause of action against agencies that may impede promulgation of future regulations.\textsuperscript{565} A potential situation could play out as follows. An agency implements a proposed regulation that OMB, for one reason or another, approves. Unfortunately, the agency was not in full compliance with the Takings Order. Pursuant to the Act, an aggrieved property owner brings suit, and her judicial action forces the agency to review the action under the Takings Order.\textsuperscript{566} Not surprisingly, the agency determines that, although the action would \textit{not} constitute a compensable taking under current takings jurisprudence, the action does have "takings implications," as they are defined in the Takings Order.\textsuperscript{567} The agency must now pretend that a court may one day rule that the action does, indeed, constitute a taking, and estimate what that ruling, and others like it, might cost the government.\textsuperscript{568} Furthermore, the agency must inform OMB

\begin{itemize}
\item \textsuperscript{559}See supra notes 170--74 and accompanying text.
\item \textsuperscript{560}See supra notes 283--89 and accompanying text.
\item \textsuperscript{561}Estimations of cost need be submitted to OMB only upon OMB's request. See Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings, supra note 15, at § VI(B)(1).
\item \textsuperscript{562}See supra notes 109--10 and accompanying text.
\item \textsuperscript{563}S. 177, 103rd Cong., 1st Sess. (1993).
\item \textsuperscript{564}See supra notes 296--300 and accompanying text.
\item \textsuperscript{565}See supra notes 270--90 and accompanying text.
\item \textsuperscript{566}See supra note 296 and accompanying text.
\item \textsuperscript{567}See supra notes 206--469 and accompanying text.
\item \textsuperscript{568}See supra note 268 and accompanying text.
\end{itemize}
of these potential costs, at OMB's request.\textsuperscript{569} When these costs are calculated into the Executive Order 12,291 cost-benefit analysis, suddenly, and not surprisingly, the action is quite costly; perhaps too costly to implement.\textsuperscript{570}

\textbf{C. The Takings Order Is An Impermissible Exercise Of Executive Control Over The Agencies}

It is clear, under current law, that the President cannot prevent agencies from failing to comply with Congress's nondiscretionary directives.\textsuperscript{571} Several courts have ruled that OMB's interference with EPA's completion of nondiscretionary duties, through the Executive Order 12,291 cost-benefit review, was an impermissible exercise of executive control over the EPA.\textsuperscript{572} The Takings Order amounts to the same thing.

The Takings Order is a vehicle for coercing agencies—and particularly agencies whose actions affect property uses, such as EPA—into not regulating or regulating less. The Takings Order does this in two ways. First, it limits an agency's ability to promulgate health and safety regulations\textsuperscript{573} and to use permit conditions.\textsuperscript{574} In addition, the Takings Order limits the amount of time that an agency may take when acting\textsuperscript{575} and it limits the scope of the agency's action relative to the public purpose the action is meant to address.\textsuperscript{576} Second, the Takings Order coerces agencies into not regulating in ways that affect the use or value of private property by feeding into the Executive Order 12,291 cost-benefit review. By overstating the types of actions that will amount to a taking, the Takings Order assigns a cost to any regulation that has takings implications.\textsuperscript{577} This cost can then be added to the cost-side of the cost-benefit review. Because agencies are prohibited from implementing programs when the costs outweigh the benefits, agencies may be prohibited from implementing actions that have takings implications because they are too costly.\textsuperscript{578} By giving the Director of OMB authority to oversee

\textsuperscript{569} \textit{See supra} notes 275–76 and accompanying text.
\textsuperscript{570} \textit{See supra} notes 110–11 and accompanying text.
\textsuperscript{571} \textit{See supra} notes 126–48 and accompanying text.
\textsuperscript{572} \textit{See supra} notes 130–48 and accompanying text.
\textsuperscript{573} \textit{See supra} notes 240–49 and accompanying text.
\textsuperscript{574} \textit{See supra} notes 246–59 and accompanying text.
\textsuperscript{575} \textit{See supra} notes 260–62 and accompanying text.
\textsuperscript{576} \textit{See supra} notes 263–64 and accompanying text.
\textsuperscript{577} \textit{See supra} note 268 and accompanying text.
\textsuperscript{578} \textit{See supra} notes 108–10 and accompanying text.
compliance with the Takings Order, President Reagan ensured that the costs created by the Takings Order would be considered in OMB's review of the Executive Order 12,291 cost-benefit analysis for each proposed regulation.

VI. CONCLUSION

Executive Orders 12,630 and 12,291 are a dangerous pair. Alone, each may be benign, but together, with one feeding off of the other, they create a situation that can prevent agencies from successfully regulating public and environmental threats. President Reagan created this machine when he fictionalized the Just Compensation Clause's threat to the public purse. The Clinton Administration can stop the machine by repealing Executive Order 12,630. Repealing the Takings Order, however, will not be enough. Congress must reject the Private Property Rights Act and completely eliminate the deregulation machine's self-perpetuating nature.

579 See supra notes 290–91 and accompanying text.