Rethinking the Physical Takings Test: An Expanded Notion of Property Rights--Seawall Assoc. v. City of New York

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The fifth amendment "takings clause" of the United States Constitution requires that owners of private property be compensated for the taking of their property for public use. The United States Supreme Court has held that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." See U.S. Const. amend. V. The fifth amendment states in pertinent part that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." Id. The fifth amendment limitation on the "taking" of private property for public use is made applicable to the states through the fourteenth amendment. See also Webb's Fabulous Pharmacies v. Beckwirth, 449 U.S. 155, 160 (1980) (takings clause applies to states through the fourteenth amendment); Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 238-39 (1897) (same). See generally Rotunda, Nowak, & Young, Treatise on Constitutional Law: Substance and Procedure §§ 15.11-14 (discussing historical development of taking jurisprudence); Ackerman, Against Ad Hocery: A Comment on Michelman, 88 Colum. L. Rev. 1697, 1702 (1988) (takings clause attempts to reconcile democratic principles with capitalist economy based on private property); Comment, Loretto v. Teleprompter Manhattan CATV Corp.: Another Excursion into the Takings Dilemma, 17 Urb. Law. 109, 109 (1985) (property rights arise from historical precedent as well as constitutional mandate); Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1165 (1967) [hereinafter Michelman, Just Compensation] "'Taking' is, of course, constitutional law's expression for any sort of publicly in-
States Supreme Court has traditionally reviewed takings issues on a case-by-case basis.¹ The takings analysis has been broken into

 inflicted private injury for which the Constitution requires payment of compensation." Id.

 A "taking" occurs when the effects of governmental action are "so complete as to de-

prive the owner of all or most of his interest in the subject matter." United States v. Gen-

eral Motors Corp., 323 U.S. 373, 378 (1945). See also Attorney General's Guidelines for

the Evaluation of Risk and Avoidance of Unanticipated Takings, at 19 (June 30, 1988)
[hereinafter Attorney General's Guidelines], reprinted in, ALI-ABA COURSE OF STUDY: IN-
VERSE CONDEMNATION AND RELATED GOVERNMENT LIABILITY, at 385 (1989). "Takings may
occur when permanent or temporary government actions result in physical occupancy of
property, the physical invasion of property, or the regulation of property." Id. See generally
Michelman, Takings, 1987, 88 COLUM. L. REV. 1600, 1603 (1988) (discussing current Su-
preme Court approach to physical and regulatory takings).

The fifth amendment requirement that private property taken by the government for
public use must be accompanied by just compensation is tacit recognition that the govern-
ment's power to take private property exists. United States v. Carmack, 329 U.S. 230, 241-
42 (1946). The limitation on that power is the obligation to pay just compensation. Id. at
242. Once a taking of private property has occurred the value of that property may be
recovered by the owner as a result of the "self-executing character of the constitutional
(quoting 6 P. NICHOLS, EMINENT DOMAIN § 25.41 (3d rev. ed. 1972)). See also Armstrong v.
United States, 364 U.S. 40, 49 (1960) (if taking is found, government must pay compensa-
tion to property owner). "The Just Compensation Clause is self-actuating, requiring that
compensation be paid whenever governmental action results in the taking of private prop-
erty regardless of whether the underlying authority for the action contemplated a taking
or authorized payment of compensation." Exec. Order No. 12,630, 53 Fed. Reg. 8,859
(1988) [hereinafter Exec. Order]. See also First English Evangelical Lutheran Church of
Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987) (temporary takings not dif-
ferent in kind from permanent takings for which Constitution requires compensation); San
(takings may arise through formal condemnation proceedings, occupancy, physical inva-
sion, or regulation); Pumpelly v. Green Bay Co., 80 U.S. 166, 178 (1872) (right to compen-
sation is incident to government's power to take private property). See generally Kmiec, The
Original Understanding of the Taking Clause is Neither Weak nor Obtuse, 88 COLUM. L. REV.
1630, 1638-44 (1988) (discussing placement of burden upon society for taking of private
property).

¹ See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987). The
Court has noted on a number of occasions that it has been unable to formalize a rule which
would apply to all takings cases. Id. Instead, the Court has "examined the 'taking' question
by engaging in essentially ad hoc factual inquiries that have identified several factors . . .
that have particular significance." Id. (quoting Kaiser Aetna v. United States, 444 U.S.
164, 175 (1979)). See also Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S.
264, 295 (1981) ("These, 'ad hoc, factual inquiries' must be conducted with respect to
specific property, and the particular estimates of economic impact and ultimate valuation
(no precise rule determines when taking has occurred); Andrus v. Allard, 444 U.S. 51, 65
(1979) (no "abstract or fixed point at which judicial intervention under takings clause be-
comes appropriate.").

For a particularly lively debate on the ad hoc nature of takings analysis compare
Michelman, Takings, 1987, supra note 1, at 1629 (ad hoc balancing is "not law's antithesis
but part of its essence") with Ackerman, supra note 1, at 1697 ("good dose of formaliza-
tion," not ad hoc balancing, is needed in takings law). See generally Note, Takings Clause
two distinct approaches to determine a private property owner's right to compensation: physical takings and regulatory takings.

Interpretation: The Tradition of Inconsistency Continues, 3 St. John's J. Legal Comment. 27, 48 (1987). The Supreme Court has failed to set guidelines as to when a taking has occurred. Id. The Court continues to approach takings cases on an ad hoc basis. Id. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432 (1982). The Court noted that a "permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." Id. A 'Taking' may more readily be found when the interference with property can be characterized by a physical invasion by government, than when the interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (citation omitted). See Loretto, 458 U.S. at 438 (installation of cable facilities upon appellant's building to provide service to adjacent buildings deemed compensable physical taking); United States v. Causby, 328 U.S. 256, 265 (1946) (aircraft activity constituting easement deemed equivalent to invasion of surface). See also Pumpelly, 80 U.S. at 181. "[I]t remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefullness, it is a taking, within the meaning of the Constitution . . . ." Id. See generally Costonis, Presumptive and Per Se Takings: A Decisional Model for the Taking Issue, 58 N.Y.U. L. Rev. 465 (1983) (discussing per se rule of Loretto and arguing for its demise).

See Agins, 447 U.S. at 260-61. A regulatory takings analysis applies a balancing of elements. Id. The Supreme Court has stated:

The application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land. The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests. Id. (citations omitted).

The recognition that government regulation could constitute a taking was an attempt to fashion a test of fairness. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). Justice Holmes, the leading proponent of a broader test for compensable takings, found that the difference between legitimate regulation and compensable taking was a matter of degree. Id. In Justice Holmes' view, when regulation "reaches a certain magnitude in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act." Id. See, e.g., Armstrong, 364 U.S. at 49. A regulatory taking "force[s] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Id. See generally Michelman, Takings, 1987, supra note 1, at 1603. Professor Michelman states that the Supreme Court has divided regulatory takings into two subclasses: one which restricts nuisance-like uses, and the other affirmatively providing any other legitimate public benefits through land-use regulations. Id. But see Muglar v. Kansas, 125 U.S. 623 (1887). In Muglar, the Court rejected the argument that regulation can amount to a compensable taking. Id. at 668-69. Justice Harlan, the leading proponent of a restricted view of takings, stated that a "prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot in any sense, be deemed a taking or an appropriation of property for the public benefit." Id. See also Rotunda, Nowak & Young, supra note 1, at 132 (Muglar has never been overruled but Court has "judiciously ignored" its broad language).
The physical takings test has been characterized by a simplistic per se approach in which any actual entry onto privately owned land, no matter how insignificant, is deemed a taking for which compensation is required. A regulatory taking exists when a property infringement other than an actual entry occurs and when one group unfairly bears society's burdens. A regulation may be an unfair burden upon a property owner if it fails to substantially advance a legitimate state interest or if it denies the owner economically viable use of his land. Unlike physical takings, in which a per se approach is utilized, regulatory takings

* See Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 (1987) (physical occupation of property by government has uniformly been found a taking regardless of other considerations); Loretto, 458 U.S. at 426. "[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the takings clause." *Id.* See also Causby, 328 U.S. at 261-62 (1946) (low level aircraft flights above owner's property constituted compensable taking); United States v. Lynah, 188 U.S. 445, 474 (1903) (invasion of floodwaters arising from construction of dam considered a taking). *But see* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 84 (1980) (physical invasion not determinative for purposes of takings clause). *See generally* Costonis, supra note 3, at 467 (discussing validity of per se takings rule).


* See Nollan, 483 U.S. at 834. "We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" *Id.* (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)). Hence, the *Nollan* Court found that the requirement of a public access easement on appellants' land as a condition for their receiving a building permit could not be treated as an exercise of land use regulation power since it did not serve the public purposes related to the permit requirement. *Id.* at 838-39.


* See Michelman, *Just Compensation*, supra note 1, at 1184. Professor Michelman contended that courts never deny just compensation for permanent physical invasions. *Id.* Further, it appears unquestionable that compensation cannot be denied when the government intentionally causes its agents to have permanent or regular use of privately owned property. *Id.* *See also* First English Evangelical Lutheran Church of Glendale v. County of Los
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have been found less frequently, perhaps due to the subjectivity inherent in their application.9

Recently, there has been a movement toward enhanced protection of individual property rights.10 The New York Court of Appeals has signaled its recognition of this trend in Seawall Associates v. City of New York11 by finding both a physical and regulatory taking in an instance where no actual invasion or occupation of property had occurred.12

In Seawall, several real estate developers challenged the City of New York's Local Law No. 9 as an unconstitutional taking of their property, without just compensation.13 This statute was

Angeles, 482 U.S. 304, 317 (1987). The Court noted the fifth amendment does not put a limit on government intrusions of private land, but instead secures compensation where there is an unreasonable interference. Id. Thus, any government action which constitutes a taking "necessarily implicates the 'constitutional obligation to pay just compensation.' ” Id. (quoting Armstrong, 364 U.S. at 49); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982). “[A] physical invasion is a government intrusion of an unusually serious character.” Id.

9 See First English, 482 U.S. at 329 (Stevens, J., dissenting). "Unlike physical invasions, which are relatively rare and easily identifiable . . . regulatory programs constantly affect property values in countless ways, and only the most extreme regulations can constitute takings." Id. See also Blume & Rubinfeld, Compensation for Takings: An Economic Analysis, 72 CALIF. L. REV. 569, 570 (1984). Without an actual physical invasion of the private property, the Supreme Court usually determines that the regulation in question constitutes a valid exercise of regulatory powers, and therefore just compensation is not required. Id.

10 See Exec. Order, supra note 1, at 1. (“Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights.”); Attorney General’s Guidelines, supra note 1, at 12. These guidelines emphasized to government officials that they be conscious of the need to respect the constitutional rights of individuals when formulating and executing government policies. Id. These officials were warned to avoid activities that could possibly result in takings. Id.

See generally Bandow, Think-Before-You-Take is Good Policy, L.A. Daily J., July 28, 1989, at 4, col. 6. “In recent decades, federal officials have grown used to acting without concern for the consequences of their actions. Reagan’s executive order helps change that by forcing them to keep the Constitution in mind before grabbing someone’s land.” Id.


12 See id., at 99, 542 N.E.2d at 1061, 544 N.Y.S.2d at 544. “In our view, Local Law No. 9 is facially invalid as both a physical and regulatory taking in violation of the federal and state Constitutions and, therefore, declare it null and void.” Id.

13 Id. 74 N.Y.2d at 99, 542 N.E.2d at 1061, 544 N.Y.S.2d at 544. See also Brief for Appellants at 9, Sutton East Associates-86 and Channel Club, Seawall Assocs. v. City of New York, 74 N.Y.2d 92, 542 N.E.2d 1042, 544 N.Y.S.2d 542, (No. 20-891), cert. denied, 110 S. Ct. 500 (1989). On December 22, 1986, the Supreme Court, New York County, consolidated actions brought by several real estate developers including Seawall Associates, Channel Club, and Sutton East, which challenged the constitutionality of New York’s Local Law No. 22 requiring SRO owners “to renovate, restore and rent vacant SRO units. . . .” Id. New York’s Local Law No. 9 largely grew out of Local Law No. 22. Id. After the City
aimed at combating the growing problem of homelessness in New York City.\textsuperscript{14} Local Law No. 9 was enacted as an attempt to preserve the city's remaining Single Room Occupancy rental units (SRO) by imposing an extended five year moratorium on the demolition or conversion of structures containing SRO housing.\textsuperscript{15} The Council enacted Local Law No. 9, the plaintiffs supplemented their original complaint to include a cause of action challenging Local Law No. 9. \textit{Id.} at 9-10.

\textsuperscript{14} See City of New York [1986] N.Y. Local Laws (No. 22), § 1 (setting out legislative intent for Local Law No. 9). "The City Council further finds that . . . there has been widespread withdrawal of single room occupancy dwelling units from the rental market, which has further reduced an already inadequate supply of such units; that this practice has contributed to the increasing homeless population ..." \textit{Id.} See also Brief for Municipal Respondents at 6, \textit{Seawall}, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (No. 20-891), \textit{cert. denied}, 110 S. Ct. 500 (1989). A study of SRO housing was prepared by Urban Systems Research & Engineering, and authored by Anthony Blackburn. \textit{Id.} The Blackburn Study concluded that New York City's stock of SRO's was diminishing. \textit{Id.} Consequently, the city's poor population, who enjoyed few, if any adequate housing alternatives would be the group most affected. \textit{Id.}


\textsuperscript{15} See City of New York [1987] N.Y. Local Laws (No. 9), preamble (to prohibit conversion, alteration and demolition of single room occupancy multiple dwellings); City of New York [1987] N.Y. Local Laws (No. 9) § 7. The moratorium was created as follows:

Subdivisions a and c of section 27-198.2 of the administrative code shall expire and shall have no further force or effect on the fifth anniversary date of the effective date . . . of such local law occurring in every fifth year thereafter unless within the thirty day period prior to such anniversary date a local law has been enacted based upon a finding that the serious public emergency described in section one of such local law continues to exist. \textit{Id.} See also \textit{Seawall}, 74 N.Y.2d at 100-01, 542 N.E.2d at 1061-62, 544 N.Y.S.2d at 544-45 (summarizes relevant provisions of City of New York [1987] N.Y. Local Laws (No. 9)).
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City Council reserved the right to renew this moratorium for additional five year periods if necessary.\textsuperscript{16} Local Law No. 9 obligated SRO owners to rehabilitate all units within their buildings and ordered that they actually lease every available dwelling to a bona fide tenant at controlled rents.\textsuperscript{17} Failure to comply with the moratorium subjected the owner to strict civil penalties, including $150,000 for each unlawful conversion and $45,000 for each unit eliminated.\textsuperscript{18} "Buy-out" and "replacement" exemptions were available to owners.\textsuperscript{19} In addition, a "hardship exemption" was available upon a showing that a net annual rate of return of 8 1/2\% on the assessed value of the property was not possible.\textsuperscript{20} When challenged, Local Law No. 9 was held to

\textsuperscript{16} See Seawall, 74 N.Y.2d at 100, 542 N.E.2d at 1061, 544 N.Y.S.2d at 544. The Seawall court argued that the indefinite length of the moratorium was irrelevant regarding the issue of physical taking because it could be extended for additional five year terms without limit. \textit{Id.} at 106 n.5, 542 N.E.2d at 1065 n.5, 544 N.Y.S.2d at 548 n.5; See also San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting). Justice Brennan argued that takings need not be permanent and irrevocable in nature to require just compensation. \textit{Id.} Rather, even temporary and reversible takings may also call for compensation under certain circumstances. \textit{Id.} (Brennan J., dissenting). See also Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 204 (1985) (Stevens, J., concurring) (certain regulatory temporary takings require just compensation); United States v. Causby, 328 U.S. 256, 268 (1946) (Court found taking although unclear whether it was temporary or permanent because government could have ended intrusion at any time).

\textsuperscript{17} See City of New York [1987] N.Y. Local Laws (No. 9) § 5. Section 5 provides in part: a. On and after June first, nineteen hundred eighty-seven, an owner of a single room occupancy multiple dwelling which is subject to the provisions of this section shall have a duty (1) to make habitable and maintain in a habitable condition all single room occupancy dwelling units and (2) to rent such habitable single room occupancy dwelling units to bona fide tenants. The duty to rent shall be satisfied by the owner if the owner has in fact rented all such units to bona fide tenants or has, in good faith, made a continuing public offer to rent such units at rents no greater than the rent authorized by law. \textit{Id.} See also Administrative Code of City of New York § 27-2152 [d] (owner presumed to have violated these requirements if any unit remains vacant for period of 30 days); Seawall 74 N.Y.2d at 100-01, 542 N.E.2d at 1061-62, 544 N.Y.S.2d at 544-45 (discusses relevant provisions of City of New York [1987] Local Laws (No. 9)).

\textsuperscript{18} See City of New York [1987] Local Laws (No. 9) § 2[d](4)(a).

\textsuperscript{19} See \textit{id.} (allows owners to purchase exemptions for $45,000 per unit or upon approval of Commissioner, become exempt by providing an equal number of replacement units). See also Brief for Municipal Respondents, \textit{supra} note 14, at 9 "The replacement provision . . . allow[ed] owners to obtain a permit to demolish or convert SRO units if they create[d] new units through construction, rehabilitation or by buying an existing multiple dwelling. The replacement units would be owned or operated by a not-for-profit corporation." \textit{Id.}

\textsuperscript{20} See City of New York [1987] Local Laws (No. 9) § 2[d](4)(b). This section provided the Commissioner with authority to reduce in whole or in part the monetary buy-out exemptions upon a showing that "there is no reasonable possibility that such owner can make
be facially invalid as a taking without just compensation under both the federal and New York Constitutions.\(^\text{21}\)

In *Seawall*, by finding that Local Law No. 9 constituted both a physical and regulatory taking,\(^\text{22}\) the Court of Appeals reversed the Appellate Division and reinstated the decision of the Supreme Court, New York County, maintaining that the law violated both the federal and New York Constitutions.\(^\text{23}\)

Writing for the majority, Judge Hancock noted that the finding of a physical taking under the facts of *Seawall* marked a departure from the traditional physical takings test.\(^\text{24}\) Interestingly, the *Seawall* court's analysis is quite similar to that of a case decided by the New York Court of Appeals nearly one hundred years ago in *Forster v. Scott*.\(^\text{25}\) Although *Forster* was not mentioned by the Sea-
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wall court, the two holdings are analogous: a statute that impinges upon an owner’s “free use and enjoyment” of his property without a physical invasion still requires just compensation.26

The determination that a physical taking had occurred in Seawall was supported by Loretto v. Teleprompter Manhattan CATV Corp.,27 in which the United States Supreme Court held that a relatively minor invasion consisting of 36 feet of cable and two service boxes was found to be an encroachment upon the owner’s possessory rights and, therefore, a physical taking.28 In Loretto, the Supreme Court maintained that “an owner suffers a special kind of injury when a stranger directly invades and occupies the owner’s property.”29 In Seawall, as in Loretto, the property rights interfered with were the owner’s rights of possession and exclusion.30 In addition, the Seawall majority argued that even if a

sary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner.” Id.

26 Compare Seawall, 74 N.Y.2d at 99, 542 N.E.2d at 1061, 544 N.Y.S.2d at 544 (ordinance requiring mandatory rental of SRO units by property owners found to be taking requiring compensation) with Forster, 136 N.Y. at 584, 32 N.E. at 977 (ordinance that deprived property owner of right to build upon land without compensation held to be taking).


28 See Loretto, 458 U.S. at 422-26. The Seawall court reasoned that the forced occupancy of one’s property is much more intrusive than the installation of CATV equipment. Sea- wall, 74 N.Y.2d at 104, 542 N.E.2d at 1064, 544 N.Y.S.2d at 547. The court also found that this possessory interference surpassed the invasiveness of easements created by regulation. Id. See, e.g., Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987) (easement created to give public access to beach); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (easement granted government access to plaintiff’s pond).

29 Loretto, 458 U.S. at 436.

30 See Seawall, 74 N.Y.2d at 102, 542 N.E.2d at 1063. 544 N.Y.S.2d at 546. “Local Law No. 9 . . . compels [SRO owners] to surrender the most basic attributes of private property, the rights of possession and exclusion.” Id. See also Loretto, 458 U.S. at 435. “The owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space.” Id. (emphasis added). See generally Costonis, supra note 3, at 507 ("right to possess or exclude predominated [Court’s] reasoning in Loretto").

In Fresh Pond Shopping Center, Inc. v. Callahan, 388 Mass. 1051, 446 N.E.2d 1060, appeal dismissed, 464 U.S. 875 (1983), the Court refused to note probable jurisdiction. However, Justice Rehnquist addressed the merits of the case in a dissenting opinion. Id. at 875 (Rehnquist, J., dissenting). In Fresh Pond, appellant signed a purchase agreement to acquire a six-unit apartment building, located adjacent to some property it already owned, with the intent to demolish the building and build a parking lot for a shopping center. Id. at 875. The apartment units were rent controlled under a city ordinance, and as such, required permission from the city for removal from the rental housing market. Id. A re-
physical taking had not occurred as a result of Local Law No. 9, the effect of the ordinance amounted to a regulatory taking, requiring just compensation.\(^{31}\)

Judge Hancock's majority opinion utilized a two-part analysis to determine whether the ordinance constituted a regulatory taking.\(^{32}\) Under the first part of the analysis, Judge Hancock stated that the local ordinance denied property owners the economically viable use of their property.\(^{33}\) Secondly, the court found that the ordinance failed to advance New York City's legitimate interest of...

...moval permit was requested and denied. Id. Similar to Local Law No. 9 in New York City, which allowed the moratorium on demolition of SRO properties to be extended for five year periods as required, Cambridge's Rent Control Ordinance 926 gave the Board "virtually unfettered discretion . . . to determine whether to grant a removal permit." Id. at 876 (Rehnquist, J., dissenting). Justice Rehnquist stated that an important fifth amendment takings issue was present under these facts which had never been decided by the Court before. Id. He reasoned that denial of the removal permit under the ordinance resulted in the "transfer of control over the reversionary interest retained by the appellant." Id. at 878 (Rehnquist, J., dissenting). In effect, this impinged on the appellant's right to exclude, which is associated with property ownership. Id. See Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) ("the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation") (footnote omitted). Based on the foregoing, Justice Rehnquist analogized the alleged taking in Fresh Pond to the physical encroachment in Loretto, concluding that the outcome is essentially the same; to deny appellant the right to "possess, use, and dispose of [the property]." Fresh Pond, 464 U.S. at 878 (Rehnquist, J., dissenting).

The Supreme Court has previously recognized that with property ownership comes a "group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use, and dispose of it." United States v. General Motors Corp., 323 U.S. 373, 378 (1945). See also Loretto, 458 U.S. at 435 (recognition of "bundle" of property rights, to possess, use, and dispose of it); Radin, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 Colum. L. Rev. 1667, 1668 (1988) ("The conception of property includes the exclusive rights of possession, use, and disposition" (quoting Epstein, Takings: Private Property and the Power of Eminent Domain at 304 (1985))).

\(^{31}\) See Seawall, 74 N.Y.2d at 106-07, 542 N.E.2d at 1065, 544 N.Y.S.2d at 548.

\(^{32}\) See id. at 107, 542 N.E.2d at 1065-66, 544 N.Y.S.2d at 548.

\(^{33}\) See id. at 111, 542 N.E.2d at 1068, 544 N.Y.S.2d at 551. The Seawall court examined whether the law denied owners the economically viable use of their property by analyzing the law's effect on their basic rights "to possess, use and dispose" of their property. Id. at 108, 542 N.E.2d at 1066, 544 N.Y.S.2d at 549. The court found that all three of these rights were substantially impaired by Local Law No. 9. Seawall, 74 N.Y.2d at 108, 542 N.E.2d at 1066, 544 N.Y.S.2d at 549. "'[T]he coerced rental provisions deprive owners the fundamental right to possess their properties.'" Id. (emphasis in original). The mandatory rental provisions, the prohibition against conversion, alteration, and demolition of the properties, and the requirement that uninhabitable units be renovated denied owners the "right to use their properties as they [saw] fit." Id. (emphasis in original). The law "also negatively affect[ed] the owners' right to dispose of their properties" because the provisions that prohibited redevelopment and mandated rentals affected the owners' ability to sell their properties "for any sums approaching their investments." Id. (emphasis in original).
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alleviating the problem of homelessness. Finally, the majority concluded that the exemptions provided in Local Law No. 9 failed to bring the law within constitutionally accepted limits.

Writing for the dissent, Judge Bellacosa maintained that New York's Local Law No. 9 was constitutional. He characterized the majority's conclusion that a regulatory taking had occurred with "respect to every SRO dwelling in the City of New York" as an

See id. at 111, 542 N.E.2d at 1068, 544 N.Y.S.2d at 551. The majority then examined whether the burdens imposed by Local Law No. 9 sufficiently advanced legitimate state interests to meet the test of constitutionality. Id. at 113, 542 N.E.2d at 1069, 544 N.Y.S.2d at 552. The court found that there was not a "sufficiently close nexus" between the burdens placed on SRO property owners and the state's purpose of relieving the homelessness problem. Id. at 111-12, 542 N.E.2d at 1068-69, 544 N.Y.S.2d at 551-52. The court pointed out that there was no guarantee that the SRO units would be rented to the homeless. Id. at 111-12, 542 N.E.2d at 1068, 544 N.Y.S.2d at 551. In conclusion, the majority stated that the nexus "between the ends to be achieved and those who are burdened" did not exist. Id. at 119, 542 N.E.2d at 1068, 544 N.Y.S.2d at 552.


See id. at 111, 542 N.E.2d at 1068, 544 N.Y.S.2d at 552. The court found that the buy-out, replacement, and hardship exemptions did not "mitigate the invidious effects of the law." Id. Judge Hancock, adopting the language of Justice Scalia in Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987), asserted that the ordinance, despite its exemption alternatives, was not "a valid regulation of land use but 'an out-and-out plan of extortion.'" Seawall, 74 N.Y.2d at 113-14, 542 N.E.2d at 1070, 544 N.Y.S.2d at 553 (quoting J.E.D. Assocs. v. Atkinson, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)). The majority stated that under the buy-out and replacement exemptions, the ordinance was in effect telling property owners that the City would not do something unconstitutional if the owners paid the City not to do it. Seawall, 74 N.Y.2d at 113, 542 N.E.2d at 1068, 544 N.Y.S.2d at 552.

Additionally, the court found that the hardship provision, at best, only allowed the Commissioner to exercise his discretion and lower the hardship exemptions did not "mitigate the invidious effects of the law." Id. Judge Hancock, adopting the language of Justice Scalia in Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987), asserted that the ordinance, despite its exemption alternatives, was not "a valid regulation of land use but 'an out-and-out plan of extortion.'" Seawall, 74 N.Y.2d at 113-14, 542 N.E.2d at 1070, 544 N.Y.S.2d at 553 (quoting J.E.D. Assocs. v. Atkinson, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)). The majority stated that under the buy-out and replacement exemptions, the ordinance was in effect telling property owners that the City would not do something unconstitutional if the owners paid the City not to do it. Seawall, 74 N.Y.2d at 113, 542 N.E.2d at 1068, 544 N.Y.S.2d at 552.

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Additionally, the court found that the hardship provision, at best, only allowed the Commissioner to exercise his discretion and lower the buy-out price, provided the owner could come within its provisions. Id. at 114, 542 N.E.2d at 1070, 544 N.Y.S.2d at 553. The court conceded to the owners that it was unrealistic to believe the hardship exemption would ever be of any appreciable value to investors. Id. at 114 n.13, 542 N.E.2d at 1070 n.13, 544 N.Y.S.2d at 553 n.13. The court recognized that the 8 1/2% of the property's assessed value below which the level of earnings must fall before triggering the hardship exemption was inadequate. Id. "The assessed value generally represents only 45% of the full value assigned to the property by the City's appraiser. Moreover, plaintiffs point out that the City's appraisal of the property is based on their current use as low-income SRO rental housing." Id. See generally Sax, Takings and the Police Power, 74 YALE L.J. 36, 67 (1964). "[W]hen an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required . . . ." Id.
unacceptable "blanket approach." Instead, he called for a case-by-case analysis. Judge Bellacosa argued that the legislation was presumptively valid. In addition, he advanced the policy argument that property rights were not absolute and therefore that the incidental burden on property owners did not outweigh compelling state interests.

This Comment will discuss an expanded definition of property interests as applied to physical takings. It will assert that the Seawall court properly addressed the concept of compensable takings by applying a physical takings analysis that focused on the effect of the government's actions upon the property owner's rights to "possess, use, and dispose" of his property, rather than focusing upon the traditional mechanical application requiring an actual physical invasion. Further, it will contend that the Supreme Court's approach to physical takings has been unnecessarily narrow, because it has been based upon an overly restrictive notion of private property. Therefore, as an alternative, this Comment will offer a broader definition of property that includes intangible rights. Recent cases support a broadened notion of property, but it was not until the Seawall decision that this expansion was fully realized. These cases will be compared with Seawall to illustrate the approach that has led to the New York Court of Appeals' forceful stance regarding the physical aspect of takings analysis.

87 Id. at 118, 542 N.E.2d at 1072, 544 N.Y.S.2d at 555. Judge Bellacosa claimed that the majority ignored the fact that Local Law No. 9 would "have varied effects on different landowners." Id. He suggested that SRO operation may constitute the best use for some properties subject to the ordinance. Id. He also noted that for some SRO operations, 81/2% may be a generous rate of return. Id. Furthermore, he reasoned that some SRO owners probably never intended to further develop their property nor develop it any differently. Id.

88 See id. at 117-18, 542 N.E.2d at 1072-73, 544 N.Y.S.2d at 555-56. "Resisting the blanket approach and using the concrete facts of an individual case is not a novel approach, especially in this area of constitutional law." Id. (citation omitted).

89 Seawall, 74 N.Y.2d at 118, 542 N.E.2d at 1072, 544 N.Y.S.2d at 555. "Research reveals no cases in which the Supreme Court or our court have used the regulatory taking theory to undo a legislative act on a facial attack." Id.

90 See id. The dissent noted that in recent years the New York Court of Appeals had "recognized and approved significant encroachments on the libertarian ideal of property rights against 'takings' claims." Id. If the property rights of owners were absolute, then ".. . government could not exist if a citizen had the unfettered right to use property." Id. (quoting Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n, 71 N.Y.2d 313, 321, 520 N.E.2d 528, 531, 525 N.Y.S.2d 809, 813 (1988)).
Finaly, this Comment will argue that substantial restrictions upon an owner's possessory rights which occur without an actual physical encroachment can also constitute a physical taking requiring just compensation.

I. AN ENHANCED APPRECIATION OF INTANGIBLE PROPERTY RIGHTS

An Executive Order issued by President Reagan on March 15, 1988, reflects an emerging trend calling for a greater appreciation of the need to protect private property owners from intrusive government activities. This trend embodies a movement that seeks to counter the past narrowness of the traditional physical takings analysis. Some critics have demanded a complete abolition of this analysis, arguing that it calls for a "form-over-substance" distinction concerning physical takings.

41 Exec. Order, supra note 1, at 8,859. "Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those takings that are necessitated by statutory mandate." Id.

42 See Blume and Rubinfeld, supra note 9, at 574. "Although the physical invasion approach to the determination of liability might appear to be a bright-line standard that is easily administered, it is not without difficulties." Id.; Michelman, Just Compensation, supra note 1, at 1227-28. Professor Michelman also found limitations in the physical invasion test:

[Its capacity to distinguish, even crudely, between significant and insignificant losses is too puny to be taken seriously. A rule that no loss is compensable unless accompanied by physical invasion would be patently unacceptable. A physical invasion test, then, can never be more than a convenience for identifying clearly compensable occasions.

Id. (emphasis in original).

Courts have held that the physical invasion test is too restrictive. See I. Sloan, Regulating Land Use: The Law of Zoning 20 (1988). However, the test is still used if there is an actual physical invasion or occupation of the landowner's property. Id. See also Comment, supra note 1, at 112 "The physical invasion test applies only when a state-sponsored, tangible intrusion of some nature has occurred. Id. This concept is limited in scope and has been criticized as an inadequate and arbitrary takings criterion." Id.; Sax, supra note 35, at 47-48 (physical invasion theory criticized as being too dependent on form rather than substance).

43 See Michelman, Just Compensation, supra note 1, at 1185-86. "[T]he magic of physical invasion is rooted in wordplay . . . . 'Property' suggests a thing owned, and 'taking' suggests physical appropriation. These connotations are reinforced by a basic form-over-substance argument." Id.; Sax, supra note 35, at 48. "For constitutional questions to depend on such formalities is . . . preposterous. The formal appropriation or physical invasion theory should be rejected once and for all." Id. (footnote omitted). See also Berger, supra note 14, at 785 ("The real issue in takings cases is the impact of the government's action on private citizens."); Note, Developments in the Law: Zoning, 91 Harv. L. Rev. 1427, 1468 (1978) ("The test is still more inappropriate for a modern society in which intrusions of a non-physical nature are the rule rather than the exception.").
Historically, physical takings have been found where an actual physical encroachment has affected the owner's rights in property. Loretto is illustrative of cases involving minor physical occupations that have been deemed to constitute takings requiring compensation. In comparison, other cases hold that interference which falls short of actual physical invasion, but nevertheless substantially impairs a property owner's rights, does not require just compensation. In these cases, the form of the invasion is irrelevant; it is the impact of the government's action on private individuals that is critical to the takings analysis.

In applying the regulatory takings test, courts have struggled with the test's subjective elements which include identifying a legitimate state interest, determining when an owner is denied eco-

44 See, e.g., Pumpelly v. Green Bay Co., 80 U.S. 166, 177-78 (1871) (compensable taking found when owner's land destroyed by flooding caused by government).
45 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982). See also Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488 (1987) ("[T]he nature of the State's action is critical in takings analysis."); Blume and Rubinfeld, supra note 9, at 574 ("Loretto supports the view that the nature of the physical invasion ought to be the primary, if not the sole determinant of whether a taking has occurred."); Costonis, supra note 3, at 514 (per se physical takings rule better suited to evaluate infringement on owner's dominion interests in property).
46 See Costonis, supra note 3, at 505. "In practical effect, other invasions may impinge more severely on property than do permanent physical occupations." Id. "Depending upon the circumstances, these invasions are surely as disruptive as the occupation by cable equipment of a minute portion of a landlord's apartment building roof." Id. See, e.g., Keystone, 480 U.S. at 474. In Keystone, the Supreme Court reviewed the plaintiff's argument that Pennsylvania's Subsidence Act, which required that coal be left beneath structures to prevent surface damage, constituted a taking for which just compensation was required. Id. The plaintiff was required to leave 27 million tons of coal beneath the earth's surface. Id. at 496. In a five-four decision, the Court failed to find that a compensable taking had occurred. Id. at 501-02. In a strongly worded dissent, Chief Justice Rehnquist supported the notion that a compensable taking had in fact occurred, finding that the Subsidence Act infringed upon the plaintiff's private property interests. Id. at 507 (Rehnquist, C.J., dissenting). "From the relevant perspective — that of the property owners — this interest has been destroyed every bit as much as if the government had proceeded to mine the coal for its own use." Id. at 518 (Rehnquist, C.J., dissenting).
47 See Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195 (1910) ("[T]he question is what has the owner lost."); Booth v. Town of Woodbury, 32 Conn. 118, 140 (1864). "The real substance of the injury, not its technical name in legal phraseology, is the criterion whereby to determine whether it falls within the constitutional restriction." Id. See also Berger, supra note 14, at 784. Professor Richard Epstein and Professor Laurence Tribe stand in agreement with Professor Berger in maintaining that it is the effect of the governmental action on the property owner and not the nature of the conduct that is decisive in takings cases. Id. at 784. Compare R. Epstein, Takings: Private Property and the Power of Eminent Domain at 94 (1985) (discussing tests for compensable takings) with L. Tribe, American Constitutional Law § 9-3 (2d ed. 1988) (same).
nomically viable use of his property, and resolving claims on concrete facts. Due to these problems and in recognition of the recent trend toward an expanded protection of private property ownership, it is submitted that the concept of physical takings should be broadened to encompass intangible rights.

The restricted notion of private property within the traditional physical takings test has hindered the judiciary's ability to extend this test beyond the limited number of clear-cut cases exhibiting an actual physical invasion or occupation. "Property" should include the intangible rights of an owner balanced against the interests of other societal entities and individuals. Hence, an isolated

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48 See Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987). "Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter." Id.; Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 841 F.2d 872, 877 (9th Cir. 1987) (exact meaning of 'economically viable use' remains unclarified by Supreme Court), cert. denied, 109 S. Ct. 79 (1988); MacLeod v. County of Santa Clara, 749 F.2d 541, 548 (9th Cir. 1984) (same), cert. denied, 472 U.S. 1009 (1985).

The elements inherent in the regulatory test do not adhere to concrete guidelines, thereby creating an aura of subjectivity. See Note, Finding a Taking: Standards for Fairness, 16 U.S.F. L. REV. 743, 745-46 (1982). "[U]ndefined or vague standards pose dangers in that the exercise of judicial discretion without direction may compromise property rights which merit constitutional protection." Id. See also Blume and Rubinfeld, supra note 9, at 577.

Another problematic element of a regulatory analysis concerns the diminution in value test. Id. This test attempts to measure the regulation's effect upon the property owner's invaded interests. Id. "Although the diminution in value approach has had some success in the lower courts, it is not easily applied to regulatory takings. The most obvious difficulty is determining which losses in the value of the land are 'substantial.' " Id. See generally Mandelker, Investment-Backed Expectations: Is There a Taking?, 51 WASH. U.J. URB. & CONTEMP. L. 3 (1987) (providing an application of the investment-backed expectations test to takings cases); Note, supra, at 769. "Not all landowners have the same interest in assuring that the state interest in regulating their property be substantial. The degree to which an owner's property is diminished in value by a regulatory measure ranks, along with the public gain, as a co-equal factor in balancing analysis." Id.

49 See Pumpelly v. Green Bay Co., 80 U.S. 166, 181 (1871) (once taking found where real estate invaded, Court looked no further). But see Michelman, Just Compensation, supra note 1, at 1183-84 (jurisprudence has moved toward highly informal, multifactor balancing). See also supra note 3 and accompanying text (traditional physical takings test requires actual entry onto landowner's property).

view of property without considering an individual’s interest in the property itself is meaningless.\textsuperscript{51} There can be little doubt that without the exercise of dominion and exclusion, a parcel of land is stripped of its very essence as property, and is worthless to its respective owner.\textsuperscript{52}

All forms of property are protected by the fifth amendment, whether they are tangible or intangible.\textsuperscript{53} Apparently, the takings analysis “must be supplemented with an understanding of just what people can be said to own.” \textit{Id.; Tribe, supra} note 47, at § 9-2 n.11. “There seems no good reason why [a] broader definition, incorporating wholly intangible forms of property, should not be extended to the takings context. Indeed, some of the Supreme Court’s recent decisions suggest it is inching toward just such a broadened conception of ‘property’ in takings analysis.” \textit{Id.}

In determining whether a taking has occurred, a court will weigh societal interests against the burden imposed upon the individual. See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124-28 (1978) (several elements considered when determining whether unfair burden imposes on individual); United States v. Central Eureka Mining Co., 357 U.S. 155, 169 (restriction placed on gold mine operation not taking due to wartime needs), \textit{reh'g denied}, 358 U.S. 858 (1958); Miller v. Schoene, 276 U.S. 272, 280 (1928) (preference of public interest over private interest even to destruction is “distinguishing characteristic of every exercise of police power effecting property”).

\textsuperscript{51} See United States v. General Motors Corp., 323 U.S. 373, 378 (1945) (Property “denote[s] the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it.”). \textit{See also} Lynch v. Household Fin. Corp., 405 U.S. 558, 552, \textit{reh'g denied}, 406 U.S. 911 (1972). “Property does not have rights. People have rights . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither can have meaning without the other.” \textit{Id.}

\textsuperscript{52} See, e.g., Seawall, 74 N.Y.2d at 103, 542 N.E.2d at 1063, 544 N.Y.S.2d at 546 (most important right of owner is possession, which includes right to exclude others). \textit{See also} Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) (“power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of rights”); \textit{General Motors}, 323 U.S. at 378 (possession, use and disposal are rights inherent in citizen’s relation to physical thing). \textit{See generally} Berger, \textit{supra} note 14, at 756-57 (“The rights of property owners receive constitutional protection, not because there is anything particularly sacred about property per se, but because of the impact on individuals of the curtailment of rights associated with property they own.”) (footnote omitted).

\textsuperscript{53} See Attorney General’s Guidelines, \textit{supra} note 1, at 12. “The Fifth Amendment’s protection extends to all forms of property — real and personal, tangible and intangible. Property is not defined by the Constitution, but by independent sources such as state, local, and federal law.” \textit{Id. See also} Hodel v. Irving, 481 U.S. 704, 715 (1987) (“right to pass on valuable property to one’s heirs is itself a valuable right”); \textit{Ruckelshaus}, 467 U.S. at 997. The Monsanto Company was an inventor and producer of various chemical products, including pesticides. \textit{Id. After holding that trade secrets constituted property protected by the takings clause, the Court applied a regulatory analysis to determine whether Monsanto was denied compensation regarding certain trade secrets that were divulged pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorized by the Environmental Protection Agency (EPA). \textit{Id.} at 1004-08, 1014-16. The significant facet of \textit{Ruckelshaus} is that intangible rights are protected under the takings clause. \textit{Id.} at 1003.

Although a regulatory test was properly applied in \textit{Ruckelshaus}, under certain circum-
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tional physical takings test has glossed over the private property owner’s possessory interests of dominion and exclusion since they do not fit squarely within the traditional definition of physical occupation or invasion. Therefore, courts should not continue to shield themselves behind the traditional test if it fails to protect private property owners from substantial infringement of their property rights. If a court focuses on the mere formality of physical entrance before finding a physical taking, many property owners may be denied compensation when, in reality, the encroachments upon their property rights of possession and exclusion may be more severe than physical takings cases requiring compensation.

The recent focus in the federal sector has been on the protection of a citizen’s economic liberties; specifically the rights inherent in private property ownership. Ownership, use, and conveyances, a physical taking may also be found with regard to intangible rights. See Wall, for example, upheld a physical taking with regard to the SRO owners’ rights to possess and exclude from their rental property. See Wall, 74 N.Y.2d at 106, 542 N.E.2d at 1065, 544 N.Y.S.2d at 548. Therefore, Wall and Ruckelshaus support the notion that intangible rights deserve fifth amendment protection. See Wall, 74 N.Y.2d at 104, 542 N.E.2d at 1063, 544 N.Y.S.2d at 546 (loss of possessory right is taking); Ruckelshaus, 467 U.S. at 1003 (trademark secret is intangible property protected by fifth amendment). Wall further expanded protection of these rights by finding a physical taking. See Wall, 74 N.Y.2d at 106, 542 N.E.2d at 1065, 544 N.Y.S.2d at 548. See also In re George Ruggiere Chrysler-Plymouth, 727 F.2d 1017, 1019 (11th Cir. 1985) (security interests are property rights protected by fifth amendment takings clause). See generally Tribe, supra note 47, § 9-2, at 591 n.11 (favoring incorporation of intangible forms of property into takings context).

See, e.g., United States v. Causby, 328 U.S. 256, 266-67 (1946) (Court found no actual physical invasion, though land could have been rendered uninhabitable by frequent low-level flights). The Causby Court found that frequent low-level overhead flights were “as complete [an invasion] as if the United States had entered upon the surface of the land and taken exclusive possession of it.” Id. See also Lutheran Church in America v. New York, 95 N.Y.2d 121, 132, 516 N.E.2d 305, 312, 359 N.Y.S.2d 7, 16 (1974) (“What has occurred here . . . where the commission is attempting to force plaintiff to retain property as is, without any sort of relief or adequate compensation, is nothing short of a naked taking.”). Cf. Miller v. Schoene, 276 U.S. 272, 279 (1928) (destruction of private property, to preserve for a greater public value, severely affected one owner); Hadacheck v. Sebastian, 239 U.S. 394, 411-12 (1915) (brickmaker’s being forced to relocate manufacturing facility found not to deprive him of valuable rights incident to ownership). See generally supra note 48 and accompanying text (discussion of subjective elements of regulatory taking and how test is difficult to satisfy even when “encroachments” on owner’s rights are substantial).

See Exec. Order, supra note 1, at § 1[a].

Recent Supreme Court decisions . . . in reaffirming the fundamental protection of private property rights provided by the Fifth Amendment and in assessing the nature of governmental actions that have an impact on constitutionally protected prop-
ance of property are rights, "not benefits or privileges bestowed by government." President Reagan's Executive Order called for "Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings." This mandate indicates that the executive branch of the government, in calling for a definitive standard, disapproves of the Supreme Court's practice of engaging in takings analysis on an ad hoc basis. It is suggested that formalized standards are needed to protect private citizens from abusive and uncompensated infringements upon their rights as property owners. These guidelines should incorporate the following criteria: the risk that a taking will occur, the alternatives available to prevent the infringement of property rights, and an analysis of the cost of compensation.

II. Analysis of Recent Cases

The Supreme Court, in addressing compensation for governmental takings, has rendered inconsistent decisions. For example, an examination of several pertinent cases reveals that as early as

**Id.** See also Berger, supra note 14, at 747 (author implies property development should also be included in property rights). See generally supra note 10 and accompanying text (policy arguments calling for greater protection of personal property rights).

**Id.** See Exec. Order, supra note 1, at § 1[c]. "The Guidelines . . . shall be disseminated to all units of each Executive department and agency no later than July 1, 1988. The Attorney General shall, as necessary, update these guidelines to reflect fundamental changes in takings law occurring as a result of Supreme Court decisions." Id.

**Id.** See supra note 2 and accompanying text (Supreme Court has traditionally reviewed takings issues on case-by-case basis). But see Ackerman, supra note 1, at 1700-02 (discussing the problems of ad hoc analysis). "The recent [Supreme Court] cases represent a continuation of the trend toward ad hoc balancing, but what takings law needs is a good dose of formalization." Id.

**Id.** See Ackerman, supra note 1, at 1700 ("Takings law should be predictable, on this view, so that private individuals confidently can commit resources to capital projects."); Comment, supra note 1, at 110 ("[U]ndefined standards pose dangers in that mere exercise of judicial discretion without direction creates a largely ad hoc body of law. This state of affairs often compromises property rights that merit constitutional uncertainty in the implementation of public policy."). See also United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) (case-by-case analysis results in undefined standard).

**Id.** See Bandow, supra note 10, at 4, col. 6. (discussing need for government officials' heightened awareness of private property rights during policy formulation before possible taking occurs).
Physical Takings Test

1979, the Court began confusing the issues surrounding physical takings.\(^6\)

In *Kaiser Aetna v. United States*,\(^6^3\) owners dredged a private pond in Hawaii and connected it with a bay.\(^6^3\) This activity was undertaken with the approval of the Army Corp. of Engineers.\(^6^4\) However, once access to the bay was established, the federal government claimed a right of access to the entire area based upon the theory that the pond was now part of the navigable waters under its control.\(^6^5\) The *Kaiser Aetna* Court found that an "actual physical invasion" had occurred.\(^6^6\) Consequently, in order to obtain access, the government was obligated to condemn the pond under its eminent domain powers and then compensate the pond's owners.\(^6^7\) Focusing upon the owner's "right to exclude," the Court held that this possessory right could not be impaired without providing just compensation.\(^6^8\) This intangible right was ultimately analyzed under the physical takings test.\(^6^9\) Access to the marina, in contravention of the owner's right to exclude, justified the finding of a physical taking.\(^7^0\) It is significant to note that an invasion by either the government or by authorized third parties had not yet occurred. It is submitted that the New York Court of Appeals' holding in *Seawall* is consistent with the *Kaiser Aetna* decision, since it supports the notion that an actual physical invasion is not

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\(^6^1\) See, e.g., notes 62 and 72 and accompanying text.
\(^6^3\) Id. at 166. Hawaiian fishponds have always been held to be the private property of landlords and were once an integral part of the Hawaiian feudal system. *Id.*
\(^6^4\) *Id.* at 167.
\(^6^5\) See *id.* at 168.
\(^6^6\) *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979). The Court stressed that Kaiser Aetna had spent substantial amounts of money on the pond's development on the assumption that the park would remain private property. *Id.* at 176.
\(^6^7\) See *id.* at 180.
\(^6^8\) See *id.* at 179-80. See also Comment, supra note 1, at 124. "Indeed, the power to exclude has been held to be a fundamental element of the property right, falling within the category of interests that government cannot take without compensation." *Id.* (citing *Kaiser Aetna*, 444 U.S. at 179-80). See generally *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (discussing right to exclude others).
\(^6^9\) See *Kaiser Aetna*, 444 U.S. at 180. "This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioner's private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina." *Id.*
\(^7^0\) See *id.* at 179-80. See generally supra note 51 and accompanying text (cases supporting theory that violation of owner's interest in property may constitute compensable taking).
required to form the basis of a physical taking. Rather, the impairment of an owner's possessory rights can define a physical taking.\footnote{See supra note 51 and accompanying text (impairment of owner's possessory rights invokes fifth amendment protection against takings).}

In \textit{Nollan v. California Coastal Commission},\footnote{483 U.S. 825 (1987).} the Commission attempted to subject a portion of the Nollans' beachfront property to a public access easement in exchange for a coastal development permit. A permit was required by law to demolish their existing dilapidated bungalow and replace it with a three-bedroom house.\footnote{Id. at 828-29. The Court noted that the Nollans' beach house was located a quarter mile south of one public beach and 1,800 feet north of another public beach. \textit{Id.} at 827.} The Commission argued that the new house would block the public's view of the ocean and limit access to and along an adjoining public beach.\footnote{Id., at 828. "[T]he Commission staff had recommended that the permit be granted subject to the condition that they allow the public an easement to pass across a portion of their property . . . ." \textit{Id.}} Rather than demand an easement, the Commission instead conditioned the issuance of the permit on the Nollans' grant of the lateral access easement.\footnote{Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-39 (1987).} The Supreme Court applied a regulatory takings analysis and found that a sufficient nexus did not exist between the issuance of the building permit and the public access easement.\footnote{\textit{Id.} (citing J.E.D. Assoc., Inc. v. Atkinson, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)).} Concluding that a regulatory taking had occurred, Justice Scalia stated that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation but 'an out-and-out plan of extortion.'"\footnote{\textit{Id.} at 841. "California is free to advance its 'comprehensive program,' if it wishes, . . . but if it wants an easement across the Nollans' property, it must pay for it." \textit{Id.} at 841-42 (citation omitted).} Therefore, the Commission was obligated to compensate the Nollans in exchange for the granting of the public access easement.\footnote{\textit{Id.}}

Justice Scalia analogized \textit{Nollan} to \textit{Loretto}, since both cases involved an impairment of the owner's right to exclude; he did this despite the fact that \textit{Nollan} was decided under a regulatory takings analysis and \textit{Loretto}, in contrast, was decided under a physical
Physical Takings Test

takings analysis. The Nollan Court defined the concept of permanent physical occupation as an occupation which permits individuals a right of continuous access upon real property, even though they did not permanently remain on the land. It is submitted that this definition suggests that a physical takings approach should have been utilized, rather than a regulatory approach. Support for applying a more expansive view of the physical takings analysis is found in the comparison between Nollan and Seawall. In both Nollan and Seawall an actual physical encroachment had not literally materialized, yet the decisions expanded the bounds of per se takings beyond that which the Supreme Court established in Loretto. Had the facts in Nollan been decided under the rationale applied in Seawall, it is likely that both a physical and regulatory taking would have been found.

A Ninth Circuit Court of Appeals’ case provides additional support for an expanded view of the physical takings test. In Hall v. City of Santa Barbara, an uncompensated takings claim was asserted by the Halls, operators of a mobile home park. An ordinance was enacted by the City of Santa Barbara in August of 1984

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79 Compare Nollan, 483 U.S. at 831 (analysis focused upon owner’s right to exclude) with Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) (same). See Brief for Appellants, supra note 13, at 41. "In both Loretto and Nollan, the government was not ‘regulating’ an existing relationship but rather requiring the owner to allow a third party onto his land." Id. See also Michelman, Takings, 1987, supra note 1, at 1609, in which Professor Michelman states:

Scalia’s point was to establish that the lateral-passage easement required of the Nollans by the Commission fell within the legal doctrinal category of ‘permanent physical occupation,’ so that if the requirement had been imposed by direct regulation, rather than indirectly as a building-permit condition, the regulation imposing it would have been a per se taking under the Loretto doctrine.

Id.

80 Nollan, 483 U.S. at 832. "We think a ‘permanent physical occupation’ has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." (footnote omitted). Id. See also Michelman, Takings, 1987, supra note 1, at 1608. "The decision seems most satisfactorily understood as a further manifestation, albeit in somewhat surprising form, of the talismanic force of ‘permanent physical occupation’ in takings adjudication." Id.

81 See Michelman, Takings, 1987, supra note 1, at 1609 n.46. The Nollan decision emphasized the extension of the physical takings analysis since the entry had not yet occurred, but by comparing the affected property interests to those of Loretto, it is brought under the realm of a physical takings analysis. Id.

82 833 F.2d 1270 (9th Cir. 1988), cert. denied, 485 U.S. 940 (1988).

83 Id. at 1273.
that provided for an indefinite extension of tenant leases in such a facility.\textsuperscript{84} The regulatory ordinance in \textit{Hall} was similiar in many respects to New York's Local Law No. 9.\textsuperscript{85} The plaintiffs argued that compensation was required because the ordinance transferred a possessory right to the tenants in the land on which their mobile homes were located.\textsuperscript{86} Viewing the claim under a physical takings analysis, the court looked to the Supreme Court's reasoning in \textit{Loretto} and \textit{Kaiser Aetna}.\textsuperscript{87}

The \textit{Hall} court found that the ordinance infringed upon the owners' right to decide who could occupy their property, and under what terms.\textsuperscript{88} Consequently, this directly limited their possessory interest to exclude, as well as their interest to dispose of the property by transfer or sale.\textsuperscript{89} From this perspective, \textit{Hall} supports the view of a physical takings analysis that focuses upon the intangible rights enjoyed by property owners.\textsuperscript{90} The \textit{Seawall} decision is consistent with the \textit{Hall} rationale. Both cases address the scope of a lessor's intangible property rights and ultimately focus

\textsuperscript{84} Id. "These leases must provide certain key terms: They must be terminable by the tenants at will, but by the mobile home operator only for cause, narrowly defined by the ordinance; rent increases are strictly limited; and disputes about rent or lease terms are made subject to binding arbitration." (footnote omitted). Id.

\textsuperscript{85} Compare Santa Barbara, Cal., City Council Ordinance No. 4285, ch. 26.08 with City of New York [1987] N.Y. Local Laws (No. 9) (ordinances similiar).

\textsuperscript{86} \textit{Hall}, 833 F.2d at 1273-74.

\textsuperscript{87} \textit{Hall v. City of Santa Barbara}, 833 F.2d 1270, 1276 (9th Cir. 1986), cert. denied, 485 U.S. 940 (1988). The \textit{Hall} court stated:

\begin{quote}
When viewed in the light most favorable to the Halls, the allegations of the complaint seem to present a claim for taking by physical occupation, as in \textit{Loretto}, \textit{Kaiser Aetna}, and their precursors. Reduced to its essentials, appellant's claim is that the Santa Barbara ordinance has transferred a possessory interest in their land to each of their 71 tenants; that this interest consists of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent; and that this interest is transferable, has an established market and a market value. If proven, appellant's claims would amount to the type of interference with the property owner's rights the Court described so eloquently in \textit{Loretto}.
\end{quote}

\textit{Id.}

\textsuperscript{88} \textit{Hall}, 833 F.2d at 1276. "[T]he landlord has no meaningful say as to who will live on the property now or in the future." \textit{Id.}


\textsuperscript{90} See, e.g., \textit{Seawall}, 74 N.Y.2d at 105 n.4, 542 N.E.2d at 1064 n.4, 544 N.Y.S.2d at 547 n.4. "The significant point . . . in \textit{Hall} as in the case at bar, [was that] the owners were deprived of their possessory interests — particularly the right to exclude strangers — the determinative factor in \textit{Kaiser Aetna, Loretto and Nollan}." \textit{Id. See also supra} notes 50-51 and accompanying text (takings should encompass intangible property rights).
upon the owner's right to decide who would occupy his property and under what terms.

CONCLUSION

The traditional physical takings test has been too narrowly construed, thereby depriving property owners of just compensation in some instances. Because of the need to protect intangible property rights such as dominion and exclusion, the Supreme Court should not continue to utilize a per se approach when addressing fifth amendment takings issues. To protect these rights, an expanded definition of property under the traditional physical takings test must be implemented which will no longer focus on the necessity of having an actual encroachment on a landowner's property before a taking will be found.

Recent cases have supported a broadening of the traditional test. The New York Court of Appeals recognized the need for an expanded definition of property in Seawall, which found both a physical taking and a regulatory taking infringing upon the landowner's intangible rights of possession, exclusion and dominion. The New York Court of Appeals should be applauded for taking an expansive stand on the issue of physical takings. The court's approach better protects individual citizens' property rights from uncompensated takings, and its decision in Seawall should serve as a model in establishing new guidelines.

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