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FORCED TENANCIES AS TAKINGS OF PROPERTY IN SEAWALL ASSOCIATES V. CITY OF NEW YORK: EXPANDING ON LORETTO AND NOLLAN

INTRODUCTION

The takings clause of the fifth amendment of the Constitution is deceptively simple: “private property shall not be taken for a public use without just compensation.”1 Traditionally, this clause has required courts in takings clause suits to balance the public’s interest in the land use regulation against the individual’s right to use her property as she sees fit.2 More recently, however, the Supreme Court has disregarded a case-by-case balancing approach for certain types of takings cases while retaining it for others.

The Supreme Court established this dichotomy in Loretto v. Teleprompter Manhattan CATV Corp.3 In Loretto, the Supreme Court held that a permanent physical occupation authorized by the government is per se compensable.4 In essence, Loretto carved an exception from the traditional rule that subjected governmental regulations to a multifactor balancing test.5 This dichotomy created by Loretto between physical occupations and other types of governmental regulations has created problems for courts. In particular, courts have struggled in determining whether governmental regulations are “physical” or “regulatory” in nature.6 This characterization is important because regulations deemed as physical will assuredly result in “just compensation” to

4. Id. at 432. The Loretto decision overturned the balancing approach that was previously used for all intrusions, physical or regulatory and instead, held that “a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.” Id. at 426.
5. Id.; see also infra note 29 (discussing balancing test’s factors that are still relevant for regulatory intrusions); infra notes 152-55 and accompanying text (same).
the landowner.\footnote{7} A classification of the government restriction as regulatory, however, may result in the property owner being unable to receive any compensation at all.\footnote{8}

In \textit{Seawall Associates v. City of New York},\footnote{9} the highest court of New York considered whether a land use regulation was physical or regulatory in nature. The regulation at issue in \textit{Seawall} was New York City's Local Law No. 9, which placed a five-year moratorium on the conversion, alteration, and demolition of single-room occupancy housing ("SRO").\footnote{10} This moratorium included a corresponding requirement for owners to restore all SRO units and lease them to tenants at controlled rents.\footnote{11} The \textit{Seawall} court held that Local Law No. 9 was unconstitutional because it constituted a physical occupation of the landlord's properties, and thus, was \textit{per se} compensable under \textit{Loretto}.\footnote{12} The court, however, did not stop there. It further held, in the alternative, that even if Local Law No. 9 was not a physical taking, it was, nevertheless, an impermissible regulatory intrusion.\footnote{13}

\textit{Seawall} is important because it is one of the first cases that attempts to interpret and apply the Supreme Court's recently adopted takings framework, a framework which has been criticized by commentators as being convoluted and inconsistent.\footnote{14} This Note traces the development of the law of takings, with a particular emphasis on the distinctions between physical and regulatory takings. The Note also examines the history of landlord-tenant regulations, which have been traditionally upheld through the years, and explains how the regulation in \textit{Seawall} went beyond traditional infringement on landlords. The Note then examines the facts and issues that the court addressed in \textit{Seawall} and contends that the case is an expansive interpretation of the Supreme Court's takings precedents. This Note further suggests that \textit{Loretto} has caused confusing and artificial distinctions that have made coherent analysis difficult in cases such as \textit{Seawall}. Finally, the Note explains how \textit{Seawall} represents one of the first major cases to expand upon recent Supreme Court precedents that provide landowners with more protection for substantive property rights.

\footnotetext[7]{See supra note 4; infra notes 74-75 and accompanying text.}  
\footnotetext[8]{See supra note 5; infra notes 77-82 and accompanying text.}  
\footnotetext[9]{74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (en banc), cert. denied, 110 S. Ct. 500 (1989).}  
\footnotetext[10]{Id. at 100, 542 N.E.2d at 1061, 544 N.Y.S.2d at 544.}  
\footnotetext[11]{Id. at 106, 542 N.E.2d at 1065, 544 N.Y.S.2d at 548 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).}  
\footnotetext[12]{Id.}  
\footnotetext[13]{Id.}  
\footnotetext[14]{See Kmiec, supra note 2, at 1630 (stating that the Supreme Court's recent cases have revealed continuing instability in the area of takings law); Comment, The Supreme Court's Tril- ogy of Regulatory Takings: Keystone, Glendale and Nollan, 38 DePaul L. Rev. 441, 442-43 (1988) (stating that the Supreme Court's "less than definitive" treatment of the takings clause has created much confusion).}
I. BACKGROUND

A. Property Rights and Land Use Regulations

The Supreme Court has defined property rights as the rights "to possess, use and dispose" of property. These rights and other rights, such as the right to modify and manage property, are often collectively referred to as an owner's "bundle" of property rights. To protect these rights, courts have attempted to balance competing interests by weighing the public benefit of a government-regulation against the landowner's right to be free from overly intrusive regulations.

The government often enacts land use regulations that infringe on these property rights in an attempt to further social policy. There are two ways in which government can engage in such action. First, government can take private property for public purposes, by exercising its power of eminent domain. Government, however, must pay for such appropriations. Second, government can regulate land uses that may have a detrimental impact on society, by exercising its police power. Governmental regulations, authorized by police power, may be implemented without paying for such appropriations.

The government's use of its police power has been a particularly important vehicle in furthering social policy. Like governmental exercises of eminent domain, acts falling under the police power are undertaken on behalf of society and must further a legitimate public purpose. These two powers, eminent domain, and police power, authorize government to infringe on personal prop-
property rights.

Thus, it is clear that property rights are not absolute. They can be infringed upon or limited, sometimes severely.\(^{24}\) Zoning, as a valid exercise of the government's police power, is a prime example of a situation where a landowner is not necessarily entitled to the highest and best use of her property.\(^{25}\) The highest and best use of the property is a hypothetical construct referring to the amount that a willing buyer would pay a willing seller if the property were sold on the open market.\(^{26}\) Zoning and other land use regulations typically place a ceiling on the highest and best use by restricting the allowable uses of land.\(^{27}\)

Since it is undisputed that government can and will infringe upon property rights, the critical question becomes how stringently property rights need to be protected against various governmental intrusions. Governmental intrusions that are severe enough to be held compensable are called "takings."\(^{28}\) Although the history of takings law is characterized not by explicit rules, but by a balancing test that includes no set formula,\(^{29}\) courts have tended to be deferential to government attempts to implement social policy.\(^{30}\) Thus, quite predictably, courts have upheld land use regulations supported by a legitimate state interest.\(^{31}\) Further, courts have accepted a variety of interests as legiti-

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24. See infra notes 156 & 158 (discussing cases which have required nearly a total loss of economic value before finding a compensable taking).


26. See Euclid, 272 U.S. at 389 (1926) (stating that highest and best use does not focus on the property's present worth, but on its potential worth).


28. See First Lutheran Church v. Los Angeles County, 482 U.S. 304, 315 (1987) (holding that governmental action that "works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation'") (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)); see also supra notes 73-75 and accompanying text (for a definition of "taking").

29. Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 124 (1978) (stating that courts normally engage in "ad hoc, factual inquiries" to determine whether just compensation is due when the government imposes restrictions on property). This same Court, however, did articulate some relevant factors which it deemed relevant for purposes of balancing: 1) the economic impact of the government regulation on the landowner; 2) the extent to which the regulation interferes with investment-backed expectations of the landowner; and 3) the character of the government action. Id. at 124-29.


31. See, e.g., Euclid v. Ambler Realty Co., 272 U.S. 365, 388-90 (1926) (sustaining zoning ordinance which restricted the location of businesses and housing and also regulated maximum lot size and structure height); see also Michelman, supra note 2, at 1607 (stating that prior to Nol-
mate, ranging from providing affordable housing for poor people to the protection of endangered birds.

Future courts, however, may not follow this historically deferential approach. In 1987, the Supreme Court indicated in *Nollan v. California Coastal Commission* that it would scrutinize land use regulations more closely than it had in the past. The plaintiffs in *Nollan* owned a parcel of beachfront property, which included a bungalow that had fallen into disrepair. The Nollans sought to build a new structure on the property and applied for a coastal development permit as required by the California Coastal Commission. The Commission granted permission to the Nollans to rebuild a house on the beachfront lot. This permission was limited, however, by a condition that the Nollans grant the public an easement to pass across their property.

The Supreme Court held that the condition amounted to an impermissible exaction of property, thereby reversing the California Court of Appeal's decision. Writing for the majority, Justice Scalia began his analysis by defining a "permanent physical occupation" as occurring when individuals have "a permanent and continuous right to pass to and fro, so that the real property may be continuously traversed . . . ." Nevertheless, the regulation in *Nollan* was analyzed primarily as a nonphysical restriction. Presumably, the Court chose

35. Id. at 834-37 & n.3 (applying an intermediate scrutiny test and rejecting the argument that the traditional takings standard was the same as that applied to due process or equal protection claims).
36. Id. at 827.
37. Id. at 828.
38. Id.
39. Id.
40. Id. at 839. An exaction is the "wrongful act of an officer or other person compelling the payment of a fee or reward for his services, under color of his official authority, where no payment is due." *Black's Law Dictionary* 500 (5th ed. 1979). According to the *Nollan* Court, the requesting of an easement was an exaction because the government had no rightful claim to use the lateral property alongside the Nollan's house. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832-33 (1987).
42. *Nollan*, 483 U.S. at 832.
43. See *Kmiec*, supra note 2, at 1650. The Supreme Court deliberately chose not to "go down the Loretto path to invalidate the easement condition as an impermissible physical invasion." *Id*. Justice Scalia does not seem to realize that looking at a multifactor balancing test or a means-ends nexus is irrelevant in the presence of a physical invasion after *Loretto*. *Id*. For a discussion of Justice Scalia's opinion, see *Michelman*, supra note 2, at 1609. Justice Scalia's opinion took great
this analysis because the physical occupation in \textit{Nollan} was the result of a conditional granting of an easement designed to offset any burden created by the new structure, and the Commission in \textit{Nollan} could have refused to allow the landowner to rebuild his property entirely.\textsuperscript{44}

The majority struck down the Commission’s action because granting the easement did not “substantially advance” a legitimate state interest.\textsuperscript{46} Accepting, for purposes of argument, the Commission’s determination that protecting the public’s ability to see the beach was a legitimate state interest, the Court held that the public purpose of protecting visual access did not require, or at least, was not substantially furthered by, the Nollans’ granting lateral access along their property to the beach.\textsuperscript{46}

The “rational nexus” test established in \textit{Nollan} requires courts to examine the relationship between the governmental ends to be served, and the means established by local law to achieve that end.\textsuperscript{47} If the means created by the land use restriction are not closely related to the state’s purported interest, the regulation may be struck down as “an out and out plan of extortion.”\textsuperscript{48} Although \textit{Nollan’s} impact is far from clear, its newly created rational nexus test appears to require a “semi-strict or heightened judicial scrutiny of regulatory means-

\textsuperscript{44} Michelman, supra note 2, at 1609.

\textsuperscript{45} Nollan v. California Coastal Comm’n, 483 U.S. 825, 834 (1987). In creating the rational nexus test, Justice Scalia cited language from prior decisions, which required a regulation to “substantially advance[] legitimate state interests,” in order to be constitutional. \textit{Id.} at 834 & n.3 (quoting Agins v. Tiburon, 447 U.S. 253, 260 (1980)). Justice Scalia also concluded that a “use restriction may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial government purpose.” \textit{Id.} at 834 (quoting Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 127 (1978)); cf. Alexander, \textit{Takings, Narratives and Power}, 88 COLUM. L. REV. 1752, 1764 (1988) (the “sufficient nexus” test is the Supreme Court’s response to what it perceives as governmental manipulation and deceit. The state’s access rationale, while itself a potentially legitimate purpose, was in this particular case merely “a trick by which the Coastal Commission could achieve an objective that it could not obtain directly without paying compensation—namely, obtaining a lateral public easement across the Nollan beachfront lot.”).

\textsuperscript{46} Nollan, 483 U.S. at 838.

\textsuperscript{47} See, e.g., Michelman, supra note 2, at 1613 (stating that Justice Scalia’s use of phrases such as “substantially advances” and “reasonably necessary” indicate a heightened level of judicial scrutiny). The Supreme Court has often used such language in different contexts to signal a noncursory, intensified level of judicial scrutiny of asserted means-ends justification of state laws. \textit{See}, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557, 564 (1980) (using heightened scrutiny for commercial speech); Craig v. Boren, 429 U.S. 190, 204 (1976) (using heightened scrutiny for sex-based discrimination). \textit{See generally} L. Tribe, \textit{American Constitutional Law} 1553-1618 (2d ed. 1988) (discussing the Court’s use of intermediate scrutiny in a variety of contexts).

\textsuperscript{48} Nollan, 483 U.S. at 837. The \textit{Nollan} Court analogized the conditional granting of an easement to a state’s prohibition on yelling “fire” in a crowded movie theater, which the state would waive if a party paid it $100. \textit{Id.} The Court reasoned that although an outright prohibition on such yelling would be valid, granting exemptions on this unconstitutional basis would change the regulation’s fundamental nature. \textit{Id.}
This heightened scrutiny standard may be a sign that the Supreme Court's newer members will provide more substantive protection to property rights in the future. Courts that impose this heightened scrutiny on land use regulations hinder the government's ability to implement social policy. By enacting land use regulations, the government is often able to further social policies and force the costs associated with those policies on a disproportionately small group of landowners. Commentators have criticized this imposition of disproportionate costs as violative of the individual landowner's rights, and have contended that the government should not solve public problems without imposing the solution on the entire public.

These same commentators have struggled in determining the proper balance between the owner's rights to her property and the government's right to implement social policy. Professor Michelman suggests that there are four important questions that need to be asked when deciding if a landowner should be entitled to compensation: 1) does the regulation result in a physical invasion to the property? 2) how detrimental, qualitatively, is the harm that is inflicted on the landowner? 3) what are the social gains when balanced against the private losses? and 4) is the landowner being restricted from activities that are normally seen as not being harmful to others? Although recognizing each factor as potentially relevant, Professor Michelman disputes that any one of these factors, by itself, provides a workable test.

49. Michelman, supra note 2, at 1607-14; cf. Alexander, supra note 45, at 1766 (acknowledging the remaining uncertainty of whether Nollan's nexus requirement will be applied only to municipal exactions or whether its scope will be much broader, and recognizing that Nollan might be limited solely to exactions that are "Loretto-like" physical invasions); Comment, supra note 14, at 479 (stating that recent Supreme Court precedents signify a shift from extreme deference toward state and local regulations to one of increased protections for private property owners who are seeking protection from intrusive regulations).

50. There is, however, much dispute among commentators on this point. See Kmiec, supra note 2, at 1648-50 (disputing Michelman's views and indicating that the ends-means requirement may, in light of more creative regulations, be easily overcome, resulting in less substantive protection for property rights).


52. See, e.g., Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1169 ("Shall the losses be left with the individuals on whom they happen first to fall, or shall they be 'socialized'?"). Some of the more conservative Supreme Court members also believe this disproportionate cost shifting to be inappropriate. See, e.g., Penn Cent., 438 U.S. at 138-48 (Rehnquist, J., dissenting) (finding it inappropriate to place the burden of preserving landmark properties in New York on individual owners rather than all taxpayers).

53. Michelman, supra note 52, at 1184.

54. Id. Michelman further argues that the only acceptable approach is to determine compensation by applying a utilitarian test of fairness: whether it is fair to implement a social policy without paying for the private loss that is inflicted in the process. Id. at 1171-72; cf. infra notes 126-28 and accompanying text (criticizing the current test which makes a distinction between permanent and temporary takings).
B. Landlord-Tenant Statutes

Landlord-tenant law has been one particular area where the government has imposed substantial regulations on landowners. The courts have typically sustained such governmental action. The Supreme Court has held that traditional landlord-tenant statutes are normally impervious to takings challenges and do not usually rise to the level of a compensable taking. Further, the Supreme Court has expressly upheld the concept of rent control as involving a valid state interest which is imposed on landowners who choose to rent their properties. This deference to landlord-tenant statutes has led to wide latitude in governmental regulation of the landlord-tenant relationship.

Typical landlord-tenant laws that have been upheld in the past involved restrictions on "existing tenancies where the landlords had voluntarily put their properties to use for residential housing." In Loab Estates, Inc. v. Druhe, the local law in question barred the eviction of tenants unless provisions had been made for their relocation. Seeking to withdraw their properties from the rental market, developers challenged the law as being a deprivation of property without due process in violation of the fourteenth amendment. The court held that restrictions on a landlord's power were within the lawful scope of the government's police power. Using a balancing test, the court held that the legitimate governmental interest in protecting the tenants in possession justified a temporary restraint upon the rights of landlords to withdraw their property from the rental market. Although the law interfered with landlords' ability to use their property at its highest and best use, the law did not create a compensable taking.

In addition to protecting tenants from eviction, the courts also have held that the government can protect tenants from excessively high rents. In

55. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982) (acknowledging states' and municipalities' "broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails").
56. See, e.g., Block v. Hirsh, 256 U.S. 135 (1921) (upholding rent control as valid state interest).
59. Id. at 179, 90 N.E.2d at 27.
60. Id. at 179, 90 N.E.2d at 26.
61. Id. at 180, 90 N.E.2d at 27.
62. The particular factors of this balancing test were unclear at the time of Loab Estates, Inc. v. Druhe, 300 N.Y. 176, 90 N.E.2d 25 (1949). The factors of this balancing test, however, were later clarified in Penn Cent. Transp. Co. v. New York, 438 U.S. 104 (1978). See infra notes 152-55 and accompanying text (discussing balancing factors).
63. Loab Estates, 300 N.Y. at 180, 90 N.E.2d at 27.
64. Id. In Loab Estates, the court noted that the landowners neither claimed that they were deprived of a reasonable rate of return nor that an emergency existed. Id. Presumably, either of these facts would have changed the analysis.
Bowles v. Willingham, the regulation at issue set rent ceilings, establishing maximum amounts above which landlords could not charge. The Supreme Court upheld the rent control statute, although it noted that the statute in question did not require "any person . . . to offer any accommodations for rent." In that sense, it is useful to separate traditional landlord-tenant law, such as Bowles, from cases in which "the government authorize[d] the permanent occupation of the landlord’s property by a third party." If the regulation is merely a rent ceiling imposed on those who rent property, then the regulation will most likely be sustained; however, if a landowner is forced to rent the property, then it will be seen as more intrusive than typical landlord-tenant statutes and will likely be subjected to heightened judicial scrutiny.

Although the Supreme Court has not directly ruled on regulations forcing landlords to offer accommodations for rent, Chief Justice Rehnquist has already said that a regulation preventing a landlord from demolishing a rent-controlled apartment building would constitute a permanent physical occupation by the government, and therefore, a compensable taking.

C. Takings

A “taking” is any type of “publicly inflicted private injury for which the Constitution requires payment of compensation.” A taking may be found under two circumstances: 1) where the government, or its agent, creates a permanent physical occupation of a landowner's property; or 2) where a court finds, after applying a balancing test, that the interests of the private landowner in unrestricted use of his property outweigh the public interest in having the regulation implemented.

The source of the takings controversy is the fifth amendment to the United

66. Id.
67. Id. at 506-08.
68. Id. at 516-18. The court noted that the act in question was written during World War II. Id. at 519. The court, therefore, suggested that if the country could demand the lives of its men and women in waging the war, the country was not constitutionally required to provide a system of price control that would assure each landowner a “fair return” on his property. Id.
70. See, e.g., Bowles v. Willingham, 321 U.S. 503 (1944) (upholding rent ceiling); cf. Loretto, 458 U.S. at 440 (distinguishing laws that cause permanent physical occupations, which are per se compensable, from rent control regulations which trigger “multifactor inquiry generally applicable to nonpossessory governmental activity”).
71. See Loretto, 458 U.S. at 440 (holding regulations that “require the landlord to suffer the physical occupation of a portion of his building by a third party” to trigger compensation).
73. Michelman, supra note 52, at 1165.
74. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982); cf. Michelman, supra note 52, at 1184 (noting that traditional takings law was that “in the absence of explicit expropriation, a compensable taking could occur only through physical encroachment and occupation”) (emphasis in original).
States Constitution, which guarantees that “private property shall not be taken for a public use without just compensation.”

Although the fifth amendment's text appears straightforward on its face, courts have found it difficult to elucidate the proper scope of the takings clause.

If a court holds a regulation to be a taking, the landowner is entitled to just compensation for any property taken. It is clear, however, that not all governmental regulations rise to the level of a taking. While all permanent physical occupations are per se compensable, nonphysical governmental regulations are only potentially compensable. With respect to governmental regulations that are not characterized as permanent physical occupations, courts balance the public and private interests at stake. If the regulation advances an important public interest and is not particularly intrusive on property rights, then the regulation is likely to be sustained as falling within the government's valid "police power."

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76. U.S. Const. amend. V.
77. Comment, supra note 14, at 464. Despite the unambiguous text of the fifth amendment's just compensation clause, the Supreme Court has not always awarded landowners compensation for the government's impermissible takings. In the past, a common remedial measure, after invalidating a regulation, was to undo the wrongful legislation and refuse monetary damages. See, e.g., Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922) (finding a taking and enjoining the enforcement of the regulation but not awarding compensatory damages); Davis v. Pima County, 121 Ariz. 343, 345, 590 P.2d 459, 461 (Ariz. Ct. App. 1978) (finding a taking yet determining that the landowner was not entitled to monetary damages, but landowner was entitled to the judicial remedy of undoing the wrongful legislation), cert. denied, 442 U.S. 942 (1979). But see First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 322 (1987) (holding it "constitutionally insufficient" to withhold remedy of monetary damages for regulatory taking). According to the First English Court, the body that created the taking is liable for all losses incurred from the day the regulation took effect. Id.

The First English decision appears to have answered the question of whether states can withhold the remedy of monetary damages for regulatory takings. In First English, a winter flood in Los Angeles destroyed the Glendale Church's camp for handicapped children. Id. at 307. The City of Los Angeles proceeded to adopt flood plain regulations that forbade the church from rebuilding its camp for an indefinite period of time. Id. The church sued for compensation for the alleged taking. Id. at 308. The California courts denied that compensation was an available remedy. Id. at 308-09. The United States Supreme Court reversed, holding that if a taking occurred, the county owed monetary damages for the losses caused by the regulation from the day it took effect. Id. at 314-22. The First English Court, however, did not touch upon the separate question of what types of regulations qualify as takings.

78. See, e.g., Armstrong v. United States, 364 U.S. 40, 50 (1960) (Harlan, J., dissenting) (acknowledging that "not every governmental act which ultimately destroys property rights constitutes a compensable taking of those rights").
81. Penn Central, 438 U.S. at 124.
82. Traditionally, land use regulations were subject to only minimum scrutiny. This standard has resulted in judicial deference to land use laws found to have a public purpose. See, e.g., Euclid v. Ambler Realty Co., 272 U.S. 365, 386-89 (1926) (upholding zoning ordinance that was neither unreasonable nor arbitrary).
1. Physical Takings

Originally, it was commonly held that a compensable taking could occur only when government physically occupied or encroached on a landowner's property. Today, the result of this doctrine is that courts, while sometimes denying compensation for nontrespassory injuries, never deny compensation for a physical occupation or encroachment.

The original physical invasion suits were agricultural cases. For instance, in *Pumpelly v. Green Bay Co.*, the Supreme Court held, for the first time, that governmental action could rise to the level of a physical taking. In *Pumpelly*, a state-constructed dam flooded 640 acres of petitioner's property for a period of six years. Petitioner's land was almost completely destroyed by the flooding. The Supreme Court held that compensation was required, even though the land's title had not been disturbed. The Court articulated the following rule: "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 usefulness, it is a taking, within the meaning of the Constitution . . . ."

A subsequent Supreme Court case, however, made the application of this takings rule unclear. In *Transportation Co. v. Chicago*, the Court distinguished *Pumpelly*. The *Transportation Co.* Court held that the construction of a needed temporary dam in a river, in order to allow construction of a tunnel, was not a taking, despite the fact that the plaintiff landowner was denied access to his properties. The Court reasoned that, unlike the *Pumpelly* dam which resulted in a permanent flooding, the obstruction in *Transportation Co.* only impaired the property's use. No compensable taking arose because "no entry was made upon the plaintiff's lot." As demonstrated in *Transportation Co.*, the Supreme Court has struggled over the general causation question of when government action becomes too intrusive; seemingly, the government's action must directly cause the landowner's injury for a court to find a compensable taking.

A related question to what level of direct governmental action is necessary to constitute a taking is, what type of governmental actions create physical, as

83. Michelman, *supra* note 52, at 1184.
84. Id.
85. 80 U.S. (13 Wall.) 166 (1872).
86. Id. at 179-80.
87. Id. at 167.
88. Id.
89. Id. at 179.
90. Id. at 181.
91. 99 U.S. 635 (1879).
92. Id.
93. Id. at 642.
94. Id.
95. See infra note 122 and accompanying text (discussing cases requiring "direct injury" in the strict sense of the phrase).
opposed to regulatory, takings. The Supreme Court decision in *Kaiser Aetna v. United States* explained which strands in an owner's bundle of property rights are potentially subject to physical invasion. The *Kaiser Aetna* Court declared that "the right to exclude" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." In *Kaiser Aetna*, the government imposed a navigational servitude which allowed public access to a landowner's pond. The Court held that the regulation resulted in an actual physical invasion, in the form of an easement, across a privately owned marina. The Supreme Court reasoned that, although the physical invasion created "only an easement in the property," the government was required to pay just compensation because the granting of the easement severely infringed upon the landowner's right to exclude others. The Court, therefore, declared the imposition to be unconstitutional.

Historically, courts have found a physical taking only when there was a relatively serious governmental intrusion on land. Therefore, until *Loretto v. Teleprompter Manhattan CATV Corp.*, it was unclear whether physical invasions, that could best be described as minor or trivial infringements on a landowner's property rights, were also compensable. The Supreme Court resolved this question in *Loretto* when it explicitly adopted a per se rule that physical takings were always compensable.

In *Loretto*, a New York statute required landlords to permit a cable television company, CATV Corporation ("CATV"), to install its cable facilities upon the landlord's property and accept payment of one dollar from the cable company, which was the amount deemed reasonable by the state commission. CATV proceeded to string television cable of less than one-half inch in diameter, and approximately 30 feet in length, along the length of the building about 18 inches above the rooftop. CATV also installed two large boxes along the roof cables.

The New York Court of Appeals upheld the statute as a legitimate police power regulation which served the purpose of eliminating landlord fees and conditions that inhibit the development of cable television. The New York
court expressly rejected the notion that a physical occupation authorized by the government was always a compensable taking.\(^{109}\) The court reasoned that the statute did not have any real economic impact on landlords and did not interfere with any reasonable investment-backed expectations.\(^{110}\) The Court of Appeals concluded that the substantial public interest outweighed the interests of the private landowner, and therefore, no compensable taking arose.\(^{111}\)

The Supreme Court of the United States reversed the New York court’s decision.\(^{112}\) Although the placement of cable facilities upon a landlord’s property was a minor occupation of an owner’s land,\(^{113}\) a majority of the Supreme Court adopted a per se rule to declare the statute a compensable taking.\(^ {114}\) Speaking for six Justices, Justice Marshall held that the takings clause compelled the conclusion that a permanent physical occupation authorized by the government is a taking regardless of the public interests that it may serve.\(^ {115}\)

The majority reasoned that “a physical intrusion by government [is] a property restriction of an unusually serious character for purposes of the Takings Clause.”\(^ {116}\) The majority further reasoned that the relevant case law had a common thread of refusing to deny compensation for a permanent physical occupation.\(^ {117}\) Therefore, the court declined the opportunity to allow for a de minimis exception.\(^ {118}\) The majority rejected the notion of a de minimis exception, at least in part, because it believed that a landowner suffered a special hardship when a stranger directly invaded and occupied the landowner’s property.\(^ {119}\) According to the Court, the uniqueness and severity of a permanent physical occupation warranted a per se rule.\(^ {120}\) Applying its per se rule, the Supreme Court declared that the installation of television cables constituted a taking, even if the wires occupied insubstantial amounts of space and did not seriously interfere with the owner’s use and enjoyment of the property.\(^ {121}\)

\(^{109}\) Id. at 146-48, 423 N.E.2d at 331-32, 440 N.Y.S.2d at 853-54.

\(^{110}\) Id. at 150-51, 423 N.E.2d at 333-34, 440 N.Y.S.2d at 856-57.

\(^{111}\) Id. at 144-46, 423 N.E.2d at 330, 440 N.Y.S.2d at 852-54.

\(^{112}\) Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

\(^{113}\) Id. at 443-45 (Blackmun, J., dissenting) (labeling the taking involved here as clearly de minimis).

\(^{114}\) Id. at 438-39.

\(^{115}\) Id. at 434-35.

\(^{116}\) Id. at 426.

\(^{117}\) Id. at 428; see, e.g., Sanguinetti v. United States, 264 U.S. 146, 149 (1924) (finding that to be considered a taking, flooding must “constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property”); cf. Michelman, supra note 52, at 1184 (noting that according to traditional takings law, “in the absence of explicit expropriation, a compensable taking could occur only through physical encroachment and occupation”) (emphasis in original).


\(^{119}\) Id. at 436. Historically, property law has protected an owner’s expectation of undisturbed possession of his property. Id. Requiring an owner to allow another to exercise complete dominion over the property is directly at odds with this protection. Id.

\(^{120}\) Id. at 432.

\(^{121}\) Id. at 434-35 (finding that a taking occurs when the government action is a “permanent
Realizing the potential ramifications of its holding, the Loretto Court distinguished permanent occupations from temporary occupations. A permanent physical occupation constitutes a compensable taking, whereas "a more temporary invasion, or government action outside the owner's property that causes consequential damages within" the property, does not necessarily constitute a taking.\(^{122}\) Further, the Loretto Court was quick to distinguish the statute at hand from rent control precedents.\(^{122}\) The Court explicitly stated that its articulated rule, that all permanent physical occupations are per se compensable, did not affect "the government's power to adjust landlord-tenant relationships.\(^{124}\)

The Loretto dissent, written by Justice Blackmun and joined by Justices White and Brennan, strongly objected to the destruction of the balancing test in favor of a per se rule.\(^{122}\) The dissenters also opposed the majority's purported talismanic distinction between physical intrusions and regulatory intrusions.\(^{126}\) Further, Justice Blackmun objected to an artificial distinction between permanent occupations and mere "temporary physical invasions."\(^{127}\) He asserted serious doubts as to whether such a distinction could be made, and if so, whether it should be made.\(^{128}\)

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122. Id. at 428; see also Sanguinetti v. United States, 264 U.S. 146, 149 (1924) (holding that flooding must "constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property" in order to rise to the level of a taking); Bedford v. United States, 192 U.S. 217, 225 (1904) (finding that damages that are incidentally consequential to a government act, as opposed to damages that are the direct consequences of a government act, are not compensable).


124. Id. (acknowledging that the Court has consistently sanctioned states' and municipalities' "broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails").

125. Id. at 446-47 (Blackmun, J., dissenting) (stating that because the extent to which "the government may injure private interests now depends so little on whether or not it has authorized a 'physical contact,' the Court has avoided per se takings rules resting on outmoded distinctions between physical and nonphysical intrusions.").

126. Id.; see also Michelman, supra note 52, at 1227 (stating that a takings rule based on a perceived distinction between physical and regulatory takings is inherently suspect because "its capacity to distinguish, even crudely, between significant and insignificant losses is too puny to be taken seriously").

127. Loretto, 458 U.S. at 442 (Blackmun, J., dissenting).

128. Id. (objecting to the majority's approach which "reduces the constitutional issue to a formalistic quibble" over whether property has been "permanently occupied" or "temporarily invaded"). Justice Blackmun began his criticism of the majority's temporal distinction by simply asking "what does the court mean by 'permanent'?" Id. at 448. According to Justice Blackmun, since all temporary limitations on the right to exclude are subject to the more complex balancing test to determine whether they are a taking, the majority presumably held that the governmental intrusion created by the statute in Loretto would last forever. Id. However, the majority conceded that the intrusion in Loretto did not require the landowner to permit cable installation forever but only so long as the property remained residential and a CATV company wished it to remain. Id. The intrusion in Loretto, therefore, was "far from permanent." Id.
2. Regulatory Takings

While permanent physical occupations have now been held to be per se compensable, regulatory intrusions on landowners' rights are still potentially constitutional. This is because regulatory intrusions are subject to a balancing test instead of the per se rule that *Loretto* adopted for physical takings. Justice Blackmun, in his *Loretto* dissent, explained that a paradox exists between physical and regulatory takings which has caused unfortunate inconsistencies in takings clause jurisprudence. Indeed, the dissent criticized the current state of the law for causing this paradox. Justice Blackmun noted that intrusive governmental regulations that greatly diminish the value of property are upheld; while, in contrast, de minimis physical occupations that cause minor financial damage are routinely struck down pursuant *Loretto*. This paradox can be seen more easily by looking at regulatory takings precedents.

In the landmark case of *Pennsylvania Coal Co. v. Mahon*, the Supreme Court established that a governmental regulation could constitute a compensable taking. In *Pennsylvania Coal*, the regulation at issue was the Kohler Act. This act prohibited coal mining “in such [a] way as to cause the subsidence of, among other things, any structure used as a human habitation . . . .” A coal company that had retained the right to mine coal underneath a landowner's house attacked the Kohler Act because it allegedly deprived the coal company of its property rights and interfered with its freedom to contract. Focusing primarily on the extensive loss in the value of the coal company's property rights, the Supreme Court applied a balancing test in striking down the Kohler Act.

The *Pennsylvania Coal* decision is known for the proposition that “the distinction between a regulation which constitutes an exercise of the police power and a regulation which constitutes a taking is one of degree.” Under *Pennsylvania Coal*, in order to determine whether a taking has occurred, the pri-

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129. See infra notes 152-55 and accompanying text (discussing balancing test for nonpermanent physical regulations).
131. *Id.*
132. *Id.* The dissent further argued that these regulatory intrusions often diminish the value of private property “far more than minor physical touchings.” *Id.* Justice Blackmun believed that the government's ability to injure private interests depends very little on whether it has authorized a "physical contact." *Id.; see also* Michelman, *supra* note 2, at 1226-29 (stating that a takings rule based on distinctions between physical and nonphysical intrusions is inherently suspect).
133. 260 U.S. 393 (1922).
134. *Id.* at 414-16. The early history of the takings clause indicated that only physical invasions could amount to a taking. Michelman, *supra* note 52, at 1184. The *Pennsylvania Coal* decision changed this established rule. *See Pennsylvania Coal*, 260 U.S. at 414-15.
136. *Id.* at 394-95.
137. *Id.* at 414.
mary focus is on the degree of interference with the property.\textsuperscript{139} This interference is typically measured by the property's diminution in value.\textsuperscript{140}

Since the \textit{Pennsylvania Coal} decision, however, courts have been reluctant to find a regulatory taking absent a highly intrusive regulation. Further, the Supreme Court has shown a continuing trend of upholding land use regulations that prohibit specific uses of land if they promote the health, safety, morals, or general welfare.\textsuperscript{141} In \textit{Euclid v. Ambler Realty Co.},\textsuperscript{142} the Court upheld a zoning scheme which prohibited individuals from putting their properties to industrial uses.\textsuperscript{143} This decision is significant because it illustrates that a landowner is not always entitled to the highest and best use of his property.\textsuperscript{144} Consistent with this proposition, courts have upheld a number of wide-ranging governmental actions, even though they may have prohibited normal and beneficial uses of property.\textsuperscript{145}

The Supreme Court's most recent interpretation of \textit{Pennsylvania Coal} is found in \textit{Penn Central Transportation Co. v. New York}.\textsuperscript{146} In \textit{Penn Central}, the Supreme Court ruled that the City of New York may place restrictions on the development of individual historic landmarks without creating a taking.\textsuperscript{147} The New York City law imposed a duty on the landowner to keep the landmark "in good repair."\textsuperscript{148} Further, any exterior alterations or improvements required approval from the Landmarks Preservation Commission.\textsuperscript{149} The Penn Central Corporation, owner of the Grand Central Train Terminal, applied for, but was denied, permission to construct an office building atop the landmark terminal.\textsuperscript{150}

The majority opinion, written by Justice Brennan, began by asserting "that the 'Fifth Amendment's guarantee . . . (is) designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and

\begin{enumerate}
\item[139.] \textit{Pennsylvania Coal Co. v. Mahon}, 260 U.S. 393, 414-16 (1922).
\item[140.] \textit{Id.}
\item[142.] 272 U.S. 365 (1926).
\item[143.] \textit{Id.} at 396-97.
\item[144.] \textit{See id.} at 389 (highest and best use does not focus on the property's present worth, but on its potential worth).
\item[145.] \textit{See cases cited supra} note 141.
\item[146.] 438 U.S. 104 (1978).
\item[147.] \textit{Id.} at 128-35.
\item[148.] \textit{Id.} at 111-12 (finding that the "good repair" requirement was designed to assure that the Landmark Law's objectives were not "defeated by the landmark's falling into a state of irreparable disrepair").
\item[149.] \textit{Id.} at 112.
\item[150.] \textit{Id.} at 116-17. The Commission's reasons for denying permission were summarized as follows: "To protect a landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off." \textit{Id.}
justice, should be borne by the public as a whole.' Justice Brennan then went on to outline the factors courts should consider when balancing the public's interest against the landowner's rights when analyzing a nonphysical governmental regulation. The following factors were deemed relevant for purposes of balancing: 1) the regulation's economic impact on the landowner; 2) the extent to which the regulation interferes with investment-backed expectations; and 3) the character of governmental regulation. The majority made it clear that all these factors were important in deciding whether a regulatory taking existed. However, the Court did not give any explicit weight to the various factors. Instead, the Court suggested that these various factors should be weighted on a case-by-case basis.

With respect to the first factor, the regulation's economic impact on the landowner, the owner must show that the regulation makes the property virtually worthless. If the landowner can still earn any type of reasonable return on his property, then the fact that he could earn substantially more money is irrelevant. Although the Penn Central Company attempted to show that the regulation resulted in a substantial diminution of millions of dollars in the value of the property, the Supreme Court rejected this argument, citing the Court's previous decisions that upheld regulations which resulted in diminutions of seventy-five percent and higher.

Furthermore, when determining the property's value, the property owner may not subdivide his property into "discrete segments" where rights may have been "entirely abrogated." Instead, courts have opted to look at inter-

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151. Id. at 123 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)). The Armstrong Court held that petitioners had a compensable property interest, within the meaning of the fifth amendment, in their liens on boats prior to another's transfer of title to the government. Armstrong, 364 U.S. at 46-49. Governmental action, which made it impossible for petitioners to enforce their liens, effectively destroyed the value of liens, and therefore, was a compensable taking. Id.

152. Prior to this articulation, much confusion and uncertainty existed as to what the relevant factors in the balancing test used for a regulatory taking were.


154. Id.

155. Id.

156. In Penn Central, the owner was still able to obtain a reasonable rate of return on his investment, and therefore, the Court held that no taking arose. Id. at 136. The Court's final footnote, however, suggests that the property must cease to be "economically viable" before the regulation reaches the level of a taking. Id. at 138 n.36. The clear implication is that the property owner must show a total loss of economic value to establish a taking. See also Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908) (if height restriction makes property "wholly useless, the rights of property . . . prevail over the public interest" and compensation is required) (emphasis added).


158. See Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (sustaining zoning law that caused 75% diminution in value); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (sustaining regulation that caused an 87 1/2% diminution in value).

159. Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 130 (1978). This subdivision of property into segments has been referred to as "conceptual severance." See Radin, supra note 2, at
ference with "rights of the parcel as a whole." In *Penn Central*, the majority expressly rejected Penn Central's argument that the restrictions on their air rights made those rights worthless, and therefore, the regulation was compensable. Because the Penn Central property, as a whole, could still earn a reasonable return, it was irrelevant that the air rights became virtually worthless.

The *Penn Central* Court also disputed the landmark owner's contention that a unique burden on a particular landowner was enough to constitute a taking. According to the majority, "[L]egislation designed to promote the general welfare commonly burdens some more than others." This "unique burden" test is only one aspect in the Court's balancing approach and a seemingly minor one at that. Nevertheless, the law's impact on Penn Central's property was closely analyzed. The majority noted that the New York City law did not interfere with the present use and "primary expectation concerning the use of the parcel," which was its continued use as a railroad terminal containing office space and concessions.

The dissent, written by Justice Rehnquist, disputed the majority's characterizations. According to the dissent, the regulation placed a unique burden on a small number of buildings that had the unfortunate luck of being considered landmarks. This landmark designation resulted in a loss of millions of dollars to Penn Central, with no corresponding benefits.

Justice Rehnquist also suggested that there is a significant constitutional distinction between regulations that prohibit harms and regulations that force a landowner to confer a benefit on society. "Harm prevention" is the term

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1676 (stating that conceptual severance consists of "delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken").

160. *Penn Central*, 438 U.S. at 130-31. In *Penn Central*, the Court stated:

Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this court focuses rather both on the character of the action and on the nature of the interference with rights in the parcel as a whole . . . .

Id.

161. Id. at 136-37.

162. Id.

163. Id. at 133.

164. Id.

165. Id. at 136.

166. Id. at 139 (Rehnquist, J., dissenting) (observing that the owner of a landmark discovers that a "landmark designation imposes upon him a substantial cost, with little or no offsetting benefit except for the honor of the designation").

167. Id. at 142-44 (Rehnquist, J., dissenting); see also Radin, supra note 2, at 1676 (noting that Justice Rehnquist forcefully argued for conceptual severance in *Penn Central* when he argued that the Landmark Law's resulting deprivation of Penn Central's right to develop an office building over the Grand Central Terminal was a complete taking of Penn Central's air rights in the property).

often given to the government’s undisputed ability to prevent a property owner from using his property to injure others without having to compensate the owner for the value of his forbidden use. This “harm prevention” rationale has traditionally been a major justification for upholding governmental regulations. Rehnquist distinguished these traditional harm prevention cases from Penn Central because the regulation in Penn Central did not prevent a nuisance. Instead, it forced the landowner to provide a benefit to the public, namely, that of maintaining a landmark. Rehnquist perceived the plaintiff corporation as being “prevented from further developing its property because it did too good a job in designing and building it.” According to Rehnquist, this affirmative duty on Penn Central to keep the landmark in “good repair” was the exact type of cost that Armstrong v. United States declared should be borne by the public as a whole “in all fairness and justice.”

II. THE SEAWALL CASE

Seawall Associates v. City of New York presented one of the first opportunities for a court to apply the Supreme Court’s recently adopted takings framework, as expressed in Loretto, Nollan, and Penn Central. In Seawall, the New York Court of Appeals considered whether a state land use regulation constituted a permanent physical occupation or a regulatory intrusion. If the New York court determined the law to be a permanent physical occupation, Loretto would control and thus would compel the City of New York (objecting to the Commission’s ability, through the Landmark Law, to exercise complete dominion over the landmark owner’s property).

169. See Finnell, Public Access to Coastal Public Property: Judicial Theories and the Taking Issue, 67 N.C.L. REV. 627, 678-79 (1989) (Public nuisance law prohibits certain harms to public interests, and “regulations that prevent harm that would otherwise constitute public nuisances . . . should not constitute takings because of the importance of the harm prevention in takings jurisprudence.”).

170. See, e.g., Goldblatt v. Hempstead, 369 U.S. 590 (1962) (upholding zoning ordinance where regulating body could identify a “harmful” use of land as being the object of the regulation and ordinance was neither unreasonable, excessive, nor unduly burdensome); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding zoning ordinance which put petitioner’s brickyard out of business, because the brickyard, although not a nuisance per se, was still found to be harmful to the public health); Mugler v. Kansas, 123 U.S. 623, 668-69 (1887) (holding that the regulation was justified by public purpose, such that no degree of interference with the land would create a taking).

172. Id. at 146 (Rehnquist, J., dissenting) (emphasis in original).
173. Id. at 140 (Rehnquist, J., dissenting) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).
York to compensate landowners. On the other hand, if the court found the law to be a regulatory intrusion, Nollan and Penn Central would control. Consequently, the city would be only potentially liable to compensate the landowners. The Seawall court, unfortunately, found it difficult to apply Supreme Court precedent on takings. The court first held that the New York land use regulation constituted a permanent physical occupation. Then the court proceeded to hold that, even if the regulation did not constitute a permanent physical occupation, the regulation nevertheless created an impermissible regulatory taking.

A. Facts and Procedure

After years of encouraging the demolition of single room occupancy properties ("SRO"), the City of New York abandoned this strategy and decided to protect SRO properties. This protection began when the City of New York discovered that the quantity of low-cost housing was shrinking dramatically. In an attempt to protect the poor and limit the number of homeless, the city enacted Local Law No. 9, which placed a five year moratorium on the conversion, alteration, and demolition of SRO multiple dwellings. Local Law No. 9 further required SRO property owners to rehabilitate and make habitable every SRO unit in their buildings and to lease out all units to "bona fide" tenants.

Local Law No. 9 included substantial penalties for noncompliance and allowed for the owner to purchase a "buy-out" exemption from the moratorium by payment of $45,000 per unit. There was also a hardship exemption for owners able to show that "there [was] no reasonable possibility that such owner [could] make a reasonable rate of return," defined for statutory purposes as a net annual rate of eight and one-half percent of the property's assessed value as an SRO multiple dwelling.

The plaintiffs in Seawall were owners of SRO housing. These owners challenged the constitutionality of Local Law No. 9, claiming that it constituted a compensable taking under the fifth amendment. The Supreme Court of New York, which is the state's intermediate appellate court, held that the so-

179. See supra notes 103-24 and accompanying text (discussing Loretto).
180. See supra notes 34-52 and accompanying text (discussing Nollan); supra notes 146-65 and accompanying text (discussing Penn Central).
182. Seawall, 74 N.Y.2d at 100-01, 542 N.E.2d at 1061, 544 N.Y.S.2d at 544-45.
183. Id.
184. Id. The moratorium was renewable for additional five-year periods as the city council deemed necessary. Id.
185. Id. at 100, 542 N.E.2d at 1061, 544 N.Y.S.2d at 544.
186. Id.
187. Id.
188. Id.
called "buy-out," "replacement," and "hardship" exemptions failed to save Local Law No. 9, and that the law constituted a taking of property. The Appellate Division of New York reversed the Supreme Court of New York, and declared the law constitutional as a valid exercise of the state's police power.

B. The Majority Opinion (Court of Appeals)

The highest court of New York, the Court of Appeals, reversed the Appellate Division and found Local Law No. 9 infirm under both the federal and state Constitutions. According to the court, the law constituted a compensable taking. The majority declared the city's law unconstitutional "on its face, finding it so repulsive to constitutional principles that it was unnecessary for the Court to use an "as applied" test, the almost universally preferred context within which a statute's constitutionality is adjudicated." Seemingly unsure of whether the law was physical or regulatory in nature, the court declared that Local Law No. 9 could not pass muster under either standard.

Justice Hancock's majority opinion distinguished the law in question from the more common rent control statutes. The court differentiated Local Law No. 9 from rent control statutes because the law in question imposed an affirmative duty on landowners to refurbish the structures and keep them fully rented. The court accepted plaintiff's argument that the regulation resulted in a physical occupation of their property, and therefore, was a per se compensable taking under Loretto. The court reasoned that the nature and extent of the interference determined whether a physical taking arose. In this instance, Local Law No. 9 constituted a serious infringement on the plaintiff's right to exclude others, one of the most important strands in the landowner's bundle of rights. Therefore, a physical taking arose. By accepting that Local Law No. 9 created a physical taking, the Seawall court necessarily rejected

191. Id.
194. Id; see also Sweeney, supra note 192, at 2, col. 3. (stating that the court distinguished Local Law No. 9 from legitimate rent control regulations by finding that rent control statutes were mere "adjustments" to the landlord-tenant relationship, unlike the New York Law, which deprived landowners of their primary rights of possession, and their corresponding rights to exclude others).
196. Id.
197. Id. at 106, 542 N.E.2d at 1065, 544 N.Y.S.2d at 548.
the City of New York's call for a narrower definition of a physical taking. This narrower definition would have required a fixed encroachment or an actual invasion of property, similar to that of the flooding created in Pumpelly. 199 Although the Supreme Court has not, as of yet, ruled on whether the loss of possessory interests, including the right to exclude, would constitute a per se physical taking, the majority held that it believed the Supreme Court would so hold. 199

Moreover, the Seawall court declared that even if a physical taking had not occurred, Local Law No. 9 still constituted a regulatory taking. 200 Using the standard balancing test traditionally applied to regulatory takings, the court declared that the regulation both: 1) denied the landowner an economically viable use of his property, and 2) did not substantially advance any legitimate state interests. 201 The court declared that such a serious intrusion on the right to possess and use property inevitably impaired the ability of the property owner to sell the property at any sum approaching his investment. 202 Therefore, by prohibiting commercial development, Local Law No. 9 seriously damaged the economic viability of the property. 203

The law in question also did not pass muster under the "rational nexus" test as set forth in Nollan. The goal of Local Law No. 9 was to alleviate the growing homeless problem. Although this goal was undeniably a permissible government end, the state failed to show that the law substantially advanced that end. 204 Using heightened scrutiny, the Seawall court looked at empirical evidence disputing the conclusion that more low-cost housing would substantially

198. Id. at 103-07, 542 N.E.2d at 1063-64, 544 N.Y.S.2d at 546-48. See Sweeney, supra note 192, at 2, col. 3 (The majority rejected the city's argument that the SRO owner still retained the right to accept or reject individual tenants and to set rental terms other than the amount of controlled rents. The majority "brushed this aside saying that it is the 'forced occupation' by strangers under the rent up provisions, not the identity of the new tenants or the terms of the lease which deprives the SRO owners of their possessory interest and results in the physical taking.").

199. Seawall Assocs. v. City of New York, 74 N.Y.2d 92, 99, 542 N.E.2d 1059, 1061, 544 N.Y.S.2d 542, 544 (en banc), cert. denied, 110 S. Ct. 500 (1989); see also Hall v. Santa Barbara, 833 F.2d 1270 (9th Cir. 1986) (finding that an ordinance imposing mandatory rental obligations on mobile home operators could constitute a per se physical taking under Loretto), cert. denied, 485 U.S. 940 (1988).


201. Id. at 107, 542 N.E.2d at 1065-66, 544 N.Y.S.2d at 549.

202. Id. at 108, 542 N.E.2d at 1066, 544 N.Y.S.2d at 549.

203. Id. at 108-10, 542 N.E.2d at 1066-67, 544 N.Y.S.2d at 549-50. The majority explicitly rejected the city's contention that the owners' very real ability to earn some type of profit on the land should work heavily against the landowner's challenge. Id. Although there is little doubt that under Local Law No. 9, landowners retained numerous property rights and could make a profit, the Seawall court rejected the contention that Local Law No. 9 was constitutional merely because the landowners retained many preexisting rights. Id. According to Justice Hancock, "the permanent abrogation of one of those rights, without regard to its comparative value in relation to the whole, may well be sufficient to constitute a taking." Id. at 110, 542 N.E.2d at 1067, 544 N.Y.S.2d at 550.

204. Id. at 111-13, 542 N.E.2d at 1068-69, 544 N.Y.S.2d at 551-52.
alleviate the homeless problem.\textsuperscript{206} The court described the nexus between the ends and means as "indirect at best and conjectural."\textsuperscript{206} The majority rejected the contention that the exemptions mitigated the invidious effects of Local Law No. 9, ruling that they were as much "out-and-out . . . extortion" as the situation in \textit{Nollan}.\textsuperscript{207} Finally, the majority reasserted Justice Rehnquist's view that there is a constitutional difference between regulations that prevent harms and regulations that force a private landowner to confer a benefit on society.\textsuperscript{208} The majority described Local Law No. 9 as imposing an affirmative requirement on landowners to dedicate their properties to a public purpose. Thus, \textit{Seawall} was distinguishable from other Supreme Court cases that upheld laws under a harm prevention rationale.\textsuperscript{209}

\textbf{C. The Dissent}

The dissent in \textit{Seawall}, which was written by Justice Bellacosa and joined by Chief Justice Wachtler, accused the majority of engaging in substantive due process, or "Lochnerizing," because it exalted property rights over the legislature's attempt to implement social policy.\textsuperscript{210} Justice Bellacosa then attacked the majority's heightened scrutiny standard,\textsuperscript{211} preferring a more deferential standard and a presumptive threshold of constitutionality that often attaches to legislative acts.\textsuperscript{212} The dissent was particularly critical of the majority's decision to accept a "facial" challenge to the law in question: that is, that the law in question was a taking in all of its applications, and a taking as to all properties.\textsuperscript{213} According to the dissent, such a facial challenge was seen as a disproportionate remedy and over-inclusive.\textsuperscript{214} Accepting such a fa-
cial challenge effectively "demolishes[d] a legislative structure designed to protect those in dire need."\(^{216}\). This demolition of the legislative structure had the effect of "authoriz[ing] the expulsion of fifty-two thousand people."\(^{216}\)

Additionally, Justice Bellacosa believed that Local Law No. 9 was sustainable under existing precedent. According to the dissent, cases such as Penn Central "approved significant encroachments on the libertarian ideal of property rights against the 'takings' claims,"\(^{217}\) and Local Law No. 9 was merely another example of the principle that a landowner is not entitled to the highest and best use of her property.\(^{218}\)

Justice Bellacosa further reasoned that a per se physical taking approach was inapplicable because Local Law No. 9 involved a temporary five-year intrusion.\(^{219}\) This temporary intrusion, therefore, did not constitute a permanent physical occupation, which was the required standard.\(^{220}\) The dissent also disputed that the law constituted a regulatory taking. Instead, the dissent described the law as a "tourniquet" to stop the loss of low-cost housing.\(^{221}\)

While the majority seemed to emphasize the regulation's intrusive nature on the landowner, the dissent preferred to focus on the substantial government interest in protecting the homeless.\(^{222}\) The dissent had no difficulty finding that the law substantially advanced a legitimate governmental interest of the "greatest societal purpose."\(^{223}\) The dissent also was unwilling to allow for a broad definition of "economically viable use" of the property. Justice Bellacosa cited case law that required "the economic value, or all but a bare residue of the economic value," be destroyed before a law would constitute a regulatory taking.\(^{224}\)

III. ANALYSIS

Although the Seawall holding can be applauded for its end result, which protects substantive property rights from an extremely intrusive regulation, the majority opinion can, nevertheless, be criticized for being somewhat confused

\(^{215}\) Id. at 122, 542 N.E.2d at 1075, 544 N.Y.S.2d at 558 (Bellacosa, J., dissenting).

\(^{216}\) Id. at 126, 542 N.E.2d at 1078, 544 N.Y.S.2d at 561 (Bellacosa, J., dissenting).

\(^{217}\) Id. at 119, 542 N.E.2d at 1073, 544 N.Y.S.2d at 556 (Bellacosa, J., dissenting).

\(^{218}\) See Andrus v. Allard, 444 U.S. 51, 65-66 (1979); see also de St. Aubin v. Flacke, 68 N.Y.2d 66, 77, 496 N.E.2d 879, 885, 505 N.Y.S.2d 859, 865 (1986) (requiring the property owner to prove "by 'dollars and cents' evidence that under no use permitted by the regulation under attack would the properties be capable of producing a reasonable return; the economic value, or all but a bare residue of the economic value, of the parcels must have been destroyed").


\(^{220}\) Id.

\(^{221}\) Id. at 125, 542 N.E.2d at 1077, 544 N.Y.S.2d at 560 (Bellacosa, J., dissenting) (believing Local Law No. 9 to substantially advance the city counsel's interest in preserving SROs and preventing the increasing flow of homeless into the streets of New York).

\(^{222}\) Id.

\(^{223}\) Id.

\(^{224}\) Id. at 126, 542 N.E.2d at 1077, 544 N.Y.S.2d at 560 (Bellacosa, J., dissenting) (citations omitted).
and indecisive. The majority’s holding, seemingly unsure of whether Local Law No. 9 was physical or regulatory in nature, struck down the law as a taking under both approaches.\(^{225}\) This sweeping style of judicial analysis ensures protection for property rights but is likely to create confusion for landowners, judges, and the legal community in general. These individuals are still left in the dark as to when a regulation should be characterized as physical, and therefore, compensable per se under *Loretto*.

### A. Why all the Confusion?

In defense of the New York Court of Appeals, the justices deciding *Seawall* were saddled with a confusing background of case law. The primary confusion that resulted in *Seawall* is directly attributable to an artificial and unnecessary distinction in the treatment between physical and regulatory takings created in *Loretto*.\(^{226}\) As commentators such as Michelman have indicated, a system based on distinctions between physical and regulatory invasions is inherently unworkable.\(^{227}\) Not only is it difficult to know where to draw the line between laws that are physical and laws that are regulatory in nature,\(^{228}\) but it is also clear that laws deemed regulatory can be just as intrusive, and often more intrusive, than regulations that are deemed “physical occupations.”\(^{229}\) Unfortunately, the Supreme Court has, in effect, held exactly the opposite. Through its explicit per se rule toward physical takings, the Supreme Court has held that all physical occupations, even seemingly minor intrusions, are more worthy of compensation than occupations deemed regulatory.\(^{230}\)

The Supreme Court’s takings structure falters because it ignores the fact that governmental regulations typically affect different property interests. Also ignored is the fact that regulations seem to vary widely in terms of how intru-

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225. *Id.* at 106, 542 N.E.2d at 1065, 544 N.Y.S.2d at 548.

226. 458 U.S. 419, 426 (1982) (distinguishing regulations which cause permanent physical occupations and those which do not rise to the level of a permanent physical occupation).

227. Michelman, *supra* note 52, at 1227-28 (stating that a justification for a physical invasion test is extremely weak, and the test’s inability to distinguish between significant and insignificant intrusions is the fatal flaw of the test).

228. Although takings that are “physical” may seem to be easily distinguishable from takings that are “regulatory,” in actuality, the wide spectrum of governmental regulations makes categorization quite difficult. *See* Michelman, *supra* note 52, at 1188 (stating that there are some kinds of governmental restrictions which are hard to analyze as acquisitions of conventionally recognized property interests). Unfortunately, the Supreme Court and lower courts have glossed over this problem, which may be one reason why the *Seawall* majority was so uncertain about the best way to declare Local Law No. 9 unconstitutional.

229. Michelman, *supra* note 2, at 1609 n.46 (stating that by any common-sense appraisal, “the easement conditionally imposed on the Nollans by the Commission was, in content if not in form, more invasive and offensive than the easement imposed on Loretto by New York”).

230. The result in *Loretto* probably arose from the concept behind a physical occupation, which seems to connote a high level of intrusiveness. *See* Michelman, *supra* note 52, at 1185 (“[W]e are accustomed to thinking of compensation as being a requirement coupled with ‘ takings’ of ‘ property.’ ‘Property’ suggests a thing owned, and ‘ taking’ suggests physical appropriation.”).
sive the regulation is on property rights. There would seem to be a continuum in terms of the intrusiveness of a regulation, rather than the dichotomy between physical and regulatory that the Supreme Court has created. Typical regulatory takings interfere with a landowner's economic enjoyment of the property, or a landowner's distinct investment-backed expectations. Although infringement on such economic rights is qualitatively different from intrusions on the right to use and possess property, such economic infringement is not necessarily less intrusive than regulations that physically intrude on a landowner. A bright line rule, such as the *Loretto* holding, does not attempt to measure the intrusiveness to the landowner. Instead, this type of rule holds that any permanent physical occupation is irrebuttably too intrusive, and therefore, compensable. In this manner, the per se rule fails to take into account the fact that laws seen as regulatory may involve a level of intrusion at least as great as a physical invasion.

The requirement in *Loretto* that a physical occupation must be "permanent" to fall under the per se rule was another source of confusion for the *Seawall* court. Although the word "permanent" may appear self-explanatory, the Supreme Court has failed, as of yet, to give any clear indication of what constitutes "permanent." Consequently, lower courts will continue to

231. *Cf.* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 450 (1982) (Blackmun, J., dissenting) (criticizing the current state of the law which often upholds intrusive governmental regulations that diminish the value of private property "far more than minor physical touchings," while striking down *de minimis* physical occupations which do not significantly infringe on property rights).


233. *See* Radin, supra note 2, at 1672-73. Radin explains: *Loretto* exacerbates the well-known paradox of takings jurisprudence: owners may suffer large pecuniary losses—as in *Penn Central*, or for that matter the classic *Euclid* loss—without a court's finding a taking requiring compensation, whereas if the court decides to characterize the government action as a physical occupation, a taking will be found even if the loss or inconvenience to the owner is minuscule. *Id.*

234. *See* Michelman, supra note 2, at 1609 n.46 (stating that distinctions between permanent and temporary are formalistic since "the legally determinative fact is the state of permanent exposure imposed by [the] regulation") (emphasis added).

235. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982). To underscore the importance or the "constitutional distinction between a permanent occupation and a temporary physical invasion," the *Loretto* Court cited *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). *Loretto*, 458 U.S. at 434. In *PruneYard*, the Supreme Court upheld a state constitutional requirement that owners of public shopping centers permit individuals to exercise free speech rights on their property. *PruneYard*, 447 U.S. at 88. The Court emphasized that the state constitution did not prevent owners from restricting expression through reasonable time, place, and manner restrictions on solicitors. *Id.* at 83-84. Since the invasion on shopping center owners, therefore, was temporary and limited, the fact that solicitors did in fact physically invade the property did not dictate a finding of a compensable taking. *Id.*

Even if one accepts the constitutional distinction between temporary and permanent, the Su-
struggle, as the Seawall court did, with the issue of what constitutes a permanent regulation. In cases such as Seawall, defining “permanent” becomes even more important because the regulation in question involved a five-year moratorium, renewable as the City of New York saw fit. The regulation’s duration in Seawall was unknowable and dependent on many factors, particularly the future plight of the poor and homeless in New York.

After Loretto, landowners will try to describe regulations imposed upon them as physical in order to take advantage of the per se rule of physical takings. The end result is that landowners will broadly define “permanent” and “physical” in an attempt to encourage courts to apply Loretto’s per se rule.

B. Applying Two Bodies of Law

After spending the bulk of its opinion describing why Local Law No. 9 created a physical taking, the Seawall court then went on to hold that the same law also could constitute a regulatory taking. This continuation was unfortunate and unnecessary because it did not help explain when a regulation is physical, as opposed to regulatory, and also did not explain how a regulation could constitute both a physical and a regulatory taking.

Local Law No. 9 would seem to be close to the mental dividing line between intrusions that are physical and intrusions that are regulatory in nature; consequently, Local Law No. 9 was an excellent example of how difficult it can be to label or characterize a regulation. Although the regulation clearly infringed on a landowner’s right to exclude others by limiting the use of her property to single room occupancy housing, it seems different from the historical context in which the concept of physical takings arose. Here, the infringement was more subtle; the government took the property for a public use but not through any type of direct invasion. The government neither palpably invaded the property nor attempted to take the property’s title. With such a subtle regulation, it is apparent that Local Law No. 9 did not clearly fit into either a physical or regulatory framework. The Seawall court may have recognized this problem. Nevertheless, the court tried to analyze the regulation as both a physical and a regulatory taking.

Local Law No. 9, in effect, forced landowners to be landlords; the law in question drove the landowner off his own property by forcing him to rent his

premum Court has avoided, or assumed as self-evident, the different question of how long an infringement must last to constitute a permanent occupation. As Seawall demonstrates, the distinction between permanent and temporary may not be as clear as the Supreme Court would like the legal community to believe.


237. Id. at 106, 542 N.E.2d at 1065, 544 N.Y.S.2d at 548.

238. Traditional takings law was that “in the absence of explicit expropriation, a compensable taking could occur only through physical encroachment and occupation.” Michelman, supra note 52, at 1184 (emphasis in original).
property to others. The *Seawall* court recognized that the resulting forced tenancy denied the owner his right of possession to the property along with the corresponding right to exclude others. Further, the *Seawall* court recognized that these rights were viewed as basic strands in the bundle of rights known as property. Unfortunately, the *Seawall* court's ability to correctly identify the rights that were being infringed did not help the court answer the far different question of whether such an infringement was physical or regulatory in nature.

The *Seawall* majority appeared to be operating under one of two assumptions: either 1) the court believed that characterizing the regulation was irrelevant because Local Law No. 9 failed under both a physical and regulatory analysis; or 2) the court believed that there were certain regulations, such as Local Law No. 9, that were impossible to categorize, and therefore, could be analyzed under either a physical or regulatory approach. The result of these assumptions is an overly broad opinion and continuing confusion as to where the line is between physical and regulatory takings.

**C. Intrusiveness and Social Policy**

In determining the correct approach to the takings clause, two questions should always be asked: first, how intrusive is the regulation in question; and second, to what degree should the government be allowed to intrude on property rights to further a substantial government interest. The first question requires a factual determination as to how the regulation is actually affecting the landowner, while the second question is a policy-oriented inquiry that...
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focuses on how far the government should be allowed to go in terms of implementing public policy.

With respect to the intrusiveness of the regulation, it is erroneous to make a constitutional distinction between intrusions that are permanent and intrusions that can be described as temporary. To begin with, the Supreme Court has failed to adequately define "temporary" or "permanent." Further, creating a dichotomy between temporary and permanent focuses the analysis on the type of the intrusion, rather than on the extent of the intrusion. For instance, depending on the particular regulation, a temporary invasion can be highly intrusive on property rights, whereas a permanent intrusion may be relatively tolerable to the landowner. In Loretto, for example, the "permanent" intrusion was the wiring of cable lines along a roof, an intrusion that many individuals would find relatively innocuous.

With respect to the amount government should be allowed to intrude on property rights to further a substantial government interest, courts should employ the traditional distinction between regulations that prohibit harms and regulations that force the landowner to confer benefits on society. Although it is undisputed that the state has the right to prohibit the landowner from injuring others, the government should not be able to impose affirmative duties on landowners. Although implementing such a suggestion would materially limit government's ability to enact certain zoning and land use ordinances, substantial regulations would still be allowed whenever the landowner's use of the property infringes or harms others. In effect, this proposal merely breathes life into the Supreme Court's declaration that the fifth amendment's purpose is to bar government from forcing some people alone to bear burdens which should be borne by the public as a whole. Although it is often difficult to draw a line between "preventing harms" and forcing the landowner to provide a benefit, it is this inquiry with which future courts should be concerned,

244. See supra notes 130-32 and accompanying text (commentary criticizing the current test which makes a distinction between permanent and temporary takings).

245. See supra note 235 and accompanying text.

246. See supra note 132 and accompanying text (Justice Blackmun's comments regarding this subject). Although distinctions between temporary and permanent do not provide a suitable framework for determining whether a taking has actually occurred, such a distinction would seem to become highly relevant in determining the amount of just compensation. A permanent taking should trigger considerably more compensation than a temporary taking because the permanent intrusion necessarily occurs over a longer period of time.

247. See Kmiec, supra note 2, at 1635.


250. One example of the difficulty in drawing such distinctions is where a company wants to place a billboard along a highway. See D. MANDLER, LAND USE LAW 418-19 (1988) (discussing how courts have inconsistently applied the takings clause with respect to billboard regulations). If the state tried to prevent the company from placing the billboard along the road, by citing aesthetic concerns, it would be an open question if such a regulation would be allowed under the classic harms/benefits dichotomy. Is this billboard regulation merely prohibiting a nu-
while hopefully, disregarding the artificial distinctions created in *Loretto*.

### D. Protecting Property Rights

Despite difficulties in clearly articulating a takings standard, the *Seawall* opinion can be applauded for protecting property rights from a highly intrusive regulation that forced landowners to solve issues which should be thought of as societal problems. By forcing owners of single room occupancy housing to remain as such, Local Law No. 9 took a discrete minority of landowners and forced them, alone, to help the homeless. In that regard, Local Law No. 9 is analogous to a regulation that would require fast food outlets to remain restaurants, if it could be shown that such outlets were an inexpensive source of nutrition for poor and indigent people. Although such an effort to help the poor would be applauded by some, *Seawall* stands for the proposition that such affirmative obligations are overly intrusive on property rights and deserve just compensation.\(^251\)

By noting the duties that the ordinance placed on landlords, the *Seawall* court recognized the constitutional difference between regulations that prevent landowners from harming others and regulations that require landowners to confer a benefit on others.\(^252\) The majority correctly noted that it is the nature of the intrusion, rather than the regulation's purpose, that is determinative.\(^253\) Further, the majority recognized that if a regulation requires a landowner to provide a service to the public at large, the regulation is more in the nature of a taking.\(^254\) If it merely prohibits the landowner from creating a nuisance, it is less of a government invasion. The dichotomy between regulations that prevent harms and regulations that force a landowner to confer benefits is often present in landlord-tenant laws, which typically only regulate the manner in

\(^{251}\) *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 117, 542 N.E.2d 1059, 1071, 544 N.Y.S.2d 542, 555 (en banc) (finding that the city of New York, "by affirmatively requiring the owners to put their properties to a public use [was] acting in its enterprise capacity, where it [took] unto itself private resources in use for the common good") (quoting Lutheran Church v. City of New York, 35 N.Y.2d 121, 128-29 (1974)), cert. denied, 110 S. Ct. 500 (1989); *see also* Sax, *Taking and the Police Power*, 74 YALE L.J. 36, 62-63 (1964) (distinguishing between the government's above-mentioned enterprise capacity, and the government's arbitral capacity, which is used when the government intervenes "to straighten out situations in which the citizenry is in conflict over land use or where one person's use of his land is injurious to others..." and concluding that the dividing line for takings should be the distinction between the government's enterprise capacity, or compensable taking, and arbitral capacity, or noncompensable regulations).

\(^{252}\) *See* Kmiec, *supra* note 2, at 1651 (recognizing a clear need to "draw a distinction between the use of the police power to prevent harms as opposed to its use to extract benefits, a distinction central to the nuisance exception to the just compensation requirement acknowledged by all members of the Court").

\(^{253}\) *Seawall*, 74 N.Y.2d at 105, 542 N.E.2d at 1064, 544 N.Y.S.2d at 547.

\(^{254}\) *Id.* at 105-06, 542 N.E.2d at 1064-65, 544 N.Y.S.2d at 547-48.
which an owner oversees his property. Unlike other landlord-tenant laws, however, Local Law No. 9 compelled landowners to be residential landlords by “placing petitioners in a business, forcing them to remain in the business and refusing to allow them to ever cease doing that business.” By striking down Local Law No. 9, the majority recognized that such an affirmative duty of dedicating the property to a public purpose is offensive to the fifth amendment.

The majority opinion also wisely avoided creating a constitutional distinction between permanent and temporary occupations. The majority ignored the fact that the law was not permanent, but instead, was a five-year renewable moratorium. This was appropriate because there is no sound rationale for making a distinction between temporary and permanent occupations for purposes of determining whether a taking has occurred. The Seawall court seemingly recognized that drawing a distinction between temporary and permanent occupations is not only difficult, but nonsensical; a renewable five-year moratorium may very well last for the effective life of the property since it can be renewed indefinitely. On the other hand, New York may choose to forsake renewal of the moratorium after five years, thus leaving only a temporary intrusion. Therefore, it was impossible to determine whether the law was a taking by looking at the regulation’s duration.

Finally, the Seawall court seemed to implicitly adopt the notion of “conceptual severance.” A conceptual severance occurs when a property owner mentally divides a single property into discrete segments of property, and then asserts that a particular segment or interest in the property has been completely taken away. The Seawall majority arguably accepted such an argument when it held that to permit abrogation of a particular property right, here, the right to exclude, “without regard to its comparative value in relation to the whole, may well be sufficient to constitute a taking.” According to the majority,

if the theory of “conceptual severance” were applied to the effect of Local Law No. 9 on the rights of SRO property owners, a taking would necessarily be found. The rights to use and to possess have been abolished and, without regard to the value of the owners’ remaining interests in their buildings, that would be sufficient.

255. See, e.g., Bowles v. Willingham, 321 U.S. 503 (1944) (federal rent control statute which did not require any owner to offer any accommodations for rent); Loab Estates, Inc. v. Druhe, 300 N.Y. 176, 90 N.E.2d 25 (1949) (landlord-tenant regulation, which applied only to existing tenancies, barred the eviction of residential tenants unless provisions existed for relocation).


257. The fact that the city council could renew the moratorium whenever it deemed necessary, however, seems to undermine the temporary nature of Local Law No. 9. Id. at 100-01, 542 N.E.2d at 1061, 544 N.Y.S.2d at 544-45.

258. See supra note 159 and accompanying text (discussing conceptual severance).

259. Seawall, 74 N.Y.2d at 110, 542 N.E.2d at 1062, 544 N.Y.S.2d. at 542.

260. Id. at 110, 542 N.E.2d at 1067-68, 544 N.Y.S.2d. at 550.
This apparent embracing of conceptual severance is significant, as it may prove hard to reconcile with the Penn Central Court's holding that taking jurisprudence "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[266]

IV. IMPACT

The Seawall holding[267] has important ramifications as both a physical and a regulatory takings precedent. By disregarding the requirement in Loretto that the law be a "permanent" occupation,[268] Seawall may have expanded the number of regulations that are subject to Loretto's per se rule that all physical occupations are compensable.[269] As a regulatory takings precedent, Seawall may confirm the suspicions of some that Nollan[270] can be utilized in the future as a powerful tool by courts seeking to apply more stringent scrutiny on regulatory takings.

A. Expanding Loretto

By disregarding the requirement that a physical occupation must also be permanent to be per se compensable, Seawall seems to both modify and also expand Loretto's scope and potential applicability. Previously, the Supreme Court specified that a permanent physical occupation was required to trigger the per se rule elaborated in Loretto.[268] Seawall, however, involved a limited five-year moratorium, which presumably would make the intrusion temporary and take Local Law No. 9 out of Loretto's scope.[267] However, the Seawall court disregarded the temporary nature of Local Law No. 9 and found the regulation to be a per se taking under Loretto.[268] By sidestepping the "permanent" requirement in Loretto, Seawall may make it easier for landowners to prove a taking; arguably, even temporary physical occupations are now per se compensable.

264. See Sweeney, supra note 192, at 2, col. 5 (suggesting that "the majority in [Seawall] may be forging a new and more stringent regulatory taking jurisprudence for municipalities and giving greater latitude to the development community to challenge local land use enactments as regulatory takings").
267. But see supra note 257 (acknowledging the fact that the five-year moratorium was potentially indefinitely renewable at the legislature's discretion).
B. Applying Nollan

Seawall is also important as one of the first cases to apply Nollan. As mentioned earlier, Nollan held that a governmental regulation which infringes on a property owner’s rights must “substantially advance” a legitimate government interest. Nollan’s substantial nexus test, which requires a close relationship between the regulation’s means and the end result to be served, seems to necessitate heightened scrutiny. Such intermediate scrutiny is important because it may require an actual statistical relationship between means and ends, not just a logical or plausible relationship.

There has, however, been much dispute recently among commentators over how expansively Nollan would be applied. Nollan could be applied to exactions only, to all land use regulations, or most broadly, to all police power regulations. Seawall seems to take a fairly expansive reading of Nollan by extending it outside of its original context of exactions and applying it to a landlord-tenant statute. This is significant because it allows for the “substantial nexus” test created in Nollan to be used in a landlord-tenant case for the first time.

Although maintaining the stock of low-cost housing would seem, at first glance, to further the goal of helping the homeless, the majority in Seawall looked at the actual, statistical relationship between SRO housing and the homeless crisis. This heightened scrutiny is significant because it indicates a potentially drastic change from the traditionally deferential rational basis test that has often been applied in all types of economic regulations. The Seawall court’s broad reading of Nollan could seriously undermine a line of pre-

269. Nollan, 483 U.S. at 825.
270. See supra note 45-47 and accompanying text (discussing heightened scrutiny holding of Nollan).
271. See supra notes 45-54 and accompanying text (discussing Nollan’s substantial nexus test).
272. See infra note 277 and accompanying text (Seawall court requiring statistical relationship).
273. See Michelman, supra note 2, at 1608-09 (stating that if all future regulatory claims are to be subjected to Nollan’s heightened scrutiny standard, the decision’s “import is both clear and startling: Who knows how many land-use regulations, hitherto thought virtually immune from federal judicial censorship, might be destined for doom at the hands of lower federal courts now supremely licensed to apply to them an intensified means-ends scrutiny?”).
274. See supra note 40 and accompanying text (discussing “exactions”).
276. See Sweeney, supra note 192, at 2, col. 5 (suggesting that “the majority in [Seawall] may be forging a new and more stringent regulatory taking jurisprudence for municipalities and giving greater latitude to the development community to challenge local land use enactments as regulatory takings”).
278. This lack of deference was one of the dissent’s primary objections to the Seawall majority. Id. at 121, 542 N.E.2d at 1074, 544 N.Y.S.2d at 557 (Bellacosa, J., dissenting) (stating that, when challenging economic legislation, “modern substantive due process principles require that the judiciary give great deference to the [legislative body]”).
cedent which has exhibited an extremely deferential attitude toward land use regulations. 279

The Seawall decision, arguably, takes the lead from Nollan by protecting substantive property rights. 280 Moreover, this potential trend may well continue into the future if Chief Justice Rehnquist's views on property rights spread. 281 The "substantial nexus" test created in Nollan was written by the then recently appointed Justice Scalia, who has been joined by other conservative Court members in recent land use cases. 282 Because the Supreme Court decides relatively few land use cases, projecting future decisions is at best speculative. It would seem, however, that the Supreme Court now has a clear majority for providing substantive property rights, as evidenced in Nollan.

C. Protecting the Homeless

The Seawall decision is important because, although Local Law No. 9 seemed to be a serious intrusion on a landowner's right of possession and the related right to exclude others, it was also a regulation that attempted to attack a compelling social problem. 283 In that sense, Seawall presented two countervailing policies: 1) a strong public interest in subsiding the homeless problem, and 2) an equally strong interest of private landowners in their property. By siding with the private landowners, Seawall may be a significant setback for special interest and minority groups, such as the homeless, who may have been the beneficiary of previous land use regulations. 284 After Seawall,

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280. Michelman, supra note 2, at 1612-13 (acknowledging that the protection of substantive property rights through the use of heightened scrutiny was defended by Justice Scalia in Nollan when he suggested that takings claims, as opposed to typical due process and equal protection claims that arise in economic or commercial settings, fall into a specially sensitive constitutional category, much like free speech claims).

281. See Radin, supra note 2, at 1674 (stating that although not explicitly adopting the teachings of neoconservatives like Richard Epstein, Rehnquist leans heavily in that direction and has implied that market alienability is of constitutional stature).

282. Pennell v. San Jose, 485 U.S. 1 (1988) (Scalia, J., dissenting in part and concurring in part) (objecting to rent control ordinance that allegedly would result in the extraction of a public benefit from landlords).

283. See, e.g., Filer, What We Really Know About the Homeless, Wall St. J., Apr. 10, 1990, at 22, 30 (stating that the Department of Housing and Urban Development has estimated the homeless population at about 350,000, although this is only a ballpark estimate. This estimate, however, is in direct conflict with the numbers of certain advocacy groups that have made claims that the true homeless population is much closer to three to four million. Id.).

284. This point, however, is disputed. According to the Wall Street Journal, the correlation between landlord-tenant statutes and the homeless is murky at best. Filer, What We Really Know About the Homeless, Wall St. J., Apr. 10, 1990, at 22, col. 4. The article states:

[W]e know almost nothing about the connection between homelessness and housing markets. There is no reliable evidence that homelessness is more extensive in cities with tight housing markets. The assertions that homelessness is linked to rent control
states that want to protect the homeless may have to raise taxes or find more creative ways to impose on landowners.

This increase in the protection of property rights is warranted, however, because the entire public, and not just individual landowners, should bear the burdens involved with these regulations. As one commentator noted:

the Seawall court is telling us that under the system of laws and justice we have chosen to ensconce ourselves in, particularly with regard to our core notions of equality and fairness, that in our legitimate quest to meet and assist those of us having significantly less fortune and advantage, that we, as a society, cannot decree a redistribution of property and assets in aid of those less advantaged by selecting one group of us who is more advantaged to bare a disproportionate amount of the burden of giving assistance. Perhaps properly so, the Court has said that the justice of assistance spreads across our bounty equally not selectively. The burden is all of ours together. It does not come to settle solely upon the more bountiful.

Landowners are not typically the creators of such societal problems, and it seems intuitively unfair to impose the costs solely on those landowners. Imposing affirmative duties on particular minorities of landowners to provide housing to poor and homeless goes far beyond harm prevention; in effect, such duties force landowners to be charitable. Although the idea of helping the unfortunate is noble, such charitable decisions should remain voluntary in a free society. If government determines that this volunteerism is insufficient to combat the homeless problem, then society should bear the costs of remedying this crisis, not just the owners of SRO properties.

V. Conclusion

The Seawall decision can actually be seen as two distinct decisions because it proclaims that the creation of forced tenancies, resulting from Local Law No. 9, constituted a taking whether analyzed under a physical or regulatory analysis. Seawall is significant as a physical takings case for declaring that tenancies coerced by the government constitute a per se physical taking of property based on the resulting infringement of the right to possess property, along with the corresponding infringement on the right to exclude others from the property. Although there is no actual displacement of the owner's possession, as in Loretto, the forced intrusion of a stranger creates an ouster of the owner's possessory interest which necessarily amounts to a physical taking. Seawall is significant as a regulatory takings case for being one of the first

or low vacancy rates are intuitions with little empirical support. We do not know the role that changes in housing markets, including the replacement of public housing programs with housing vouchers, stricter building and zoning codes, and the explicit policies designed to reduce the number of single room occupancy hotels, have played in creating homelessness.

Id. (emphasis added).

cases to apply the *Nollan* "substantial nexus" test outside of its original context. The result is that the *Seawall* case used heightened scrutiny for the first time in looking at the relationship between the quantity of single room occupancy housing and the number of homeless in New York City. By scrutinizing the statistical relationship between single room occupancy housing and the homeless, the court may have signified a crumbling of the rational basis test in the area of land use regulations.

While *Seawall* applied both physical and regulatory takings precedents, the result under both approaches is that substantive private property rights are given increased protection from intrusive land use regulations. Although *Seawall* unfortunately shows that the line between physical and regulatory takings is as unclear as ever, both areas of the law are at least moving in the same direction: toward more protection of private landowners’ bundle of property rights. This movement in takings law decreases the previous paradoxical state of the law where physical takings were per se compensable, even if seemingly trivial in nature, while substantial regulations on property were often held non-compensable, if deemed regulatory in nature.

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