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De Facto Takings and the Pursuit of Just Compensation

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NOTES

DE FACTO TAKINGS AND THE PURSUIT OF JUST COMPENSATION

INTRODUCTION

When urban renewal or other public land use projects are announced and preparations begin, predictable changes occur in the affected property and in the surrounding areas. The property owner may be forbidden to make improvements and the property inevitably begins to deteriorate. Tenants move and businesses disintegrate. Mortgage money disappears and insurance rates soar. Accordingly, the value of the property diminishes rapidly.[1] In these circumstances, controversial legal issues arise concerning whether government action commenced for the public benefit results in an appropriation of private property without just compensation in violation of the fifth amendment.[2] Specifically, during the course of formal eminent domain proceedings, an aggrieved property owner may attempt to establish a de facto taking by demonstrating that governmental activity in furtherance of an impending condemnation has altered the character of the property and interfered with the owner's use to the extent there has been a confiscation by the government prior to actual passage of title.[3] In addition, a claim that a de facto taking has occurred may arise when there has been no initiation of eminent domain proceedings, but the operation of a statute, regulation, or some other governmental activity has so restricted the use of property and reduced its value that the private property is rendered unsuitable for any economically beneficial purpose.[4]

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1. *See, e.g.*, Richmond Elks Hall Ass'n v. Richmond Redev. Agency, 561 F.2d 1327 (9th Cir. 1977); Amen v. City of Dearborn, 363 F. Supp. 1267 (E.D. Mich. 1973), *rev'd on other grounds*, 532 F.2d 554 (6th Cir. 1976); Madison Realty Co. v. City of Detroit, 315 F. Supp. 367 (E.D. Mich. 1970); Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968); City of Detroit v. Cassese, 376 Mich. 311, 136 N.W.2d 896 (1965); City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971).

2. "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

3. Vesting of title may occur at different times depending upon the statutory scheme established by the particular jurisdiction. For example, New York requires that the condemning authority conduct a public hearing prior to acquisition. N.Y. Em. Domain Proc. Law § 201 (McKinney 1979). After the hearing, the condemning authority may acquire title to the property by filing an acquisition map in the county clerk or registrar's office of the county in which the property is located. *Id.* § 402. The acquisition is complete and title is vested in the state as of the filing of the acquisition map. *Id.* § 402(A)(3). Michigan, on the other hand, uses two different procedures. First, the condemnor may file a petition in court describing the land to be taken and the person or persons having an interest in the land. Mich. Comp. Laws Ann. § 213.2 (1967). A hearing is then held and a jury determines the compensation that is to be awarded to the condemnee. *Id.* § 213.3. The court then enters a judgment vesting title in the state. *Id.* § 213.4. The second procedure, called a "quick take," permits the condemnor to file a declaration of taking. *Id.* § 213.367. If the condemnee does not make a motion to review the petition, title immediately vests in the condemnor and the right to just compensation vests in the condemnee. *Id.* § 213.369.

4. *See* Nectow v. City of Cambridge, 277 U.S. 183 (1928) (residential zoning ordinance);

Resolution of these issues requires a delicate balancing of the legitimate interests of private individuals with those of the general public. Thus, the courts must distinguish between the government's "police power" to regulate property for the benefit of the public health, safety and welfare without payment of compensation,[5] and its "eminent domain power" to appropriate private property for public use by payment of just compensation according to the property's highest and best use.[6] To reduce the hardships that the government may inflict upon property owners, and yet to avoid prohibitive costs of public projects, the courts have followed two divergent theories of establishing a de facto taking. The formal definition, applied by New York courts, permits a property owner to receive just compensation only when there has been "physical invasion" of property or "direct legal restraint" on its use.[7] In contrast, a more flexible definition, employed by Michigan courts and expressly rejected by the New York courts, requires the government to pay just compensation whenever its deliberate action results in a substantial diminution in private property values.[8] These approaches produce significantly varying legal results that lead to different allocations of the financial burdens of public projects to the government and the affected property owner.

This Note contends that the approach developed by the Michigan courts to fulfill the mandate of the fifth amendment represents a more equitable resolution of the de facto taking issue. The constitutional background and the general theories that guide state court decisions are introduced in Part I. Part II analyzes the New York test of de facto taking and demonstrates that the physical invasion and direct legal restraint requirements do not provide practical or ethical standards to enable the courts to protect both private and public interests. Part III examines the Michigan approach and shows that courts applying more pragmatic standards to determine whether a de facto taking has occurred will be more successful in accomodating private rights and public order within the existing legal framework.

Miller v. Schoene, 276 U.S. 272 (1928) (statute); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (zoning ordinance); notes 91-93 *infra* and accompanying text.

5. The police power is the sovereign power of the states, not surrendered to the federal government, to enact legislation and promulgate regulations to promote the general welfare of the public. E. Freund, The Police Power § 3, at 3 (1904); L. Tribe, American Constitutional Law 323 (1978). Thus, the police power is capable of change as social, economic, and political conditions evolve. "[T]he range of public interests comprehended by the public welfare is exceedingly broad." Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709, 723 (D.N.J. 1976). "The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." Berman v. Parker, 348 U.S. 26, 33 (1954); *accord*, Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

6. *See, e.g.*, United States v. Fuller, 409 U.S. 488, 490-92 (1973); Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473-74 (1973); United States v. Reynolds, 397 U.S. 14, 16-19 (1970).

7. City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971); *see* pt. II(A)-(B) *infra*.

8. City of Detroit v. Cassese, 376 Mich. 311, 136 N.W.2d 896 (1965); *see* pt. III *infra* and accompanying text.

I. CONSTITUTIONAL MANDATE OF THE TAKING CLAUSE

Despite years of litigation, the fifth amendment's prohibition against taking private property for public use without the payment of just compensation continues to be "murky and confused."[9] One reason for the lack of certainty is that the precise theoretical basis[10] of the provision and the motivation for including it in the Bill of Rights are not clear.[11] Furthermore, neither the language of the provision, nor its legislative history,[12] provide a definition of the terms "property,"[13] "taking," or "just compensation." In addition, legisla-

9. Kanner, *Condemnation Blight: Just How Just Is Just Compensation?* 48 Notre Dame Law. 765, 766 (1973). The courts admit that this area of the law is a difficult one. *E.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123 (1978) ("The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty."); Armstrong v. United States, 364 U.S. 40, 48 (1960) ("difficulty of trying to draw the line"); United States v. Caltex, Inc., 344 U.S. 149, 156 (1952) ("No rigid rules can be laid down."). Many commentators have attempted to develop a workable rule of law out of the confusing and apparently incompatible court decisions. *See, e.g.*, Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 Colum. L. Rev. 1021 (1975); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 Sup. Ct. Rev. 63; Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 Calif. L. Rev. 596 (1954); Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 Wis. L. Rev. 3; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967); Tomain, *Elimination of the Highest and Best Use Principle: Another Path Through the Middle Way*, 47 Fordham L. Rev. 307 (1978).

10. Several common law concepts and political theories appear to have influenced the drafting of the fifth amendment's taking clause. F. Bosselman, D. Callies & J. Banta, The Taking Issue 100 (1973) [hereinafter cited as The Taking Issue]; Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 572-73 (1972). These include the Magna Carta, the writings of Blackstone and Grotius, and the concepts of natural law. The Magna Carta provided that the sovereign should not be permitted to seize arbitrarily the lands of free men. Magna Carta ¶ 39; *see* The Taking Issue, *supra*, at 53-60, 79-80, 103; Hazeltine, *The Influence of Magna Carta on American Constitutional Development*, 17 Colum. L. Rev. 1, 10 (1917). Blackstone and Grotius asserted that if the sovereign acquired property from an individual, the individual should be indemnified for any loss suffered. 1 W. Blackstone, Commentaries *138-39; Grotius on the Rights of War and Peace 179 (W. Whewell trans. 1853); *see* The Taking Issue, *supra*, at 88-92; Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 54-57 (1964) [hereinafter cited as Sax I]. Common to these writings is the theory that the individual's private property rights should be protected against arbitrary or uncompensated seizure by the government.

11. "There is a conspicuous absence of historical data that might enable one to determine why Madison added the just compensation language of the Fifth Amendment." The Taking Issue, *supra* note 10, at 99-100. It has been suggested, however, that the provision was intended to prevent the military seizure of food and supplies from citizens as had occurred during the Revolutionary War. *Id.* at 103-104; Sax I, *supra* note 10, at 56-57.

12. *See generally* 2 B. Schwartz, The Bill of Rights: A Documentary History 983-1167 (1971).

13. The definition of the term "property" as used in the taking clause is a subject of controversy. "[T]he concept of property never has been, is not, and never can be of definite content." Philbrick, *Changing Conceptions of Property in Law*, 86 U. Pa. L. Rev. 691, 696 (1938). "[P]roperty jurisprudence stubbornly resists the best efforts of courts, legislators, and scholars to etch the concept's dimensions in stone." Costonis, *The Disparity Issue: A Context for the* Grand Central Terminal *Decision*, 91 Harv. L. Rev. 402, 402 (1977). In some cases the Supreme Court has formulated a very expansive definition of property. For example, in United States v. General Motors Corp., 323 U.S. 373 (1945), the Court defined property to include the entire "group of

tures have generally ignored the problem, and courts have been reluctant to complicate further the legal issues by incorporating economic evidence and political attitudes into their analyses.[14]

Although its legislative foundations are not certain, the policy underlying the taking clause is the necessity of protecting an individual's right to private property from an uncompensated seizure by the government for public use. Thus, any interpretation of the taking clause must accomodate both private property interests and the necessity for public programs.[15] Recognizing the formidability of this task the Supreme Court has recently stated: "[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[16]

Despite its hesitance to define the precise constitutional meaning of the term "taking," the Supreme Court has developed several approaches to determine whether just compensation must be paid to an aggrieved property owner. Most commonly used by the courts[17] are the "physical invasion" theory and

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rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *Id.* at 378. One commentator suggested that property includes every species of interest in land and things that an owner can transfer to another person. Stoebuck, *supra* note 10, at 606. *See also* Cormack, *Legal Concepts in Cases of Eminent Domain,* 41 Yale L.J. 221, 240 (1931). The Supreme Court, however, has dismissed claims that alleged the occurrence of a taking on the ground that the private interests interfered with by government action were not "property." United States v. Willow River Power Co., 324 U.S. 499 (1945) (no property interest in maintaining high water level); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913) (no private property interest can exist on navigable waters); *see* Kratovil & Harrison, *supra* note 9, at 602-03; Sax, *Takings, Private Property and Public Rights,* 81 Yale L.J. 149, 152 & n.8 (1971) [hereinafter cited as Sax II]; Sax I, *supra* note 10, at 51-52.

14. *See, e.g.,* Costonis, *The disparity Issue: A Context for the* Grand Central Terminal *Decision,* 91 Harv. L. Rev. 402, 408-09 (1977); Costonis, *supra* note 9, at 1047-49.

15. "The law of eminent domain is fashioned out of the conflict between the people's interest in public projects and the principle of indemnity to the landowner." United States *ex rel* TVA v. Powelson, 319 U.S. 266, 280 (1943). While the government has paramount rights to appropriate private property, the fifth amendment requires that just compensation be paid whenever this right is exercised. United States v. Lynah, 188 U.S. 445, 465 (1903). Compensation must be "just," however, "not merely to the individual whose property is taken, but to the public which is to pay for it." Searl v. School Dist. No. 2, 133 U.S. 553, 562 (1890). "In a variety of ingenious ways, courts have narrowed the principle of 'just compensation' in order to reduce the costs of economic development with the effect of subsidizing growth." Miller v. United States, 583 F.2d 857, 862 (6th Cir. 1978).

16. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); *see* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962); Armstrong v. United States, 364 U.S. 40, 49 (1960).

17. The "noxious use abatement" and "balancing social gains against private losses" theories have also been suggested. The noxious use abatement theory focuses on "whether the claimant has sustained any loss apart from restriction of his liberty to conduct some activity considered harmful to other people." Michelman, *supra* note 9, at 1184; *see, e.g.,* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reinman v. City of Little Rock, 237 U.S. 171 (1915); Bacon v. Walker, 204 U.S. 311 (1907). The rationale underlying the noxious use theory is that compensation is not required "when the public simply requires one of its members to stop

the "diminution in value" theory. Because the physical invasion theory emphasizes the form of the challenged governmental activity, and the diminution in value theory stresses its economic impact, courts that apply these theories frequently attain contradictory results.[18]

A. *The Physical Invasion Theory*

Central to the physical invasion theory is the determination "whether or not the public or its agents have physically used or occupied something belonging to the claimant."[19] For example, the Supreme Court characterized the government's activity as physical invasion in *Pumpelly v. Green Bay Co.*,[20] in

making a nuisance of himself." Michelman, *supra* note 9, at 1196. The theory originated in Mugler v. Kansas, 123 U.S. 623 (1887), a case involving the validity of a statute that prohibited the manufacture and sale of intoxicating liquor. Mugler complained that the prohibition on the use of his brewery rendered it worthless and was, in effect, a taking of property for public use without compensation and a deprivation of property without due process of law. *Id.* at 664. The Court disagreed, stating that: "[T]he destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner." *Id.* at 669. A shortcoming of the noxious use theory is illustrated in Hadacheck v. Sebastian, 239 U.S. 394 (1915), in which the plaintiff's brick factory was located on the outskirts of a city, but it later became surrounded by a residential development. Because brick manufacturing involves the firing of the bricks in kilns which emit fumes, gases, and soot detrimental to the health of those living in the vicinity, the city enacted an ordinance prohibiting the manufacture of brick within the city limits. The plaintiff challenged the validity of the ordinance under the fourteenth amendment. The Court upheld the ordinance on the ground that it was directed merely to prevent a nuisance. *Id.* at 411. The owner of the brickyard, however, was free from any wrongdoing. His use of the property was not noxious when he assumed ownership. Rather, the use became noxious as the residential community developed. Thus, the problem is one of public policy, in choosing between two lawful uses of land: manufacturing and residential. By characterizing brick manufacturing as noxious, however, the test presupposes that the residential uses are to be preferred. Thus, the noxious use test appears to encourage rigid characterization rather than analysis of the competing public policy. *See* Sax I, *supra* note 10, at 49. The balancing test, on the other hand, is rarely used by the courts. The key to determining the occurrence of a compensable taking according to this test is "whether the claimant's loss is or is not outweighed by the public's concomitant gain." Michelman, *supra* note 9, at 1184; *see* Kratovil & Harrison, *supra* note 9, at 609, 626. If the individual's losses are found to be "outweighed" by the social gains, there is no taking. *See, e.g.*, Rochester Business Inst. v. City of Rochester, 25 A.D.2d 97, 267 N.Y.S.2d 274 (4th Dep't 1966); Comment, *Balancing Private Loss Against Public Gain To Test For A Violation of Due Process or A Taking Without Just Compensation*, 54 Wash. L. Rev. 315 (1979). The problem with such a theory is the difficulty of weighing the individual's loss and the public's gain. These interests cannot be accurately defined, measured or compared on a standard scale. Michelman, *supra* note 9, at 1193-96.

18. Sax I, *supra* note 10, at 46; *see* Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. Rev. 165 (1974); Michelman, *supra* note 9, at 1191.

19. Michelman, *supra* note 9, at 1184; *see, e.g.*, United States v. Pewee Coal Co., 341 U.S. 114 (1951); United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); United States v. Causby, 328 U.S. 256 (1946); United States v. Cress, 243 U.S. 316 (1917); United States v. Welch, 217 U.S. 333 (1910); United States v. Lynah, 188 U.S. 445 (1903); Transportation Co. v. Chicago, 99 U.S. 635 (1878); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).

20. 80 U.S. (13 Wall.) 166 (1871).

which the state authorized the construction of a dam which caused the flooding of the plaintiff's land. The Court stated that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution."[21]

Although the Supreme Court recently expressed its preference for the theory, stating that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government,"[22] the physical invasion requirement often depends upon a "purely fortuitous circumstance."[23] For example, in airplane overflight cases in which the plaintiffs claim that frequent and regular flights by government airplanes constitute a taking, courts applying the physical invasion theory have held that only those owners whose property was located directly below the flight path could receive compensation.[24] Thus, while the physical invasion theory may furnish an expeditious standard for distinguishing between compensable and noncompensable interferences with private property, recovery can be dependent upon an inquiry "as irrelevant as whether the wing tip of the aircraft passes through some fraction of an inch of the airspace directly above the plaintiff's land."[25]

Moreover, by making a tresspassory-type invasion the threshold for a taking, a court applying the physical invasion test does not take into account the deleterious effects on property value caused by government action involving adjacent property. For example, in *Transportation Co. v. Chicago,*[26] the government's construction of a tunnel left the plaintiff's property landlocked so that boats were unable to approach its docks. In addition, excavation of an adjacent street blocked the doors of the plaintiff's warehouse. Utilizing the physical invasion test, the Supreme Court refused to award the plaintiff compensation because government acts "not directly encroaching upon private property, though their consequences may impair its use, are . . . not . . . a taking within the meaning of the constitutional provision."[27] Thus, under the physical invasion test, government activities that occur outside the boundaries of private property may be insufficient to constitute a taking despite the substantial losses suffered by the private owner.

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21. *Id.* at 181.

22. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). The Court noted, however, that it did not "embrace the proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel." *Id.* at 123 n.25.

23. Michelman, *supra* note 9, at 1226.

24. Batten v. United States 306 F.2d 580, 583 (10th Cir. 1962), *cert. denied,* 371 U.S. 955 (1963); Neher v. United States, 265 F. Supp. 210, 216 (D. Minn. 1967); Bellamy v. United States, 235 F. Supp. 139, 140 (E.D.S.C. 1964); Leavell v. United States 234 F. Supp. 734, 739 (E.D.S.C. 1964); Avery v. United States, 330 F.2d 640, 645 (Ct. Cl. 1964).

25. Martin v. Port of Seattle, 64 Wash. 2d 309, 316, 391 P.2d 540, 545 (1964), *cert. denied,* 379 U.S. 989 (1965).

26. 99 U.S. 635 (1878).

27. *Id.* at 642.

B. *The Diminution in Value Theory*

Perhaps in direct contrast to the physical invasion theory, is the diminution in value theory, which emphasizes the "size of the harm sustained by the claimant or the degree to which his affected property has been devalued"[28] in determining whether government action has resulted in a taking. This theory was derived from Justice Holmes's opinion in *Pennsylvania Coal Co. v. Mahon,*[29] which involved the validity of a state statute that prohibited any coal mining that would cause the collapse or subsidence of a public building, road, or dwelling. The coal company, which possessed the right to mine subsurface coal, attacked the statute on the ground that it completely destroyed the coal company's rights in the property in violation of the fifth amendment.[30] In holding that the statute unconstitutionally effected a "taking" of private property without just compensation, Justice Holmes articulated the basis of the diminution in value theory:

> As long recognized, some [property] values are enjoyed under an implied limitation and must yield to the police power. When [the extent of diminution] reaches a certain magnitude, [however,] in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. . . .
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> . . . [W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.[31]

Although Justice Holmes labeled the effect of the statute in *Pennsylvania Coal* as a "taking," the Court only decided that the statute was an invalid exercise of the police power, not that an actual appropriation of property occurred. The remedy for an "overregulation" is to declare it unconstitutional; in contrast, when the government actually "takes" private property for public use, just compensation must be paid.[32]

Justice Holmes's statement of the law in *Pennsylvania Coal* has been a constant source of frustration for courts that must decide whether government action has actually resulted in a taking requiring just compensation.[33] As one court stated, "[t]he distinction, although definable, between a compensable taking and a noncompensable regulation is not always susceptible of precise demarcation."[34] The dichotomy is particularly unclear when the predicate of

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28. Michelman, *supra* note 9, at 1184; *see, e.g.,* Armstrong v. United States, 364 U.S. 40 (1960); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908).

29. 260 U.S. 393 (1922).

30. *Id.* at 395-96.

31. *Id.* at 413-15.

32. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 593 (1962); Miller v. Schoene, 276 U.S. 272, 280 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); Welch v. Swasey, 214 U.S. 91, 105 (1909).

33. The Taking Issue, *supra* note 10, at 124-38; Costonis, *supra* note 9, at 1040-42; Kratovil & Harrison, *supra* note 9, at 608-11; Michelman, *supra* note 9, at 1229-34; Sax I, *supra* note 10, at 40-43; Tomain, *supra* note 9, at 307-11; Kiniec, Book Review, 13 Val. L. Rev. 589 (1979). *See generally* Berger, *supra* note 18; Netherton, *Implementation of Land Use Policy: Police Power vs. Eminent Domain,* 3 Land & Water L. Rev. 33 (1968).

34. Fred F. French Investing Co. v. City of N.Y., 39 N.Y.2d 587, 593, 350 N.E.2d 381, 384, 385 N.Y.S.2d 5, 8, *cert. denied,* 429 U.S. 990 (1976).

either concept is the extent of diminution in value of private property caused by the challenged governmental activity. The vagueness of the diminution in value test is due, in part, to the absence of guidance as to the degree of diminution in value sufficient to constitute a compensable taking.[35] As a result, the theory is not applied in many cases despite evidence of a substantial diminution in property values.[36]

The jurisprudence of the taking clause at the federal level, characterized by an absence of "satisfactory rules, standards, and criteria"[37] affords little guidance to the states which are required by the fourteenth amendment to guarantee just compensation for a governmental appropriation of private property.[38] Nevertheless, in attempting to reconcile the traditional legal theories with the actual effects of governmental activity upon private property, the state courts have developed two conceptual types of takings: de jure and de facto. The legal, political, and practical problems associated with de jure and de facto takings, however, are more complex than the definitional distinctions might suggest.

C. *De Jure Takings*

De jure taking refers to government acquisition of legal title to property or property rights during a formal condemnation proceeding. The power of eminent domain permits the government to effect a de jure taking of private property for public use despite protest by the owner.[39] The fifth amendment's taking clause, however, limits the eminent domain power by requiring the payment of just compensation whenever there is a formalized transfer of title to the government.[40] Because the state legislature prescribes the procedures for exercises of eminent domain, only two constitutional problems must be resolved during condemnation proceedings: first, a determination of whether

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35. Michelman, *supra* note 9, at 1229-34; Sax I, *supra* note 10, at 50, 60; Comment, *De Facto Taking and Municipal Clearance Projects: City Plan or City Scheme?*, 9 Urb. L. Ann. 317, 320 (1975).

36. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reinman v. City of Little Rock, 237 U.S. 171 (1915). These cases applied the noxious use prevention theory. Prof. Michelman suggests that the diminution in value theory is used only in cases involving neither a physical invasion nor a restriction of the noxious use. Michelman, *supra* note 9, at 1191.

37. Magavern, *The Evolution and Extension of the New York Law of Inverse Condemnation*, 24 Buffalo L. Rev. 273, 275 (1974); *see* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1977); Armstrong v. United States, 364 U.S. 40, 48 (1960); United States v. Caltex, Inc., 344 U.S. 149, 156 (1952).

38. West v. Chesapeake & Potomac Tel. Co., 295 U.S. 662, 671 (1935); Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226, 239 (1897).

39. *See* N.Y. Em. Domain Proc. Law § 101 (McKinney 1979); 1 P. Nichols, The Law of Eminent Domain § 1.11, at 1-5 (rev. 3d ed. J. Sackman 1974).

40. U.S. Const. amends. V, XIV; Mich. Const. art. 10, § 2; N.Y. Const. art. I, § 7. The eminent domain power is an inherent and necessary power of government to guard its independent existence and to promote the welfare of the public. *See* United States v. Jones, 109 U.S. 513 (1883); Boom Co. v. Patterson, 98 U.S. 403 (1878); Kohl v. United States, 91 U.S. 367 (1875); 1 P. Nichols, *supra* note 39, § 1.3 at 1-78; Kratovil & Harrison, *supra* note 9, at 596; Stoebuck, *supra* note 10, at 556, 568.

the government has appropriated the property for "public use,"[41] and second, a computation of the owner's "just compensation" as of the date of transfer of title to the government.[42]

The determination of just compensation is often difficult because government action in connection with an impending condemnation may adversely affect property values.[43] To prevent the government from taking advantage of such adverse effects by acquiring the property at a depreciated price, the

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41. The "public use" requirement of the fifth amendment has been considered a limitation on the power of eminent domain. *See* Nichols, *The Meaning of Public Use in the Law of Eminent Domain,* 20 B.U. L. Rev. 615 (1940). However, in United States *ex rel* TVA v. Welch, 327 U.S. 546 (1946), and Berman v. Parker, 348 U.S. 26 (1954), the Supreme Court appears to have repudiated a strict application of the doctrine of public use. *See, e.g.,* Dunham, *supra* note 9, at 65-71; Glaves, *Date of Valuation in Eminent Domain: Irreverance for Unconstitutional Practice,* 30 U. Chi. L. Rev. 319, 320 (1963); Stoebuck, *supra* note 10, at 588-99; Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem,* 58 Yale L.J. 599, 611-14 (1949).

42. The definition of the term "just compensation" has also been the subject of debate. *See, e.g.,* Kanner, *supra* note 9, at 778-785; Kratovil & Harrison, *supra* note 9, at 615-20; Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses,* 67 Yale L.J. 61 (1957). Two approaches to providing just compensation are the "indemnity" or "owner's loss" theory and the "taker's gain" theory. Under the indemnity theory, the owner is entitled to be put in as good a position as he would have been if his property had not been taken. United States *ex rel* TVA v. Powelson, 319 U.S. 266, 281 (1943); *see* United States v. Miller, 317 U.S. 369, 373 (1943). Under the taker's gain theory, the government must pay only for that property which is acquired, and the individual is not compensated for incidental losses proximately caused by the taking, such as business losses or moving expenses. Mitchell v. United States, 267 U.S. 341, 345 (1925). The rationale of the taker's gain theory is that forcing the public to pay for more than it actually acquires would unduly increase the cost of the public project for which the property has been taken. It is incorrect, however, to say that the total cost of the project is decreased when certain of the owner's losses are not compensated. Denial of compensation does not reduce the cost of the acquisition. Rather, the total cost remains the same, but is redistributed so that a greater proportion falls on the owner. Kanner, *supra* note 9, at 784-85; *see* Van Alstyne, *Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California,* 16 U.C.L.A. L. Rev. 491, 543-44 (1969). New York follows the indemnity theory. Rose v. State, 24 N.Y.2d 80, 87, 246 N.E.2d 735, 739, 298 N.Y.S.2d 968, 975 (1969); *See* Marraro v. State, 12 N.Y.2d 285, 292-93, 189 N.E.2d 606, 609-11, 239 N.Y.S.2d 105, 109-10 (1963); *In re* Board of Water Supply, 277 N.Y. 452, 14 N.E.2d 789 (1938); Banner Milling Co. v. State, 240 N.Y. 533, 148 N.E. 668 (1925); New York, Ont. & W. Ry. v. Livingston, 238 N.Y. 300, 144 N.E. 589 (1924). Michigan also follows the indemnity theory. State Highway Comm'r v. Eilender, 362 Mich. 697, 108 N.W.2d 755 (1961); *In re* John C. Lodge Highway, 340 Mich. 254, 65 N.W.2d 820 (1954); City of Detroit v. Yellen, 28 Mich. App. 529, 184 N.W.2d 563 (1970).

43. The Supreme Court has "recognized that the 'market value' of property condemned can be affected, adversely or favorably, by the imminence of the very public project that makes the condemnation necessary." United States v. Reynolds, 397 U.S. 14, 16 (1970); United States v. Miller, 317 U.S. 369, 376-77 (1943); Shoemaker v. United States, 147 U.S. 282, 304-05 (1893). The subject of computation of fair market value is not within the scope of this Note. For a discussion of this subject, see Am. Inst. of Real Estate Appraisers of the Nat'l Ass'n of Realtors, 1 Readings in Real Property Valuation Principles (1977); 4 P. Nichols, *supra* note 39, §§ 12.1-.35, at 12-4 to -235; 1 L. Orgel, Valuation Under the Law of Eminent Domain (1953); E. Rams, Valuation for Eminent Domain (1973); Bigham, *"Fair Market Value," "Just Compensation," and the Constitution: A Critical View,* 24 Vand. L. Rev. 63 (1970); Hershman, *Compensation—Just and Unjust,* 21 Bus. Law. 285 (1966).

concept of condemnation blight may be employed.[44] A court that applies the condemnation blight concept permits a condemnee to introduce evidence that the acts of the condemning authority reduced the value of his property. If the condemnee produces such evidence, he will recover the market value of his property as it would have been at the time of the de jure taking without the debilitating impact of the impending condemnation.[45]

Under the condemnation blight concept, however, the date of the taking is not affected. Rather, it remains the date of the de jure vesting of title in the government.[46] As a result, the condemnee must continue to maintain the property and pay the taxes and insurance until the passage of title to the government.[47] In addition, the condemnee may not recover losses in rental income, even though such losses may have been directly caused by the pendency of the proceedings.[48] Finally, interest on the condemnation award does not begin to accrue until the date of the de jure taking.[49] Thus, even when condemnation blight is accounted for, the total recovery does not fully compensate the condemnee's loss.

While the presentation of condemnation blight evidence may more closely approximate full compensation to the condemnee, such evidence may only be

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44. To permit compensation to be increased or decreased by an alteration in market value caused by condemnation or a public works project would not lead to the just compensation required by the Constitution. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 478 (1973); United States v. Reynolds, 397 U.S. 14, 16 (1970); United States v. Virginia Elec. & Power Co., 365 U.S. 624, 635-36 (1961); United States v. Cors, 337 U.S. 325, 332 (1949).

45. City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 257-58, 269 N.E.2d 895, 905, 321 N.Y.S.2d 345, 359 (1971); *In re* Montauk, 58 A.D.2d 579, 580, 395 N.Y.S.2d 218, 219 (2d Dep't 1977) (mem.); Rome Urban Renewal Agency v. Nickley, 51 A.D.2d 680, 378 N.Y.S.2d 339 (4th Dep't 1976) (mem.); City of Buffalo v. Manguso, 42 A.D.2d 673, 344 N.Y.S.2d 248 (4th Dep't 1973); City of Buffalo v. George Irish Paper Co., 31 A.D.2d 470, 299 N.Y.S.2d 8 (4th Dep't 1969), *aff'd mem.*, 26 N.Y.2d 869, 258 N.E.2d 100, 309 N.Y.S.2d 606 (1970); Niagara Frontier Bldg. Corp. v. State, 33 A.D.2d 130, 305 N.Y.S.2d 549 (4th Dep't 1969), *aff'd*, 28 N.Y.2d 755, 269 N.E.2d 912, 321 N.Y.S.2d 368 (1971); *In re* Incorporated Village of Lynbrook, 75 Misc. 2d 678, 348 N.Y.S.2d 115 (Sup. Ct. 1973); J. Sackman, *Condemnation Blight—A Problem in Compensability and Value*, 1973 Institute on Planning, Zoning and Eminent Domain 157; J. Sackman, *Condemnation Blight—Part II*, 1976 Institute on Planning, Zoning and Eminent Domain 283.

46. City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 255, 269 N.E.2d 895, 903, 321 N.Y.S.2d 345, 357 (1971); *In re* Incorporated Village of Lynbrook, 75 Misc. 2d 678, 680, 348 N.Y.S.2d 115, 118 (Sup. Ct. 1973); *see* City of Buffalo v. George Irish Paper Co., 31 A.D.2d 470, 299 N.Y.S.2d (4th Dep't 1969), *aff'd mem.*, 26 N.Y.2d 869, 258 N.E.2d 100, 309 N.Y.S.2d 606 (1970); *In re* City of N.Y., 1 A.D.2d 807, 148 N.Y.S.2d 706 (1st Dep't 1956) (mem.).

47. *In re* Incorporated Village of Lynbrook, 75 Misc. 2d 678, 680, 348 N.Y.S.2d 115, 118 (Sup. Ct. 1973); *see* City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971).

48. City of Buffalo v. J.W. Clement Co., 41 A.D.2d 41, 46-47, 342 N.Y.S.2d 89, 94-95 (4th Dep't 1973); Niagara Frontier Bldg. Corp. v. State, 33 A.D.2d 130, 305 N.Y.S.2d 549 (4th Dep't 1968), 269 N.E.2d 912, 321 N.Y.S.2d 368 (1971); *In re* Incorporated Village of Lynbrook, 75 Misc. 2d 678, 680, 348 N.Y.S.2d 115, 118 (Sup. Ct. 1973).

49. City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 254, 269 N.E.2d 895, 903, 321 N.Y.S.2d 345, 356-57 (1971); *In re* Incorporated Village of Lynbrook, 75 Misc. 2d 678, 680, 348 N.Y.S.2d 115, 118 (Sup. Ct. 1973).

used during the course of a formal condemnation proceeding.[50] Therefore, if there is no de jure taking, an aggrieved property owner has no remedy to recover damages for condemnation blight unless he establishes a de facto taking.[51]

D. *De Facto Takings*

A de facto taking involves a claim by a property owner that governmental activity has so affected the use and value of the property as to have, in effect, constituted a taking of his property for public use without payment of just compensation.[52] The claim may arise during an eminent domain proceeding or during an inverse condemnation proceeding.[53] In contrast to a de jure taking, which is identifiable by its formal procedural characteristics, a de facto taking presents the constitutional problem of determining whether a taking has actually occurred, and if so, when it occurred.

A condemnee may establish a de facto taking during the course of an eminent domain proceeding to prove an earlier date of taking.[54] By establish-

50. Fisher v. City of Syracuse, 78 Misc. 2d 124, 128, 355 N.Y.S.2d 239, 243 (Sup. Ct.), *aff'd*, 46 A.D.2d 216, 361 N.Y.S.2d 773 (4th Dep't 1974), *appeal denied*, 36 N.Y.2d 642, 368 N.Y.S.2d 1025, *cert. denied*, 423 U.S. 833 (1975).

51. *See* 76 Crown St. Corp. v. City of N.Y., 35 A.D.2d 1005, 317 N.Y.S.2d 978 (2d Dep't 1970); Beaux Arts Props., Inc. v. United Nations Dev. Corp., 68 Misc. 2d 785, 328 N.Y.S.2d 16 (Sup. Ct. 1972), *aff'd mem.*, 39 A.D.2d 844, 332 N.Y.S.2d 1008 (1st Dep't 1972); Cinco v. City of N.Y., 58 Misc. 2d 828, 296 N.Y.S.2d 26 (Sup. Ct. 1968).

52. 2 P. Nichols, *supra* note 39, § 6.2(1); *see, e.g.*, City of Detroit v. Cassese, 376 Mich. 311, 136 N.W.2d 896 (1965); City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971).

53. *See* Magavern, *supra* note 37, at 274-75. There is no single accepted definition of the term inverse condemnation, which generally describes an action brought by a property owner against the government to obtain just compensation if his property has been taken or damaged for public use. *Id.*; Mandelker, *supra* note 9, at 3. Inverse condemnation claims arise from various types of government action, including both physical and regulatory activities. For example, governmental activity which amounts to a physical invasion, such as flooding, United States v. Cress, 243 U.S. 316 (1917), governmental activity outside the physical boundaries of the property which adversely affects the property, such as changes in highway grades, Thom v. State Highway Comm'r, 376 Mich. 608, 138 N.W.2d 322 (1965), or government regulation which impairs private property interests may support an inverse condemnation action. *See* Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-called Inverse or Reverse Condemnation*, 1968 Urb. L. Ann. 1, 2. Inverse condemnation actions are procedurally analagous to direct condemnation proceedings and employ substantially the same rules of evidence. In addition, the measure of damages recovered is virtually the same as in formal condemnation. Kratovil & Harrison, *supra* note 9, at 607. Inverse condemnation, however, is not the only remedy available to a property owner whose lands have been taken or damaged. The owner may receive damages under a tort or contract theory, or may be able to enjoin the governmental activity which would otherwise amount to a taking. *See* Note, *Eminent Domain—Rights and Remedies of an Uncompensated Landowner*, 1962 Wash. U.L.Q. 210 (1962).

54. *See* City of Detroit v. Cassese, 376 Mich. 311, 136 N.W.2d 896 (1965); Leeds v. State, 20 N.Y.2d 701, 229 N.E.2d 446, 282 N.Y.S.2d 767 (1967); City of N.Y. v. Ash-Lip Realty Corp., 49 A.D.2d 905, 373 N.Y.S.2d 391 (2d Dep't 1975) (mem.); Lambert v. State, 30 A.D.2d 582, 290 N.Y.S.2d 412 (3d Dep't 1968) (mem.); Cicci v. State, 31 A.D.2d 733, 297 N.Y.S.2d 291 (4th Dep't 1968) (mem); Kahn v. State, 27 A.D.2d 476, 280 N.Y.S.2d 268 (3d Dep't 1967); *In re* 572 Warren St., 58 Misc. 2d 1073, 298 N.Y.S.2d 429 (Sup. Ct. 1968).

ing that a de facto taking occurred prior to the date of the de jure taking, the condemnee is entitled to recover: (1) the market value of the property as of the date of the earlier de facto taking; (2) the difference between the income or benefits he received from his use or occupation of the property prior to the de facto taking, and the income derived during the interim until the de jure taking, plus the taxes, insurance, and maintenance costs that he expended during that time; and, (3) interest on the award measured from the earlier date of the de facto taking.[55] Thus, the condemnee's total compensation is considerably greater than that afforded under the condemnation blight theory.

A claim that a de facto taking has occurred may also be established during an inverse condemnation proceeding in which a private property owner asserts that the government has taken his property without paying just compensation.[56] Thus, in either an inverse condemnation proceeding or a formal eminent domain proceeding, the courts must decide the extent of governmental activity that constitutes a taking. Failure to establish the occurrence of a de facto taking in an inverse condemnation action, however, deprives the owner of just compensation and leaves the property in private ownership even though its value has been reduced and its use substantially impaired.[57] To protect private owners from such loss, and yet to avoid

55. City of Detroit v. Cassese, 376 Mich. 311, 318-19, 136 N.W.2d 896, 900-01 (1965). For cases establishing market value as of the date of de facto taking, see *In re* City of N.Y., 43 N.Y.2d 512, 373 N.E.2d 984, 402 N.Y.S.2d 804 (1978); Kravec v. State, 40 N.Y.2d 1060, 360 N.E.2d 925, 392 N.Y.S.2d 246 (1976); Wolfe v. State, 22 N.Y.2d 292, 239 N.E.2d 517, 292 N.Y.S.2d 635 (1968); Kahlen v. State, 223 N.Y. 383, 119 N.E. 883 (1918); Amsterdam Urban Renewal Agency v. Johnson, 60 A.D.2d 661, 400 N.Y.S.2d 213 (3d Dep't 1977) (mem.); Lambert v. State, 30 A.D.2d 582, 290 N.Y.S.2d 412 (3d Dep't 1968). For a case holding that the condemnee is entitled to recover the fair rental value of its property from the date of the de facto appropriation, see Mastic Acres, Inc. v. State, 46 Misc. 2d 660, 260 N.Y.S.2d 532 (Ct. Cl. 1965). For cases establishing the award of interest from the date of de facto taking, see Van Wagoner v. Morrison, 279 Mich. 285, 271 N.W. 760 (1937); Campau v. City of Detroit, 225 Mich. 519, 196 N.W. 527 (1923); Michigan State Highway Comm'n v. Great Lakes Express Co., 50 Mich. App. 170, 183, 213 N.W.2d 239, 245 (1973); *In re* City of N.Y., 43 N.Y.2d 512, 518, 373 N.E.2d 984, 987, 402 N.Y.S. 804, 807 (1978); Leeds v. State, 20 N.Y.2d 701, 229 N.E.2d 446, 282 N.Y.S.2d 767 (1967); Ley v. State, 28 A.D.2d 943, 281 N.Y.S.2d 685 (3d Dep't 1967), *aff'd*, 25 N.Y.2d 876, 250 N.E.2d 878, 303 N.Y.S.2d 887 (1969); Rymkevitch v. State, 42 Misc. 2d 1021, 249 N.Y.S.2d 514 (Ct. Cl. 1964).

56. Balken v. Town of Brookhaven, 70 A.D.2d 579, 416 N.Y.S.2d 51 (2d Dep't 1979); Gengarelly v. Glen Cove Urban Renewal Agency, 69 A.D.2d 524, 418 N.Y.S.2d 790 (2d Dep't 1979); Pum Realty Corp. v. State, 67 A.D.2d 1014, 413 N.Y.S.2d 252 (3d Dep't 1979); Hudson Valley Sand & Stone Co. v. State, 57 A.D.2d 344, 395 N.Y.S.2d 507 (3d Dep't 1977); O'Brien v. City of Syracuse, 54 A.D.2d 186, 388 N.Y.S.2d 866 (4th Dep't 1976); Tobin v. Ford, 49 A.D.2d 83, 371 N.Y.S.2d 721 (3d Dep't 1975); Department of Public Works v. Town of Hornellsville, 41 A.D.2d 685, 342 N.Y.S.2d 632 (4th Dep't 1973); Evans v. City of Johnstown, 96 Misc. 2d 755, 410 N.Y.S.2d 199 (Sup. Ct. 1978).

57. *See, e.g.*, Ton-Da-Lay, Ltd. v. State, 70 A.D.2d 742, 416 N.Y.S.2d 895 (3d Dep't 1979); Pum Realty Corp. v. State, 67 A.D.2d 1014, 413 N.Y.S.2d 252 (3d Dep't 1979); Fisher v. City of Syracuse, 46 A.D.2d 216, 361 N.Y.2d 773 (4th Dep't 1974), *appeal denied*, 36 N.Y.2d 642, 368 N.Y.S.2d 1025, *cert. denied*, 423 U.S. 833 (1975); Beaux Arts Props., Inc. v. United Nations Dev. Corp., 68 Misc. 2d 785, 328 N.Y.S.2d 16 (Sup. Ct.), *aff'd mem.*, 39 A.D.2d 844, 332 N.Y.S.2d 1008 (1st Dep't 1972); Horizon Adirondack Corp. v. State, 88 Misc. 2d 619, 388 N.Y.S.2d 235 (Ct. Cl. 1976).

prohibitive increases in the cost of government projects, the courts of New York and Michigan have adopted different methods for resolving the de facto taking issue.

II. THE NEW YORK APPROACH TO DE FACTO TAKINGS

A. *The Development of the* Clement *Test*

In *City of Buffalo v. J. W. Clement Co.*,[58] the New York Court of Appeals considered the "amorphous and apparently perplexing concept of *de facto* appropriation in the hope of clearly defining and firmly establishing its perimeters."[59] Unfortunately, that decision has engendered even more confusion and uncertainty regarding the de facto taking concept.

The *Clement* case arose during an urban renewal project pending in the City of Buffalo. The city notified Clement, a major printing firm,[60] of its intention to condemn Clement's property nearly twelve years before condemnation proceedings were actually commenced.[61] During this period, the city officials engaged in "a pattern of continuous agitation" concerning the project.[62] In addition to frequent meetings, widespread publicity, and denials of building permits, the city lowered property assessments of the redevelopment area.[63] As a result of these actions, the area around Clement's plant "fell into general disrepair," "vacancies were common," and Clement's property became "unsalable" and "unrentable."[64] In reliance upon official representations that condemnation was imminent, Clement moved to a new location as a matter of economic necessity.[65]

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58. 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971).

59. *Id.* at 247, 269 N.E.2d at 899, 321 N.Y.S.2d at 351.

60. The company printed one hundred million paperback books per year, as well as national magazines such as *Time* and *Life*. For these purposes, enormous printing machinery were used requiring substantial time to prepare for operation and production. *Id.* at 248, 269 N.E.2d at 899, 321 N.Y.S.2d at 351.

61. Clement received its first notification of the project on or about December 10, 1954. *Id.* at 248, 269 N.E.2d at 899, 321 N.Y.S.2d at 351. Condemnation proceedings, however, were not instituted until January, 1967. City of Buffalo v. J.W. Clement Co., 34 A.D.2d 24, 25, 311 N.Y.S.2d 98, 100 (4th Dep't 1970), *modified*, 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971).

62. City of Buffalo v. J.W. Clement Co., 28 N.Y.2d at 249, 269 N.E.2d at 900, 321 N.Y.S.2d at 352. Government officers held frequent meetings with owners of property within the area to advise them when property would be appropriated. In 1957, the officials advised Clement that the taking would be started between 1960 and 1962. In 1960, the officials informed Clement that it would have to vacate its property in three to four years. In 1961, the officials told the company that all industry must be out of the urban renewal area within one and one-half to two years. In 1962, the officials advised Clement that negotiations for the property would begin the following spring. Finally, in 1963, the city informed Clement that the acquisition was scheduled for May of that year. *Id.* at 248-49, 269 N.E.2d at 899, 321 N.Y.S.2d at 351-52.

63. *Id.* at 249-50, 269 N.E.2d at 899-900, 321 N.Y.S.2d at 351-52.

64. *Id.* at 249, 269 N.E.2d at 900, 321 N.Y.S.2d at 352.

65. *Id.* at 248-49, 269 N.E.2d at 899, 321 N.Y.S.2d at 352. Due to the size of Clement's printing machinery, it would take a considerable amount of time to set up a new plant. Furthermore, because Clement printed current magazines, it could not properly service its customers if it shut down its operations while a new plant was being constructed. *Id.*, 269 N.E.2d at 899, 321 N.Y.S.2d at 351.

When condemnation proceedings were finally commenced, Clement contended that its property had already been the subject of a de facto taking almost four years earlier, when the company was forced by the circumstances to vacate and move its operations to a new site.[66] The trial court and the appellate division agreed,[67] finding that because of the city's actions and its long delay in condemning Clement's property, the "essential elements of ownership [had] been destroyed and substantial justice [could not] otherwise be had."[68] Purportedly guided by "the dictates of precedent, practicality, and public policy," the New York Court of Appeals modified the judgment of the appellate division and announced that there can be no de facto taking absent a physical invasion of property or the imposition of a direct legal restraint on its use.[69] The court further held that Clement was entitled to present evidence of condemnation blight in subsequent valuation proceedings, but that evidence of diminution in property value did not amount to a de facto taking within the meaning of the federal and state constitutions.[70]

The court of appeals first analyzed the condemnation blight concept, and disagreed with the lower courts' decision that evidence of severe condemnation blight is sufficient to constitute a de facto taking.[71] According to the court of appeals, condemnation blight is the result of " 'affirmative value-depressing acts,' "[72] whereas a de facto taking is "no less than an out and out appropria-

66. City of Buffalo v. J.W. Clement Co., 34 A.D.2d 24, 26, 311 N.Y.S.2d 98, 101 (4th Dep't 1970), *modified*, 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971). The city argued that even if its actions caused Clement to lose the use of its property, such a loss is merely a consequence of the condemnation which must be accepted by any citizen whose property is condemned. 34 A.D.2d at 28, 311 N.Y.S.2d at 103.

67. The appellate division affirmed the trial court's finding of fact, *id.*, and conclusion that a taking had occurred, *id.* at 31, 311 N.Y.S.2d at 106, but modified the judgment by increasing the award to compensate Clement for the removal of its machinery and by deleting an award for machinery left on the premises. *Id.* at 37, 311 N.Y.S.2d at 112.

68. *Id.* at 32, 311 N.Y.S.2d at 106. Justice Gabrielli dissented, characterizing the city's actions as merely an expression of an intent to appropriate and arguing that such action neither "directly or indirectly . . . or even inferentially," served to deprive Clement of its possession, enjoyment or use of the property. *Id.* at 37-38, 311 N.Y.S.2d at 112-13 (Gabrielli, J., dissenting). The dissent concluded that the impending condemnation was not the sole motivation for the move, indicating that Clement had been anticipating a move for several years because it was outgrowing its present location. *Id.* at 38, 311 N.Y.S.2d at 113. Thus, the dissent refused to agree that a de facto taking had occurred, finding no evidence of actions on the part of the city "which could possibly be translated into dominion or control over the property." *Id.* at 37, 311 N.Y.S.2d at 113.

69. City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 247-48, 253, 269 N.E.2d 895, 899, 902, 321 N.Y.S.2d 345, 351, 356 (1971).

70. *Id.* at 254-55, 269 N.E.2d at 902-03, 321 N.Y.S.2d at 356-57.

71. *Id.* at 253, 269 N.E.2d at 902, 321 N.Y.S.2d at 356. The court commented that "to hold that there can be a *de facto* appropriation absent a physical invasion or direct legal restraint would, needless to say, be to do violence to a workable rule of law. It is our view that only the most obvious injustice compels such a result." *Id.* Ostensibly, the court did not find that Clement was the victim of an "obvious injustice." The court did not, however, define the situation warranting such a characterization.

72. *Id.* at 258, 269 N.E.2d at 905, 321 N.Y.S.2d at 360. The court, however, did not define the type of government action that would constitute " 'affirmative value-depressing acts' " thereby requiring invocation of the condemnation blight concept. *See* 72 Colum. L. Rev. 772, 779

tion of property."[73] Thus, the court of appeals hesitated to adopt the lower courts' more flexible definition of de facto taking because it would allow all aggrieved property owners "to seek refuge under the broader umbrella of *de facto* appropriation,"[74] and would "impose an 'oppressive' and 'unwarranted' burden upon the condemning authority."[75]

To avoid formulation of a test that would require both consideration of the extent of the governmental activity and emphasis on the effect of such activity upon the value of the property, the court of appeals attempted to further delineate the scope of the test of de facto taking.[76] To establish a de facto taking, a property owner must show that the governmental activity amounted to "an assertion of dominion and control" over the property.[77] Exemplary of such governmental activities, according to the court, are "a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property."[78] Thus, a "mere announcement" of an impending condemnation, even if it is coupled with substantial delay and property damage, as in *Clement*, does not constitute a de facto taking.[79]

(1972). Moreover, the court failed to distinguish adequately the acts of appropriation that would result in a finding of de facto taking and the " 'affirmative value-depressing acts' " that would require utilizing the concept of condemnation blight. *See* 3 St. Mary's L.J. 339, 345-47 (1971).

73. 28 N.Y.2d at 254, 269 N.E.2d at 903, 321 N.Y.S.2d at 356.

74. *Id.* at 251, 269 N.E.2d at 901, 321 N.Y.S.2d at 353.

75. *Id.* at 256, 269 N.E.2d at 904, 321 N.Y.S.2d at 358. The appellate division noted the "marked distinction between (1) those cases which by reason of the cloud of condemnation, resulting in so-called condemnation blight, permit the claimant to establish his true damage for the *de jure* taking by proving its value at an earlier time before the debilitating threat of condemnation . . . has depressed its value . . . and (2) those cases which go to the extent of declaring that the acts of the condemnor constitute a *de facto* taking long before the *de jure* taking. The application of such principles must depend not only upon the acts of the condemnor but upon the effect upon the condemnee, and the court must be guided by the further principle that its object is to achieve substantial justice between the condemning public and the private owner." 34 A.D.2d at 32, 311 N.Y.S.2d at 107 (citations omitted); *see* pt. III *infra*.

76. 28 N.Y.2d at 255, 269 N.E.2d at 903, 321 N.Y.S.2d at 357.

77. *Id.* One commentator speculated whether an activity that falls short of physical entry or ouster could constitute an "assertion of dominion and control" and thus permit the finding of a de facto taking. Magavern, *supra* note 37, at 294. While the court's formulation of the definition would appear to indicate that such activity does not constitute a taking, the commentator queried whether the court intended to overrule Weismantle v. State, 210 A.D. 608, 206 N.Y.S. 570 (4th Dep't 1924). In that case, a landowner received compensation when the government caused erosion of his land, even though the government's actions could not have been characterized as a physical entry or ouster. Magavern, *supra* note 37, at 294-95.

78. 28 N.Y.2d at 255, 269 N.E.2d at 903, 321 N.Y.S.2d at 357.

79. *Id.* at 257, 269 N.E.2d at 904, 321 N.Y.S.2d at 359. Applying its definition of de facto taking to the facts of *Clement*, the court characterized the city's activities as simply a "manifestation of an intent to condemn," which did not amount to a deprivation of possession, enjoyment or use of Clement's property. *Id.* at 255, 269 N.E.2d at 903, 321 N.Y.S.2d at 357. This characterization of the activity, however, represents a departure from the court's previous description of the government's activity as a "pattern of continuous agitation." *Id.* at 249, 269 N.E.2d at 900, 321 N.Y.S.2d at 352. In addition, the court did not consider that the city had been denying all applications for building permits by owners in the area. *Id.* Moreover, by

B. *Criticism of the* Clement *Test*

The *Clement* limitation on the definition of de facto taking has caused more problems for New York courts in interpreting and applying the "direct legal restraint" / "physical invasion" test than the court of appeals attempted to solve. Not only was the application of that test unfavorable in *Clement,* but analysis of subsequent litigation indicates the continuing difficulties in determining the occurrence of a de facto taking using *Clement* as a practical and precedential guide.

First, under the indemnity or owner's loss theory used in New York to calculate just compensation in eminent domain proceedings, the condemnee is to be placed in the same relative position as if there had not been a taking.[80] Under the condemnation blight concept applied by the court of appeals, however, although Clement established the market value of his property prior to the debilitating effect of condemnation, Clement could not recover the taxes, insurance, and maintenance expenses that it had paid during the time between the vacation of the old plant and the completion of condemnation.[81] In addition, because of the impending condemnation, Clement was unable to sell or rent its old plant; thus, Clement lost opportunity income by not receiving any return on its investment in the old plant during the period between the vacation of the plant and the ultimate condemnation verdict. Had the time of taking been established as the earlier date, Clement would at least have recovered interest on the condemnation award for the interim period.[82] When this loss of interest is considered in addition to the expenses incurred and the lost opportunity income, it becomes apparent that the refusal of the court to find a de facto taking was onerous for the property owner.[83]

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concluding that the governmental activity did not deprive Clement of its possession, the court appears to have given little weight to the finding of fact, affirmed by the appellate division, that Clement had been forced, by the city's threat of condemnation, to move its business operation, and that the city's acts rendered the property unsuitable for the proper functioning of Clement's business. *Id.* at 252, 269 N.E.2d at 901-02, 321 N.Y.S.2d at 354-55.

80. Rose v. State, 24 N.Y.2d 80, 87, 246 N.E.2d 735, 739, 298 N.Y.S.2d 968, 975 (1969); *see* Marraro v. State, 12 N.Y.2d 285, 292-93, 189 N.E.2d 606, 609-11, 239 N.Y.S.2d 105, 109-10 (1963). *See also In re* Board of Water Supply, 277 N.Y. 452, 14 N.E.2d 789 (1938); Banner Milling Co. v. State, 240 N.Y. 533, 148 N.E. 668 (1925); New York, Ont. & W. Ry. v. Livingston, 238 N.Y. 300, 144 N.E. 589 (1924).

81. City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 249, 269 N.E.2d 895, 900, 321 N.Y.S.2d 345, 352 (1971); *see In re* Incorporated Village of Lynbrook, 75 Misc. 2d 678, 348 N.Y.S.2d 115 (Sup. Ct. 1973).

82. The interest award on a finding of de facto taking would have amounted to $459,603.86. City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 254, 269 N.E.2d 895, 903, 321 N.Y.S.2d 345, 356-57 (1971). While the sum is substantial, it should be noted that condemnation awards, in general, are not based upon prevailing bank interest rates. *See In re* Incorporated Village of Lynbrook, 75 Misc. 2d 678, 680, 348 N.Y.S.2d 115, 118 (Sup. Ct. 1973). Admittedly, recovery of interest, even at a lower rate, is preferable to a complete lack of recovery.

83. Commentators have suggested that the refusal of the courts to find de facto takings places an even heavier burden on a private homeowner, whose real property represents a major investment. In view of the necessity of adequate housing, and in reliance upon the official representations that the condemnation will occur quite rapidly, such homeowners are compelled to acquire other homes. Typically, they cannot afford to maintain two properties and may suffer if the condemnation is allowed to drag on interminably. *See* Kanner, *supra* note 9, at 806-07; 72

An even more important defect of the *Clement* decision is that it rewarded the government for its inefficiency and unwarranted delay in commencing condemnation proceedings, and penalized the private property owner for acting as a prudent businessman. Because it takes substantial time and resources to plan the move of a sizable business operation, Clement had no recourse but to rely on governmental communications regarding the date of the proposed taking. Although accurate information was never forthcoming from the city officials, the trial court found that Clement had waited to move " 'until the last possible moment that a prudent businessman could wait.' "[84] The court of appeals, nevertheless, refused to find that a de facto taking had occurred when Clement determined that it was compelled to transfer operations to a new plant. While it is true that a certain degree of diminution in value may be an incident of ownership assumed by a property owner, without ordering the government to provide full compensation for damages caused by its own delay, there is no incentive for the government to carry out public projects quickly and efficiently.[85] Furthermore, because the political function of the taking clause is to protect the rights of the individual against oppressive governmental activity, this misallocation of the financial burden of public projects plays havoc with fundamental private rights.[86]

Finally, although the *Clement* court attempted to formulate the de facto taking concept to facilitate judicial administration and application of the taking clause mandates, it is submitted that the court did not succeed in "clearly defining and firmly establishing" the concept.[87] The "direct legal restraint" and "physical invasion" tests have increased the ambiguity and uncertainty in an area of the law already fraught with confusion.[88] Examina-

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Colum. L. Rev. 772, 779-80 (1972). Moreover, it is becoming increasingly difficult for low income or middle income people to acquire or rent temporary housing. *See* Engelberg, *G.A.O. Details Rentals' Decline,* N.Y. Times, Nov. 18, 1979, § 8 (Real Estate), at 1, col. 1.

84. City of Buffalo v. J.W. Clement Co., 34 A.D.2d 24, 28, 311 N.Y.S.2d 98, 103 (4th Dep't 1970), *modified,* 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971). The court of appeals, however, noted that Clement had the right to remain in quiet possession for four or five additional years and that the impending condemnation was not the sole reason for Clement's move. The court also referred to Clement's desire to move to larger facilities to accommodate its expanding business. 28 N.Y.2d at 250-51, 269 N.E.2d at 900-01, 321 N.Y.S.2d at 353-54.

85. This factor should be relevant to decisions regarding de facto takings during the course of eminent domain or inverse condemnation proceedings. Recent studies conducted by SRI International, a research organization, confirm that the field of land use and building regulation is highly vulnerable to corruption and administrative inadequacies. National Institute of Law Enforcement & Criminal Justice, Law Enforcement Assistance Administration, U.S. Dep't of Justice, *Corruption in Land Use & Building Regulation* at iv-vi (vol. I 1979). The study notes several characteristics of housing, land use and urban development programs that make corruption, inefficiency, and ineffectiveness particularly inevitable. For example, standards are enunciated in idealistic and unrealistic terms, *id.* at 31, regulatory systems are highly complex, *id.* at 32, staffs of local government lack expertise, *id.*, and there is a large degree of official discretion that leaves many opportunities for politicians, planners, and private businessmen to exert influence on the programs. *Id.*

86. *See* notes 9-16 *supra* and accompanying text.

87. City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 247, 269 N.E.2d 895, 899, 321 N.Y.S.2d 345, 351 (1971).

88. *See* Magavern, *supra* note 37, at 294; 72 Colum. L. Rev. 772, 778-80 (1972); notes 9-18 *supra* and accompanying text.

tion of litigation subsequent to *Clement* reveals the inadequacies of that decision and the inequitable precedent that has become firmly embedded in New York law.

C. *The Direct Legal Restraint Test*

The *Clement* court stated that direct legal restraints are "laws which by their own force and effect, deprive owners of property or materially affect its beneficial use and free enjoyment."[89] Accordingly, a property owner should be able to establish a de facto taking by showing "a legal interference with the physical use, possession or enjoyment of the property or a legal interference with [the] power of disposition of the property."[90] Thus, the *Clement* direct legal restraint test defines a compensable de facto taking in terms that are used to determine the constitutionality of a statute or a police power regulation.[91] Such a definition is problematic for an aggrieved property owner, however, because under existing constitutional law, legitimate police power regulations that affect the value and use of private property rarely constitute compensable takings.[92] Furthermore, it is unlikely that a court applying New York precedent or statutory law would compensate private property owners for the impact of unconstitutional restrictions on property because the usual remedy is merely to declare the regulation or statute invalid.[93] Thus, a de facto taking should not be predicated on the same test used to determine the validity of a statute or police power regulation.

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89. 28 N.Y.2d at 256, 269 N.E.2d at 904, 321 N.Y.S.2d at 358.

90. *Id.* at 255, 269 N.E.2d at 903, 321 N.Y.S.2d at 357.

91. *Id.* at 253, 269 N.E.2d at 902, 321 N.Y.S.2d at 356. The court of appeals in *Clement* cited Keystone Assocs. v. Moerdler, 19 N.Y.2d 78, 224 N.E.2d 700, 278 N.Y.S.2d 185 (1966), and Forster v. Scott, 136 N.Y. 577, 32 N.E. 976 (1893), as cases that involved de facto takings.

92. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 125 (1978); City of Eastlake v. Forest City Enterprises, 426 U.S. 668, 674 n.8 (1976); Goldblatt v. Town of Hempstead, 369 U.S. 590, 593 (1962); Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928); Gorieb v. Fox, 274 U.S. 603, 608 (1927); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915); Reinman v. City of Little Rock, 237 U.S. 171, 176-77 (1915); Welch v. Swasey, 214 U.S. 91, 105 (1909); Mugler v. Kansas, 123 U.S. 623, 668-69 (1887); Modjeska Sign Studios, Inc. v. Berle, 43 N.Y.2d 468, 373 N.E.2d 255, 402 N.Y.S.2d 359 (1977); Whitmier & Ferris Co. v. State, 20 N.Y.2d 413, 230 N.E.2d 904, 284 N.Y.S.2d 313 (1967); Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967); New York State Thruway Auth. v. Ashley Motor Court, Inc., 10 N.Y.2d 151, 176 N.E.2d 566, 218 N.Y.S.2d 640 (1961).

93. *See* Charles v. Diamond, 41 N.Y.2d 318, 329, 360 N.E.2d 1295, 1303, 392 N.Y.S.2d 594, 603 (1977); Fred F. French Investing Co. v. City of N.Y., 39 N.Y.2d 587, 595, 350 N.E.2d 381, 386, 385 N.Y.S.2d 5, 9-10, *cert. denied*, 429 U.S. 990 (1976); Lutheran Church in America v. City of N.Y., 35 N.Y.2d 121, 123, 130-31, 316 N.E.2d 305, 307, 308, 311-12, 359 N.Y.S.2d 7, 9, 15-16 (1974); Golden v. Planning Bd., 30 N.Y.2d 359, 377, 285 N.E.2d 291, 301, 334 N.Y.S.2d 138, 151 (1972); Salamar Bldrs. Corp. v. Tuttle, 29 N.Y.2d 221, 224-26, 275 N.E.2d 585, 587-89, 325 N.Y.S.2d 933, 936-37 (1971). *But see* Keystone Assocs. v. State, 33 N.Y.2d 848, 850, 307 N.E.2d 254, 254, 352 N.Y.S.2d 194, 195 (1973) (Breitel, J., dissenting). Prof. Magavern adds: "[This] writer is not aware of, any prior New York case in which a regulatory measure was held to give rise to a valid claim to compensation on the ground that it had in effect taken private property interests for public use." Magavern, *supra* note 37, at 297.

This problem is highlighted by examining *Forster v. Scott*,[94] in which the New York Court of Appeals considered the constitutionality of a state statute providing that no compensation would be awarded for buildings erected on property after a municipality designated the property as a potential site for construction of a public road.[95] The court set forth the following test for determining the constitutionality of such a statute: "Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment, that materially affect its value, without legal process or compensation, it deprives him of his property within the meaning of the Constitution."[96] Thus, because the statute in *Forster* deprived the landowner of the right to develop his property, impaired the value of the property, and interfered with his rights of disposition, the court held that the statute was invalid as to that landowner.[97]

Similarly, *Keystone Associates v. Moerdler (Keystone I)*[98] involved a statute that created a private corporation vested with eminent domain power to appropriate the old Metropolitan Opera House (Old Met) for use as a public auditorium. The statute further provided that the City Superintendent of Buildings could refuse to issue a demolition permit for a period of 180 days at the request of the corporation, in order to ensure sufficient time to raise funds for the appropriation.[99] Keystone, which had previously leased the premises and agreed to demolish the Old Met to construct an office building, sought to compel the issuance of a demolition permit and to have the statute declared unconstitutional.[100] The court of appeals held that the statute was unconstitutional for two reasons: first, it was not a legitimate police power regulation because it was not intended to protect the public health, safety, or welfare, but merely permitted the appropriation of the Old Met;[101] second, it was not a valid eminent domain statute because it deprived the owner of the use of its property during the period of delay, but did not provide for just compensation.[102]

Thus, in both *Forster* and *Keystone I*, the court of appeals considered state restrictions on the uses of private property. In each of these cases the court simply declared the statutes invalid, but in neither case was compensation for

94. 136 N.Y. 577, 32 N.E. 976 (1893).

95. *Id.* at 582, 32 N.E. at 976-77. The *Forster* case involved a suit to enforce a contract for the sale of land warranted to be free of any encumbrances. On the date of closing, the defendant-purchaser refused to accept the deed tendered by the plaintiff-vendor on the ground the statute created an encumbrance on the property. The court determined that if the statute were valid, it would create an encumbrance on the realty. *Id.* at 583, 32 N.E. at 977.

96. *Id.* at 584, 32 N.E. at 977.

97. *Id.* at 584-85, 32 N.E. at 977-78.

98. 19 N.Y.2d 78, 224 N.E.2d 700, 278 N.Y.S.2d 135 (1966).

99. *Id.* at 85-86, 224 N.E.2d at 701-02, 278 N.Y.S.2d at 187-88. The events which led to the enactment of the statute are as follows: When the Metropolitan Opera Association moved from the Old Met into the new Lincoln Center for the Performing Arts in New York City, it entered into a lease with Keystone Associates, pursuant to which Keystone was to demolish the Old Met and build a modern office building. *Id.* The statute was intended to save the Old Met from destruction.

100. *Id.* at 86, 224 N.E.2d at 701, 278 N.Y.S.2d at 187.

101. *Id.* at 87, 224 N.E.2d at 702, 278 N.Y.S.2d at 188.

102. *Id.* at 89-90, 224 N.E.2d at 703-04, 278 N.Y.S.2d at 190.

a taking sought or considered as a remedy. Yet, both of these cases were cited by the *Clement* court as examples of de facto takings resulting from a direct legal restraint.[103] The *Clement* direct legal restraint test seems to suggest, therefore, that if a regulatory measure exceeds the limits of the police power, courts should find a de facto taking for which just compensation would be required in addition to declaring the measure invalid.[104] In fact, because the court of appeals was constrained by the repeated references in *Clement* to the circumstances of *Keystone I* as an example of a de facto taking, in *Keystone Associates v. State (Keystone II),*[105] the court took the unprecedented step of declaring that an unconstitutional statute effected a compensable "de facto taking" of private property.[106] In recognition that courts construing *Clement* were apt to confuse the metaphorical "taking" with a taking in reality, the court of appeals again endeavored to clarify the concepts of noncompensable police power regulations and compensable de facto takings in *Fred F. French Investing Co. v. City of New York.*[107]

In *French,* the city rezoned two private parks as public parks and thereby eliminated the only economically rewarding use of the property.[108] In an inverse condemnation action, the owner of the parks challenged the constitu-

103. 28 N.Y.2d at 254, 269 N.E.2d at 903, 321 N.Y.S.2d at 356.

104. *See* Magavern, *supra* note 37, at 295-96. Any suggestion that the *Clement* decision was intended to restrict the police power was dispelled by the court of appeals the following year in Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972). In that case, the court of appeals upheld a zoning ordinance prohibiting residential development of a parcel of property for at least 18 years. The court noted that "[t]he fact that the ordinance limits the use of, and may depreciate the value of the property will not render it unconstitutional, however, unless it can be shown that the measure is either unreasonable in terms of necessity or the diminution in value is such as to be tantamount to a confiscation." *Id.* at 381, 285 N.E.2d at 304, 334 N.Y.S.2d at 155.

105. 33 N.Y.2d 848, 307 N.E.2d 254, 352 N.Y.S.2d 194 (1973) (mem.), *aff'g,* 39 A.D.2d 176, 333 N.Y.S.2d 27 (3d Dep't 1972).

106. Keystone Associates sought damages for the temporary appropriation of its property during the operation of the statute held invalid in *Keystone 1. See* notes 98-102 *supra* and accompanying text. The appellate division, stating that "[d]oubt as to whether the trial court or this court could hold that as a matter of law there was no *de facto* appropriation is dispelled by the repeated references in [*Clement*] to the [*Keystone I*] case as an example of a *de facto* appropriation." Keystone Assocs. v. State, 39 A.D.2d 176, 178, 333 N.Y.S.2d 27, 29 (3d Dep't 1972). Over the dissent of Judge Breitel, the court of appeals affirmed the decision on the opinion of the appellate division. Judge Breitel commented that "there is no provision in precedent or statutory law for compensating owners of property because of the impact of unconstitutional legislation. . . . The rule laid down in this case is not only novel but may foretell a broad questionable policy providing a tort remedy for the harmful effects of unconstitutional legislation." 33 N.Y.2d at 850-51, 307 N.E.2d at 254, 352 N.Y.S.2d at 195. *But see* Badler, *Municipal Zoning Liability in Damages—A New Cause of Action,* 5 Urb. Law. 25, 25 (1973) (advocating provision of a damage remedy for landowners adversely affected by invalid zoning ordinances).

107. 39 N.Y.2d 587, 594, 350 N.E.2d 381, 385, 385 N.Y.S.2d 5, 8-9, *cert denied,* 429 U.S. 990 (1976). The court of appeals strived to articulate the precise distinction between exercises of the eminent domain power and police power regulations: "[W]hen the State 'takes', that is appropriates, private property for public use, just compensation must be paid. In contrast, when there is only regulation of the uses of private property, no compensation need be paid." 39 N.Y.2d at 593, 350 N.E.2d at 384, 385 N.Y.S.2d at 8.

108. *Id.* at 590-91, 350 N.E.2d at 382-83, 385 N.Y.S.2d at 6-7.

tionality of the zoning ordinance and claimed that the restriction on the use of the land constituted a taking for which compensation must be paid.[109] The *French* court held that the ordinance was void because it exceeded the limits of the police power, but did not warrant just compensation for a taking.[110]

Distinguishing an invalid police power regulation from a compensable taking, the court of appeals noted that a state regulation on property that deprives "the owner of the reasonable income productive or other private use of his property" and "thus destroys its economic value, or all but a bare residue of its value," violates due process of law,[111] but does not generally result in a taking for which compensation must be paid.[112] Applying the rules of *Clement*, the *French* court held that a compensable taking occurs only when there is "actual appropriation" by physical invasion or by governmental assumption of control or management, even though the owner may be deprived of many of the economic benefits of ownership.[113]

Thus, the *French* court clarified and limited the broad direct legal restraint test formulated in *Clement*. Regulations on use, such as zoning ordinances, which are valid exercises of the police power, are excluded from the category. In addition, regulations that exceed the permissible limits of the police power do not result in compensable de facto takings unless the measure contemplates eventual acquisition, or causes physical encroachment by the government.[114]

The recent court of appeals decision in *Spears v. Berle*[115] represents the continuing efforts of the New York Court of Appeals since *Clement* to

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109. *Id.* at 590, 350 N.E.2d at 382, 385 N.Y.S.2d at 6.

110. *Id.* at 595, 597, 350 N.E.2d at 386, 387, 385 N.Y.S.2d at 9-10, 11.

111. *Id.* at 593-96, 350 N.E.2d at 385-87, 385 N.Y.S.2d at 8-10.

112. *Id.* at 593-94, 350 N.E.2d at 384-85, 385 N.Y.S.2d at 8. When a regulatory measure is challenged, the remedy sought is to have the measure declared invalid, either generally or with respect to the particular plaintiff. *See* cases cited notes 92-93 *supra*. The exception to this rule is when compensation is paid pursuant to a regulating measure that is intended to effectuate government ownership of the property. Keystone Assocs. v. State, 33 N.Y.2d 848, 307 N.E.2d 254, 352 N.Y.S.2d 194 (1973) (mem.), *aff'g*, 39 A.D.2d 176, 333 N.Y.S.2d 27 (3d Dep't 1972), discussed at notes 105-106 *supra*. In addition, when the government in connection with a regulation has encroached upon the land in a trespassory sense, a taking by physical invasion or ouster may be found and just compensation will be awarded. Fred F. French Investing Co. v. City of N.Y., 39 N.Y.2d at 594-95, 350 N.E.2d at 385, 385 N.Y.S.2d at 9. *See* Costonis, *supra* note 9, at 1035.

113. 39 N.Y.2d at 595, 350 N.E.2d at 386, 385 N.Y.S.2d at 9-10.

114. In making this determination, the *French* court was greatly influenced by Prof. Costonis. *See* Costonis, *supra* note 9, at 1035. For an exhaustive treatment of the conflict between police power regulations and eminent domain, see Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 Stan. L. Rev. 1439 (1974).

115. No. 373 (N.Y. Oct. 18, 1979). Claimants applied to the Commissioner of Environmental Conservation for a permit allowing extraction of humus, sand, and stone from the wetlands. The commissioner denied the application after a public hearing during which undisputed evidence demonstrated that the proposed mining activities would lead to all but complete destruction of the wetlands. Although petitioners conceded during the hearing that a grant of the permit would be inconsistent with the purposes of wetland regulation, the claimant contended that mining was the only use of the property which would produce a reasonable economic return. Claimant then sought an order directing the commissioner to issue the permit, or to institute condemnation proceedings. *Id.*, slip op. at 2.

formulate a "bright-line standard" for determining whether a statute has placed "such an onerous burden on [property] that a taking must be deemed to have occurred."[116] In *Spears*, the court applied the rules of *French* to the Freshwater Wetlands Act.[117] This statute empowers the government to designate certain properties as wetlands[118] and to prohibit any use of such land that would interfere with wetland ecology.[119] The statute further provides that if the regulation of a particular parcel has become so rigorous as to result in a taking, the Commissioner of Environmental Conservation may either institute condemnation proceedings or issue a permit to allow the use.[120] The inclusion of this remedy for the aggrieved property owner obviated the court's declaring the constitutionality of the statute.[121]

To determine whether the operation of a statute is confiscatory, *Spears* used the test that the *French* court used to determine the constitutionality of a statute.[122] Thus, to satisfy the burden of proof that the operation of a statute, expressly authorizing condemnation, has resulted in a compensable taking of the affected property, *Spears* requires the landowner to "produce 'dollars and cents' evidence . . . that the economic value, or all but a bare residue of the value, of the parcel has been destroyed . . . ."[123] Therefore, if the challenged statute specifically contemplates the acquisition of property or is an "avowed taking statute,"[124] such as the statute in *Spears*, economic evidence that the regulation of the property is excessive may now be the basis of a de facto taking.

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116. *Id.* at 5-6.

117. N.Y. Envir. Conserv. Law §§ 24-0101 to -1305 (McKinney Supp. 1979-80).

118. *Id.* § 24-0301. This section authorizes the Commissioner of Environmental Conservation to conduct a study of freshwater wetlands within the state of New York and to identify those that are of unusual local importance. *Id.*

119. *Id.* § 24-0701. Property identified by the commissioner as freshwater wetlands becomes subject to stringent regulation. Certain uses, such as fishing, hunting, trapping, farming, and grazing, are permitted as of right. *Id.* § 24-0701(3), (4). Other activities may be conducted only if a permit is obtained. *Id.* § 24-0701(1).

120. *Id.* § 24-0705(7).

121. No. 373, slip op. at 4.

122. *See* Fred F. French Investing Co. v. City of N.Y., 39 N.Y.2d 587, 596, 350 N.E.2d 381, 386, 385 N.Y.S.2d 5, 10, *cert. denied*, 429 U.S. 990 (1976); *e.g.*, Lutheran Church in America v. City of N.Y., 35 N.Y.2d 121, 130, 316 N.E.2d 305, 311, 359 N.Y.S.2d 7, 15 (1974); Vernon Park Realty, Inc. v. City of Mt. Vernon, 307 N.Y. 493, 499, 121 N.E.2d 517, 519-20 (1954); Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 232, 15 N.E.2d 587, 592 (1938).

123. Spears v. Berle, No. 373, slip op. at 7 (N.Y. Oct. 18, 1979).

124. This term was used by the court of appeals in Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974), to distinguish between statutes that are mere police power regulations of property and statutes that are intended to result in the eventual acquisition of the property by the government. *Id.* at 130, 316 N.E.2d at 311, 359 N.Y.S.2d at 15. For an example of the latter type of statute, see Keystone Assocs. v. Moerdler, 19 N.Y.2d 78, 224 N.E.2d 700, 278 N.Y.S.2d 185 (1966); *cf.* Charles v. Diamond, 41 N.Y.2d 318, 330-31, 360 N.E.2d 1295, 1304-05, 392 N.Y.S.2d 594, 604 (1977). In *Charles v. Diamond*, a landowner brought an action against village and state officials, alleging that the village had unreasonably delayed making improvements to its sewer system. These improvements were necessary before the state would allow the village to permit a developer to hook up his proposed apartment development to the sewer system. The landowner alleged that the actions of the county and the village were "arbitrary and capricious, resulting in an unconstitutional appropriation of his property without compensation." *Id.* at 320, 360 N.E.2d at 1298, 392 N.Y.S.2d at 597. The

It is apparent that the *Clement* court erred in devising a "direct legal restraint" test for a de facto taking that is linguistically and conceptually broad enough to encompass police power regulations.[125] Even though this test was later clarified in *French* and *Spears,* several substantial problems remain. First, it seems illogical to invalidate a statute or regulation because it deprives a private owner of all the income productive uses of his property during the operation of the statute, and yet deny the owner any compensation unless the statute is an "avowed taking statute."[126] Furthermore, it is highly unlikely that a New York court would award damages for an unconstitutional police power measure in the absence of a statute or regulation such as the one in *Spears,* that specifically provides for compensation if it effects a de facto taking or results in property damage.[127] Perhaps such statutory provisions are the type of solution called for by the court of appeals in *French,* when the court stated that "new ideas and new standards of constitutional tolerance must and will evolve . . . [to solve the taking problem] without placing an impossible or unsuitable burden on the individual property owner, the public fisc, or the general taxpayer."[128] In fact, many commentators have asserted

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narrow issue presented was whether a village sewer ordinance was being applied to his property unconstitutionally. The remedy, if such were the case, would be to invalidate the regulation, not to award temporary or permanent damages. *Id.* at 330-31, 360 N.E.2d at 1303-04, 392 N.Y.S.2d at 603-04. The court reasoned that "absent a taking of property, the courts may not impose liability damages [for misjudgment or indiscretion by municipal officials] particularly when the imposition appears to be more punitive than compensatory. The courts should not use the threat of money sanctions to whip government into providing municipal improvements." *Id.* at 332, 360 N.E.2d at 1305, 392 N.Y.S.2d at 605.

125. *See* Magavern, *supra* note 37, at 294-95. "Almost any zoning ordinance and many other police power measures would fall within the literal scope of the language used." *Id.* at 295.

126. *See* Charles v. Diamond, 41 N.Y.2d 318, 329-32, 360 N.E.2d 1295, 1303-05, 392 N.Y.S.2d 594, 603-05 (1977); Fred F. French Investing Co. v. City of N.Y., 39 N.Y.2d 587, 597, 350 N.E.2d 381, 387, 385 N.Y.S.2d 5, 11, *cert. denied,* 429 U.S. 990 (1976).

127. *See* Spears v. Berle, No. 373, (N.Y. Oct. 18, 1979); cases cited at note 94 *supra. But see* Keystone Assocs. v. State, 33 N.Y.2d 848, 307 N.E.2d 254, 352 N.Y.S.2d 194 (1973) (mem.), *aff'g,* 39 A.D.2d 176, 333 N.Y.S.2d 27 (3d Dep't 1972). Although the *Keystone* decisions have been characterized as "bedrock law," the court of appeals refused to extend it to situations not involving government trespass. Charles v. Diamond, 41 N.Y.2d 318, 331, 360 N.E.2d 1295, 1305, 392 N.Y.S.2d 594, 604 (1977); *see* note 93 *supra* and accompanying text.

128. 39 N.Y.2d at 600, 350 N.E.2d at 389, 385 N.Y.S.2d at 13. It has been suggested that one way to deal with this problem would be an amendment to the state constitution to provide compensation for property "taken or damaged." Fisher v. City of Syracuse, 46 A.D.2d 216, 219, 361 N.Y.S.2d 773, 776 (4th Dep't 1974) (Goldman, J., concurring), *appeal denied,* 36 N.Y.2d 642, 368 N.Y.S.2d 1025, *cert. denied,* 423 U.S. 833 (1975). The following 26 state constitutions already allow compensation for property damaged as well as property that is taken: Ala. Const. art. XII, § 235; Alaska Const. art. I, § 18; Ariz. Const. art. 2 § 17; Ark. Const. art. 2, § 22; Cal. Const. art. 1 § 14; Colo. Const. art. II, § 15; Ga. Const. art. I, § III, ¶ 1; Ill. Const. art. 1, § 15; Ky. Const. § 242; La. Const. art. 1, § 2; Minn. Const. art. 1, § 13; Miss. Const. art. 3, § 17; Mo. Const. art. 1, § 26; Mont. Const. art. III, § 14; Neb. Const. art. I, § 21; N.M. Const. art. II, § 20; N.D. Const. art. I, § 14; Okla. Const. art. 2, § 24; Pa. Const. art. 1, § 10; S.D. Const. art. VI, § 13; Tex. Const. art. 1, § 17; Utah Const. art. I, § 22; Va. Const. art. I, § 11; Wash. Const. art. 1, § 16; W. Va. Const. art. 3, § 9; and Wyo. Const. art. 1, § 33. In addition, Prof. Costonis has suggested a "middle way" that provides for "fair compensation" of the property owner for the adverse economic or aesthetic effects of government regulation without paying for a total

that the eminent domain/police power dichotomy is unfair and unrealistic and that this "all or nothing approach" to just compensation should be rejected altogether.[129]

Second, the direct legal restraint test as now formulated does not recognize that less formal legal actions such as denial of building permits,[130] strict enforcement of building codes,[131] and inclusion of property within an official street map,[132] can "directly or indirectly" interfere with the use, enjoyment, and possession of property and result in extreme hardship for the property owner. Nevertheless, because these actions do not amount to "avowed taking statutes," the landowners are without remedy unless eminent domain proceedings are instituted, and even then would be unable to prevail on a de facto taking claim.[133]

Finally, the New York approach to de facto takings now depends upon physical invasion of private property because the direct legal restraint test has been narrowly limited to appropriation statutes. There are, however, significant problems with the New York physical invasion test as well.

D. *The Physical Invasion Test*

According to *Clement,* a de facto taking by physical invasion requires "a physical entry by the condemnor [or] a physical ouster of the owner" that amounts to an "assertion of dominion and control" over the private property.[134] It is submitted that these categories of governmental activity are too narrow to encompass the range of government actions that can effectively deprive private owners of the reasonable and beneficial uses of their property.

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appropriation of property. Costonis, *The Disparity Issue: A Context for the* Grand Central Terminal *Decision,* 91 Harv. L. Rev. 402, 405-09 (1977). *See also* Tomain, *supra* note 9. The recent Supreme Court decision in Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978), is an example of an accomodation between the police power and eminent domain power. In *Penn Central,* the Supreme Court denied the owner of Grand Central Terminal the right to build a modern office building over the terminal, but awarded it development rights that could be transferred to other parcels of property. "While these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on [the property owners] and, for that reason, are to be taken into account in considering the impact of regulation." 438 U.S. at 137. Prof. Costonis suggests that such programs overcome the deficiencies of the eminent domain/police power dichotomy by joining legitimate police power regulations with some form of compensation that affords an equitable return on the affected property. Costonis, *supra,* at 403.

129. *See* Berger, *supra* note 18, at 165; Costonis, *supra* note 9, at 1022; Michelman, *supra* note 9, at 1167; Sax I, *supra* note 10, at 61-64; Sax II, *supra* note 13, at 149-51; Tomain, *supra* note 9, at 309.

130. *See, e.g.,* City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 253, 269 N.E.2d 895, 902, 321 N.Y.S.2d 345, 356 (1971); Ton-Da-Lay, Ltd. v. State, 70 A.D.2d 742, 416 N.Y.S.2d 895 (3d Dep't 1979).

131. *See, e.g.,* 76 Crown St. Corp. v. City of N.Y., 35 A.D.2d 1005, 317 N.Y.S.2d 978 (2d Dep't 1970).

132. *See, e.g.,* Jensen v. City of N.Y., 42 N.Y.2d 1079, 369 N.E.2d 1179, 399 N.Y.S.2d 645 (1977) (mem.).

133. *See* Fisher v. City of Syracuse, 46 A.D.2d 216, 361 N.Y.S.2d 773 (4th Dep't 1974), *appeal denied,* 36 N.Y.2d 642, 368 N.Y.S.2d 1025, *cert. denied,* 423 U.S. 833 (1975).

134. 28 N.Y.2d at 255, 269 N.E.2d at 903, 321 N.Y.S.2d at 357.

Moreover, the physical invasion test is based on vague property law notions which do not adequately reflect the reality of contemporary land use situations.[135]

1. Physical Entry

The essential criterion of the physical entry test is that the entry be permanent or continuous.[136] For example, when a state contractor entered an owner's land without permission and constructed a drainage ditch, the court found a de facto taking because the ditch constituted an invasion of a permanent and continuous nature.[137]

In contrast, a physical entry that amounts only to a temporary intrusion is not sufficient to constitute a de facto taking.[138] When government surveyors temporarily entered land for the purpose of making a survey, for example, and the entry caused only incidental damage, there was no de facto taking.[139] Similarly, when the government temporarily piled construction materials from an adjacent construction site against an owner's building, there was no de facto taking.[140] In each of these cases, the government's physical entry lacked the "degree of dominion and control indicative of a taking."[141]

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135. Prof. Michelman suggests that "only those trespassory acts which are implicitly assertive of ownership—in the sense necessary to ground an action of ejectment or to start running the statutory period for acquisition of title by adverse possession—amount to such physical invasions as automatically, without further inquiry, require a compensation payment." Michelman, *supra* note 9, at 1228, n.110. Prof. Dunham suggests that a "taking occurs when interference with the owner's use has occurred to such an extent that an easement by prescription will rise by lapse of time." Dunham, *supra* note 9, at 87. *See also* National Institute of Law Enforcement & Criminal Justice, Law Enforcement Asst. Admin., U.S. Dep't of Justice, *Corruption in Land Use & Building Regulation* at v (vol. I 1979) (land use "regulations to be enforced lag far behind the state of the art."). In short, most concepts and procedures associated with eminent domain were developed in an agrarian society that do not apply readily in an urban society with an increasingly complex economy. *See* Costonis, *supra* note 9, at 1038 & n.69.

136. *See* Hylan Flying Serv., Inc. v. State, 54 A.D.2d 278, 388 N.Y.S.2d 444 (4th Dep't 1976); O'Brien v. City of Syracuse, 54 A.D.2d 186, 388 N.Y.S.2d 866 (4th Dep't 1976); New York State Elec. & Gas Corp. v. Meredith, 63 Misc. 2d 319, 313 N.Y.S.2d 216 (Sup. Ct. 1970).

137. Hylan Flying Serv., Inc. v. State, 54 A.D.2d 278, 388 N.Y.S.2d 444 (4th Dep't 1976). Similarly, when the state paved a parcel of land which was adjacent to a public highway to widen the road, a de facto taking was found because the state took permanent possession of that property. Rochford v. State, 153 Misc. 239, 274 N.Y.S. 656 (Ct. Cl. 1934), *aff'd*, 245 A.D. 794, 282 N.Y.S. 254 (3d Dep't 1935). In addition, when the government entered land to construct a canal, Utley v. Hayden, 6 Hill 359 (Sup. Ct. 1844), or a highway, Leeds v. State, 20 N.Y.2d 701, 229 N.E.2d 446, 282 N.Y.S.2d 767 (1967); Lambert v. State, 30 A.D.2d 582, 290 N.Y.S.2d 412 (3d Dep't 1968) (mem.); Kahn v. State, 27 A.D.2d 476, 280 N.Y.S.2d 268 (3d Dep't 1967), de facto takings were found to have occurred.

138. O'Brien v. City of Syracuse, 54 A.D.2d 186, 388 N.Y.S.2d 866 (4th Dep't 1976).

139. King v. Power Auth., 44 A.D.2d 74, 353 N.Y.S.2d 547 (3d Dep't 1974); Edwards v. Law, 63 A.D. 451, 71 N.Y.S. 1097 (2d Dep't 1901); New York State Envir. Facilities Corp. v. Young, 66 Misc. 2d 299, 320 N.Y.S.2d 821 (Sup. Ct. 1971). However, if the surveyors cut a path through the forest for the purpose of establishing a permanent base line, then the entry and occupation would constitute a de facto taking. Litchfield v. Bond, 186 N.Y. 66, 79, 78 N.E. 719, 724 (1906).

140. O'Brien v. City of Syracuse, 54 A.D.2d 186, 388 N.Y.S.2d 866 (4th Dep't 1970).

141. *Id.* at 189, 388 N.Y.S.2d at 869. The landowner, however, is not necessarily remediless.

2. Physical Ouster

As in the case of physical entry, not every instance of "physical ouster"[142] of the owner constitutes a de facto taking. For example, when the state acquired an easement across a portion of an owner's property and thereby blocked access to the remainder, a de facto taking of the remainder was found.[143] However, when some continuous, albeit limited, access was available, the ouster was not complete, and a de facto taking of the remainder was not found.[144] The essential criterion, therefore, is that the owner be completely deprived of possession by the actions of the government.

Thus, New York courts define a de facto taking from the perspective of the specific government action that is challenged, rather than from a consideration of the effects of the government action on the private property. There are instances, however, in which governmental activity, although falling short of physical invasion, amounts to an "assertion of dominion and control over the property," by causing substantial decreases in the value of property and interference with its use.[145] It is submitted that by focusing on the extent of physical invasion and by insufficiently emphasizing the effect of governmental activity on property values and uses, the New York approach unjustly forces a private owner to bear losses that should be shared by the public. The unfairness of the New York approach is typified by *Fisher v. City of Syracuse*.[146]

In the *Fisher* case, although more than ten years had passed since the commencement of an urban renewal plan, the plaintiff's property located within the area of the plan, had not yet been condemned.[147] Some of the buildings in the area had already been condemned by the city, and were demolished or boarded up. The plaintiff alleged that as a result of the city's activities, his tenants moved, he lost substantial rental income, and the value of his property drastically declined.[148] Accordingly, the plaintiff sought

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Even though the unauthorized entry lacks the degree of permanence or continuity to constitute a de facto taking, the landowner may obtain compensation for damages in an action for trespass. *Id.* at 188, 388 N.Y.S.2d at 869.

142. "Ouster" is defined as "[a] species of injuries to things real, by which the wrong-doer gains actual occupation of the land, and compels the rightful owner to seek his legal remedy in order to gain possession. Black's Law Dictionary 1253 (rev. 4th ed. 1957). "Actual ouster" does not require "a physical eviction, but a possession attended with such circumstances as to evince a claim of exclusive right and title, and a denial of the right of [others] to participate in the profits." *Id.* It is unclear which definition is followed by the New York courts.

143. Kravec v. State, 40 N.Y.2d 1060, 360 N.E.2d 925, 392 N.Y.S.2d 246 (1976); Lorig v. State, 58 A.D.2d 734, 396 N.Y.S.2d 122 (4th Dep't 1977); Clark v. State, 20 A.D.2d 182, 245 N.Y.S.2d 787 (4th Dep't 1964), *aff'd*, 15 N.Y.2d 990, 207 N.E.2d 606, 260 N.Y.S.2d 10 (1965); Jafco Realty Corp. v. State, 18 A.D.2d 74, 238 N.Y.S.2d 66 (4th Dep't 1963), *aff'd*, 14 N.Y.2d 556, 198 N.E.2d 39, 248 N.Y.S.2d 651 (1964).

144. Burns v. State, 63 A.D.2d 848, 405 N.Y.S.2d 853 (4th Dep't 1978).

145. *See* Department of Public Works v. Town of Hornellsville, 41 A.D.2d 685, 342 N.Y.S.2d 632 (4th Dep't 1973).

146. 78 Misc. 2d 124, 355 N.Y.S.2d 239 (Sup. Ct.), *aff'd*, 46 A.D.2d 216, 361 N.Y.S.2d 773 (4th Dep't 1974), *appeal denied*, 36 N.Y.2d 642, 368 N.Y.S.2d 1025, *cert. denied*, 423 U.S. 833 (1975).

147. *Id.* at 126, 355 N.Y.S.2d at 240-41.

148. *Id.* at 127, 355 N.Y.S.2d at 242.

damages for the lost income, diminution in property value, and increased insurance and maintenance expenses, alleging that the city's actions violated the due process and equal protection clauses of the state and federal constitutions.[149] The trial court held that the plaintiff was not entitled to be compensated for damages absent a de jure or de facto taking and dismissed the complaint for failure to state a cause of action.[150]

Under the New York approach, the court could not find a de facto taking of Fisher's property although there was an intention to condemn, because the government had neither physically entered the property or ousted the owner from possession, nor had it engaged in any activity amounting to an assertion of dominion and control. Thus, Fisher could not prevail in an inverse condemnation action; nor could he recover damages in a trespass action. Furthermore, he could not recover condemnation blight damages because the city never completed formal condemnation proceedings,[151] and even in that event, Fisher could not have recovered the lost rentals, increased maintenance, or taxes paid during the ten-year period the urban renewal project dragged on.[152] The inequity of this result was expressed by Justice Goldman who concurred in the appellate division's dismissal of Fisher's complaint:

> It is of little comfort to tell these [property owners] that, . . . 'you have been damaged but that damage is without wrong. True, your properties are now in a vast waste land, without tenants, neither desirable for residential nor commercial use, deteriorating daily but, unfortunately, under the present state of the law you have no recourse.'[153]

The long range implications of *Fisher* are even more disconcerting than its immediate result. The New York courts' denial of a remedy to landowners such as Fisher, may leave them with no other recourse but to stop paying taxes and abandon their property to the government.[154] This reaction to inordinate governmental delay and inefficiency appears to be justified from the point of view of the property owner: he is receiving no rental income from the property, but insurance and maintenance costs are rising; if he awaits formal condemnation, his losses will be greater because the best he can do is

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149. *Id.*

150. *Id.* at 129, 130, 355 N.Y.S.2d at 243, 245. The judgment of the trial court was affirmed by the appellate division. Fisher v. City of Syracuse, 46 A.D.2d 216, 361 N.Y.S.2d 773 (4th Dep't 1974), *appeal denied,* 36 N.Y.2d 642, 368 N.Y.S.2d 1025, *cert. denied,* 423 U.S. 833 (1975).

151. "[C]ondemnation blight is not a cause of action." *Id.* at 128, 355 N.Y.S.2d at 243.

152. *See In re* Incorporated Village of Lynbrook, 75 Misc. 2d 678, 348 N.Y.S.2d 115 (Sup. Ct. 1973); notes 43-51 *supra* and accompanying text.

153. Fisher v. City of Syracuse, 46 A.D.2d 216, 219, 361 N.Y.S.2d 773, 776 (4th Dep't 1974), *appeal denied,* 36 N.Y.2d 642, 368 N.Y.S.2d 1025, *cert. denied,* 423 U.S. 833 (1975).

154. *See, e.g.,* Archer Gardens, Ltd. v. Brooklyn Center Dev. Corp., 468 F. Supp. 609 (S.D.N.Y. 1979); Kanner, *supra* note 9, at 798. In *Archer Gardens,* owners of property in an area designated for urban renewal, alleged that the city conspired and misused condemnation powers to delay the date of acquisition in order to acquire the property through tax foreclosure sales at lower prices, rather than by condemnation proceedings. The claimants asserted that the continuing threat of condemnation rendered them unable to generate income from their property by sale or lease, and thus, they were unable to meet their tax obligations. 468 F. Supp. at 611. The district court held that the allegations "must be construed to state a claim of taking without just compensation in violation of the Constitution." *Id.* at 613.

introduce evidence of condemnation blight which does not compensate him for lost rents, taxes and lost opportunity income.[155] Alternatively, rather than abandonment, the aggrieved owner may decide to minimize his losses by accepting a low offer from the government when it attempts to negotiate a purchase of his property.[156] Thus, the government would acquire the property at a much lower cost than originally anticipated in planning condemnation or other public projects, and the cost of the project is shifted from the public to the private individual. When this shifting is the result of governmental mismanagement it is submitted that the costs should be borne by the public for two reasons: first, to act as a disincentive for governments that may "drag their heels" in condemning property or effectuating public improvements; second, to fulfill the function of the taking clause to protect and secure the rights of the individual from oppressive government action.

In sum, the New York definition of de facto taking produces harsh and often unfair results because the economic impact of governmental activity is essentially irrelevant. A better approach is to define de facto taking in such a way that both the actions of the government and their effect on the value of property are taken into consideration. This is the approach developed by the courts of Michigan.

III. THE MICHIGAN APPROACH

Under the Michigan approach, a de facto taking is found when the government has "by deliberate acts reduce[d] the value of private property and thereby deprive[d] the owner of just compensation."[157] The Michigan

155. *See, e.g.*, City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971); *In re* Incorporated Village of Lynbrook, 75 Misc. 2d 678, 348 N.Y.S.2d 115 (Sup. Ct. 1973).

156. *See* Amen v. City of Dearborn, 363 F. Supp. 1267, 1272 (E.D. Mich. 1973), *rev'd on other grounds*, 532 F.2d 554 (6th Cir. 1976); Kanner, *supra* note 9, at 798; Comment, *De Facto Taking and Municipal Clearance Projects: City Plan or City Scheme?*, 9 Urb. L. Ann. 317 (1975).

157. City of Detroit v. Cassese, 376 Mich. 311, 317, 136 N.W.2d 896, 900 (1965). While the Michigan Supreme Court does not use the term "de facto taking" in its opinion, it is clear that the same concept is involved. The court refers to situations in which the action of the government "is such as to amount to a taking of private property, even though there is no eminent domain proceeding." *Id.* at 315, 136 N.W.2d at 898. The more flexible approach was first accepted by the Sixth Circuit. Foster v. City of Detroit, 405 F.2d 138 (6th Cir. 1968), *aff'g*, 254 F. Supp. 655 (E.D. Mich. 1966); Amen v. City of Dearborn, 363 F. Supp. 1267 (E.D. Mich. 1973); *rev'd on other grounds*, 532 F.2d 554 (6th Cir. 1976); Madison Realty Co. v. City of Detroit, 315 F. Supp. 367 (E.D. Mich. 1970); Ellis v. City of Grand Rapids, 257 F. Supp. 564 (W.D. Mich. 1966). Subsequently however, the Sixth Circuit appeared to limit its application of a more liberal approach to cases involving an "abuse of eminent domain." Sayre v. City of Cleveland, 493 F.2d 64, 69 (6th Cir.), *cert. denied*, 419 U.S. 837 (1974); Woodland Mkt. Realty Co. v. City of Cleveland, 426 F.2d 955, 958 (6th Cir. 1970). The First Circuit does not appear to follow the more liberal approach. In Ortega Cabrera v. Municipality of Bayamon, 562 F.2d 91 (1st Cir. 1977), the court held that "substantial economic loss and significant diminution in value alone do not establish compensable takings." *Id.* at 100. Moreover, "government action which interferes with the value of land only by making it less desirable for its present uses does not effect a taking, notwithstanding the fact that speculative future business opportunities may have been destroyed." *Id.* at 101; *accord*, Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956, 963 (1st Cir. 1972). The Second Circuit courts also appear to follow the more liberal approach. *See* Jimmie's Inc. v. City of West Haven, 436 F.2d 1339 (2d Cir.), *cert. denied*, 403 U.S. 931 (1971);

approach is based on a liberal interpretation of the constitutional term "taking."[158] The commitment of the Michigan courts to eschew a narrow construction of the constitutional guarantee of just compensation was evident in 1889 when in *Pearsall v. Board of Supervisors,*[159] the court stated: "the term 'taking,' should not be used in an unreasonable or narrow sense. . . . [I]t should include cases where the value is destroyed by the action of the government, or serious injury is inflicted to the property itself, or exclusion of the owner from its enjoyment, or from any of the appurtenances thereto."[160] Thus, if an individual's property rights are interfered with, damaged, or destroyed by the activities of the government, the Michigan courts regard the damage or destruction as a taking for which the owner is entitled to just compensation.[161]

To establish a de facto taking under the Michigan approach, a property

Archer Gardens, Ltd. v. Brooklyn Cent. Dev. Corp., 468 F. Supp. 609 (S.D.N.Y. 1979); Katz v. State of Conn., 307 F. Supp. 480 (D. Conn. 1969), *aff'd,* 433 F.2d 878 (2d Cir. 1970); Haczela v. City of Bridgeport, 299 F. Supp. 709 (D. Conn. 1969). While not discounting the importance of physical occupation by government to establish a taking, the Third Circuit rejects a formalistic approach to the taking question. *See* Lehigh & New Eng. Ry. v. ICC, 540 F.2d 71 (3d Cir. 1976), *cert. denied,* 429 U.S. 1061 (1977); Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709 (D.N.J. 1976). In Donohoe Constr. Co. v. Montgomery County Council, 567 F.2d 603 (4th Cir. 1977), *cert. denied,* 438 U.S. 905 (1978), the Fourth Circuit declined to apply the liberal definition of de facto taking. In *Donohoe,* the government decided to acquire plaintiff's property to build a recreation center sometime in the future. *Id.* at 606. To prevent the plaintiff from carrying out its plans to construct a fourteen-story office building, the government rejected plaintiff's application for a building permit and "downzoned" the area. *Id.* at 607-08. The court held that such government actions were not such an abuse of the condemnation power as to constitute a de facto taking. *Id.* at 609. Rather than attempting to explore the esoteric question whether there can be a "taking without a touching," the Fifth Circuit has held that a diminution in value is not enough to constitute a taking, and that the "*sine qua non* of a constitutional taking is a loss occasioned by an intrusion, interference or encroachment of some degree upon the private property owner's *rights* in his property." Florida E. Coast Props., Inc. v. Metropolitan Dade County, 572 F.2d 1108, 1111 (5th Cir.), *cert. denied,* 439 U.S. 894 (1978) (emphasis in original); *see* Chacon v. Granata, 515 F.2d 922, 925 (5th Cir.), *cert. denied,* 423 U.S. 930 (1975). The Seventh Circuit has not adopted the more flexible approach to the taking issue. In Schoone v. Olsen, 427 F. Supp. 724 (E.D. Wis. 1977), the plaintiffs claimed the proposed redevelopment of a blighted urban area caused them to lose tenants and deprived them of the use of their property. Granting a motion for summary judgment, the court stated that the evidence did not indicate "a taking in either the legal or constitutional sense. It did not constitute a condemnation of the plaintiffs' property or an illegal denial of their right to use and enjoy their property." *Id.* at 725. The Eighth and Ninth Circuits follow the more liberal approach. Thomas W. Garland, Inc. v. City of St. Louis, 596 F.2d 784 (8th Cir. 1979); Richmond Elks Hall Ass'n v. Richmond Redev. Agency, 561 F.2d 1327 (9th Cir. 1977). The Tenth Circuit does not require an actual physical invasion to find that the government has taken private land and must, therefore, pay just compensation. *See* United States v. City of Pawhuska, 502 F.2d 821 (10th Cir. 1974); C.F. Lytle Co. v. Clark, 491 F.2d 834 (10th Cir. 1974). The more flexible approach has not been followed in the District of Columbia Circuit. *See* Goddard v. Dist. of Columbia Redev. Land Agency, 287 F.2d 343 (D.C. Cir.), *cert. denied,* 366 U.S. 910 (1961). The court of claims has expressed agreement with the flexible approach. *See* Benenson v. United States, 548 F.2d 939 (Ct. Cl. 1977); Drakes Bay Land Co. v. United States, 424 F.2d 574 (Ct. Cl. 1970).

158. Thom v. State Highway Comm'r, 376 Mich. 608, 613, 138 N.W.2d 322, 323 (1965).

159. 74 Mich. 558, 42 N.W. 77 (1889) (road closing case).

160. *Id.* at 561, 42 N.W. at 77-78.

161. *Id.* at 562, 42 N.W. at 78.

owner must present evidence of (1) deliberate government action or inaction, which causes (2) a significant diminution in the value of the property.[162] The claim of de facto taking arises in two types of cases: first, in an eminent domain proceeding when the condemnee is attempting to prove an earlier date of taking,[163] and second, in an inverse condemnation case when the aggrieved property owner is seeking to compel the government to appropriate its property or to receive compensation for damage due to governmental activity.[164]

In the eminent domain proceeding if the Michigan property owner can establish sufficient deliberate governmental activity and diminution of property value to constitute a de facto taking, the jury is permitted to determine the exact date of the taking and to ascertain the market value of the property as of that date.[165] In these cases, the condemnee is awarded market value as determined by the jury, reimbursement for taxes, maintenance, and insurance paid after the date of taking fixed by the jury, less any income received during the period prior to the jury's verdict.[166] In addition, interest is computed from the date of the de facto taking to the date of the award.[167]

In Michigan inverse condemnation actions, on the other hand, the owner seeks compensation in the court of claims for the damage done to property by the actions of the government.[168] It is not necessary, however, for the

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162. *See* Thom v. State Highway Comm'r, 376 Mich. 608, 628, 138 N.W.2d 322, 331 (1965); City of Detroit v. Cassese, 376 Mich. 311, 317, 136 N.W.2d 896, 900 (1965); Heinrich v. City of Detroit, 90 Mich. App. 692, 699, 282 N.W.2d 448, 451-52 (1979); Detroit Bd. of Educ. v. Clarke, 89 Mich. App. 504, 508, 280 N.W.2d 574, 576 (1979); City of Muskegon v. DeVries, 59 Mich. App. 415, 419, 229 N.W.2d 479, 483 (1975).

163. *See, e.g.*, Rogoski v. City of Muskegon, 550 F.2d 1075, 1076 (6th Cir. 1977); City of Detroit v. Cassese, 376 Mich. 311, 136 N.W.2d 896 (1965); Detroit Bd. of Educ. v. Clarke, 89 Mich. App. 504, 280 N.W.2d 574 (1979); City of Detroit v. Barak, 50 Mich. App. 164, 212 N.W.2d 780 (1973).

164. *See, e.g.*, Hill v. State Highway Comm'n, 382 Mich. 398, 170 N.W.2d 18 (1969); Thom v. State Highway Comm'r, 376 Mich. 608, 138 N.W.2d 322 (1965); Heinrich v. City of Detroit, 90 Mich. App. 699, 282 N.W.2d 448 (1979); Biff's Grills, Inc. v. State Highway Comm'n, 75 Mich. App. 154, 254 N.W.2d 824 (1977); Tamulion v. State Waterways Comm'n, 50 Mich. App. 60, 212 N.W.2d 828 (1973); Holloway Citizens Comm. v. Genesee County, 38 Mich. App. 317, 196 N.W.2d 484 (1972).

165. City of Detroit v. Cassese, 376 Mich. 311, 318-20, 136 N.W.2d 896, 900-01 (1965); Detroit Bd. of Educ. v. Clarke, 89 Mich. App. 504, 280 N.W.2d 574 (1979); City of Detroit v. Sherman, 68 Mich. App. 494, 242 N.W.2d 818 (1976); City of Detroit v. Barak, 50 Mich. App. 164, 212 N.W.2d 780 (1973).

166. City of Detroit v. Cassese, 376 Mich. 311, 318-19, 136 N.W.2d 896, 900-01 (1965).

167. *Id.* at 311, 319 & n.4, 136 N.W.2d 896, 901 & n. 3 (1965); *In re* State Highway Comm'r, 279 Mich. 285, 271 N.W. 760 (1937) (interest allowed from the date of actual appropriation, even though that was years before the condemnation award was confirmed); Campau v. City of Detroit, 225 Mich. 519, 196 N.W. 527 (1923) (interest allowed to accrue on a condemnation award even though there had been no physical taking as of the date of the award); State Highway Comm'n v. Great Lakes Express Co., 50 Mich. App. 170, 181-83, 213 N.W.2d 239, 245-46 (1973) (the purpose of interest on a condemnation award is to give the condemnee just compensation from the date of actual or constructive taking.).

168. "[T]he Court of Claims is the proper forum in which to seek relief where a plaintiff alleges an already accomplished inverse condemnation by the State of Michigan." Biff's Grills, Inc. v. State Highway Comm'n, 75 Mich. App. 154, 158, 254 N.W.2d 824, 826 (1977) (footnote omitted).

government actually to acquire title for the owner to receive compensation.[169]

The Michigan approach to de facto takings is exemplified by *City of Detroit v. Cassese,*[170] in which the Supreme Court of Michigan held that the concurrence of several deliberate acts by the city in effectuating an urban renewal plan which significantly reduced the value of private property was sufficient to constitute a taking.[171] In *Cassese,* the city sent form letters to property owners in an area slated to be taken for urban renewal, informing them that condemnation was about to commence. A condemnation action followed and lis pendens were filed.[172] Ten years later, the project was abandoned and the condemnation action discontinued, but in another two years, the city reinstituted the condemnation proceedings.

During the second condemnation proceeding, the owner of two parcels of property within the renewal area contended that a de facto taking occurred when the first condemnation proceeding commenced.[173] The owner specified ten acts by the city including the following: sending letters to tenants which caused them to move; filing lis pendens which impaired his ability to sell the property and reduced its value; refusing to issue building permits for substantial improvements; relaxing police protection which resulted in vandalism; reducing municipal sanitary services; strictly enforcing building codes; sending notices to property owners requiring them to repair, board up, or tear down buildings that had been vandalized; razing or boarding up vacant buildings in the area which gave the area a deserted wasteland appearance; refusing to permit certain businesses to continue operations while awaiting condemnation; and delaying the trial of the first condemnation action for ten years, discontinuing it, and then reinstituting a new action in which the property appraisals were based on the value at the time of the second condemnation action.[174]

The owner contended that these actions of the city caused approximately an eighty percent decline in property value, and therefore should constitute a de facto taking.[175] The city argued that the reduction in value was not due to its actions, but was a result of the age of the buildings in the area, stringent

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169. Detroit & M. Ry. v. Sioux City Seed & Nursery Co., 168 Mich. 668, 134 N.W. 1103 (1912); Keyser v. Lake Shore & M. S. Ry., 142 Mich. 143, 105 N.W. 143 (1905); Taylor v. Bay City St. Ry., 101 Mich. 140, 59 N.W. 447 (1894); Grand Rapids & Ind. R.R. v. Heisel, 47 Mich. 393, 11 N.W. 212 (1882); *see* Gordon v. City of Warren, 579 F.2d 386 (6th Cir. 1978); Hill v. State Highway Comm'n, 382 Mich. 398, 170 N.W.2d 18 (1969); Thom v. State Highway Comm'r, 376 Mich. 608, 138 N.W.2d 322 (1965); Biff's Grills, Inc. v. State Highway Comm'n, 75 Mich. App. 154, 254 N.W.2d 824 (1977); Tamulion v. State Waterways Comm'n, 50 Mich. App. 60, 212 N.W.2d 828 (1973); Standen v. Alpena County, 22 Mich. App. 416, 177 N.W.2d 657 (1970).

170. 376 Mich. 311, 136 N.W.2d 896 (1965).

171. *Id.* at 317, 136 N.W.2d at 900.

172. *Id.* at 313, 136 N.W.2d at 898.

173. *Id.* at 313-14, 136 N.W.2d at 898.

174. *Id.* at 316-17, 136 N.W.2d at 899-900.

175. In 1950 this parcel was worth at least $3200.41, the amount owing to the owner on a sales contract. In 1959 the city directed the owner to tear down a building which had been vandalized. When the second condemnation action was instituted in 1962 the city valued the property as a vacant lot worth $525. *Id.* at 314, 136 N.W.2d at 898.

economic conditions, and evolutionary changes in the neighborhood, such as automation and mass exodus to suburbia.[176]

The *Cassese* court held that "a city may not by deliberate acts reduce the value of private property and thereby deprive the owner of just compensation."[177] Thus, "[i]f an area has been made a wasteland by the condemning authority, the property owner should not be obliged to suffer the reduced value of his property."[178] The court concluded, therefore, that if the city's action reduced the value of the owner's property, then the evidence could go to the jury for the determination of the actual date of taking and the computation of just compensation.

The Michigan Supreme Court in *Cassese* appeared to be concerned with protecting the private property owner from improper government actions in connection with its eminent domain power.[179] The court was undoubtedly influenced by certain actions of the government which tended to indicate an "abuse of eminent domain"[180] or overreaching by the condemning authority.[181] The series of actions by the city, which resulted in protracted condemnation proceedings, caused a reduction in property values even though there was no actual physical confiscation. Rather than permit the city to acquire the private property at a substantially reduced cost and deprive the owner of payments for its attendant losses, the court determined that the situation could warrant just compensation. The same concern was manifested in the recent case *Detroit Board of Education v. Clarke,*[182] in which the Michigan Court of Appeals concluded that threats of condemnation, "coupled with affirmative action such as unreasonable delay or oppressive conduct" in the furtherance of condemnation, constitutes a de facto taking.[183] *Clarke* involved action somewhat less onerous than *Cassese,* but nevertheless, the governmental activity resulted in a diminution in value and partial destruction of private property.

In *Clarke,* in 1962 and again in 1965, the government announced its intention to acquire the condemnee's property.[184] Although the government condemned other property in the neighborhood, it did not acquire the condemnee's property until 1977, almost fifteen years after the first announcement of an intention to condemn.[185] During that time, uncertainty as

176. *Id.* at 314, 317-18, 136 N.W.2d at 898-900.

177. *Id.* at 317, 136 N.W.2d at 900.

178. *Id.* at 318, 136 N.W.2d at 900.

179. The Michigan Supreme Court expressed similar concerns in Grand Trunk Western R.R. v. City of Detroit, 326 Mich. 387, 40 N.W.2d 195 (1949). In this case, the court held invalid a zoning ordinance because it was enacted for the purpose of depressing property values prior to the institution of condemnation proceedings.

180. *See* Madison Realty Co. v. City of Detroit, 315 F. Supp. 367 (E.D. Mich. 1970); Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd,* 405 F.2d 138 (6th Cir. 1968); Heinrich v. City of Detroit, 90 Mich. App. 692, 282 N.W.2d 448 (1979).

181. For example, requiring a property owner to tear down a vandalized building and then valuing the property as a vacant lot would be an abuse of condemnation powers. 376 Mich. at 314, 136 N.W.2d at 898.

182. 89 Mich. App. 504, 280 N.W.2d 574 (1979).

183. *Id.* at 509, 280 N.W.2d at 576-77.

184. *Id.* at 507, 280 N.W.2d at 576.

185. *Id.* at 506, 280 N.W.2d at 575.

to which property would be taken caused the neighborhood to deteriorate and the condemnee to have difficulty retaining tenants.[186] The court stated that there is "no precise formula or specific method" for determining whether a taking occurs, however, more than the mere publicizing of plans is needed to constitute a taking.[187] A threat of condemnation and cumulative government action causing accelerated condemnation blight is sufficient to allow the jury to find a de facto taking.[188]

Although most de facto taking cases arise in the context of condemnation plans, "[i]nitiation of eminent domain proceedings is not a requisite to a finding that a 'taking' has in fact occurred."[189] Michigan law recognizes that the theory of inverse condemnation may be used to enforce the constitutional ban on uncompensated takings of property. For example, in *Thom v. State Highway Commissioner,*[190] the state highway department altered the grade of a road in front of the claimant's farm headquarters. The Supreme Court of Michigan held that even though the state had no intention to condemn the claimant's property, the state was liable for a partial taking without due process of law.[191] The court found that the claimant had encountered difficulty and danger in moving his farm machinery, that access to an attractive farm house was considerably impaired, and that the government's actions resulted in a substantial diminution of the property's value.[192] In ordering just compensation, the court comported with the principle that it is unjust for society to "benefit itself at the expense of an individual by failing to compensate him for damage done to him in order to procure society's benefit."[193]

In general, the Michigan courts consider both the character of the government's activity and the cumulative economic impact of the activity to determine whether a compensable taking of private property has occurred. In recognition of the harsh economic impact of various forms of governmental activity, the Michigan courts, as a policy matter, strive to protect the individual from uncompensated losses caused by government actions.

186. *Id.* at 507, 280 N.W.2d at 576.

187. *Id.* at 508, 280 N.W.2d at 576; *accord,* Heinrich v. City of Detroit, 90 Mich. App. 692, 698, 282 N.W.2d 448, 451 (1979).

188. 89 Mich. App. at 507, 509, 280 N.W.2d at 576-77.

189. Madison Realty Co. v. City of Detroit, 315 F. Supp. 367, 371 (E.D. Mich. 1970).

190. 376 Mich. 608, 138 N.W.2d 322 (1965).

191. *Id.* at 628-29, 138 N.W.2d at 331.

192. *Id.* at 625-26, 138 N.W.2d at 329-30.

193. *Id.* at 623, 138 N.W.2d at 328. Similarly, in Tamulion v. State Waterways Comm'n, 50 Mich. App. 60, 212 N.W.2d 828 (1973), private property owners brought suit in the court of claims seeking compensation for damage to their property which resulted from repairs made by the government to prevent erosion. The government constructed a peninsula about eighty feet east of the plaintiff's property to serve as a harbor for small crafts. As a result of the construction of the harbor, serious erosion problems were encountered; the plaintiffs gave the government permission to take remedial measures to abate the erosion. Upon completion of the work, tons of jagged rocks and boulders were dumped on the plaintiffs' property which made access to the water virtually impossible yet did not halt the serious erosion. The plaintiffs claimed that the government's actions constituted an appropriation of property without the payment of just compensation. The court held that these actions were sufficient to establish a taking for which the plaintiffs were entitled to just compensation. *Id.* at 67, 212 N.W.2d at 831.

A. *Types of Governmental Activity*

Under the Michigan approach, neither physical invasion nor statutory restraint is required for the challenged governmental activity to constitute a taking as long as the activity causes a diminution in property values.[194] For example, in New York, announcement of an impending condemnation and subsequent delay, causing damage to the property, does not constitute a de facto taking,[195] while in Michigan, these activities are sufficient to support such a finding.[196] Similarly, sending letters to area residents causing them to move out,[197] refusing to issue building permits for improvements,[198] strictly enforcing building codes,[199] and piecemeal condemning,[200] do not constitute a

194. Thom v. State Highway Comm'r, 376 Mich. 608, 614, 138 N.W.2d 322, 323 (1965); City of Big Rapids v. Big Rapids Furniture Mfg. Co., 210 Mich. 158, 177 N.W. 284 (1920); Detroit Bd. of Educ. v. Clarke, 89 Mich. App. 504, 280 N.W.2d 574 (1979). Under the Michigan approach, the diminution in value must be causally related to the governmental activity in order for a taking to be found. In City of Muskegon v. DeVries, 59 Mich. App. 415, 229 N.W.2d 479 (1975), the court stated the test for causal relation: "While [the property owner's] claim [that] it should be sufficient for recovery to show that the acts of the city were a *substantial* cause or *a* cause [of the loss], we disagree. We hold . . . that to constitute a taking it must be shown to be *the* cause . . . ." *Id.* at 420, 229 N.W.2d at 483 (emphasis in original). More recently, however, in Heinrich v. City of Detroit, 90 Mich. App. 692, 282 N.W.2d 448 (1979), the Michigan Court of Appeals stated that the rule announced in *City of Muskegon,* was "too narrow an approach to the question of causation." *Id.* at 700, 282, N.W.2d at 451. The court stated that in inverse condemnation actions, a plaintiff may satisfy his burden of proof "by proving that the government's actions were a *substantial* cause of the decline of his property's value." *Id.* (emphasis in original). As the court recognized, "establishment of a causal link, in cases involving a city's management of an urban renewal program, may be hindered by the presence of other factors affecting a property's viability, such as neighborhood deterioration, urban blight and commercial obsolescence. Ironically, these factors may have provided the impetus for the urban renewal program in the first place and yet obscure even a plaintiff's legitimate right to compensation." *Id.* The element of causation is an important one because reductions in property value may be the result of factors other than the actions of the government. For example, property values may fall as buildings in an area become dilapidated and residents move. *See* City of Detroit v. Cassese, 376 Mich. 311, 314, 136 N.W.2d 896, 898 (1965). Similarly, property values may drop because of an owner's failure to properly manage or maintain the property. In these cases, the government should not provide compensation because it did not cause the diminution of value. Although it is an important consideration to avoid burdening the government with damages not solely attributable to its conduct, the causal requirement poses a formidable obstacle of proof for the aggrieved landowner.

195. City of Buffalo v. J.W. Clement Co. 28 N.Y.2d 241, 257, 269 N.E.2d 895, 904, 321 N.Y.S.2d 345, 359 (1971); *see* pt. II(a) *supra.*

196. Detroit Bd. of Educ. v. Clarke, 89 Mich. App. 504, 509, 280 N.W.2d 574, 576 (1979).

197. Niagara Frontier Bldg. Corp. v. State, 33 A.D.2d 130, 305 N.Y.S.2d 549 (4th Dep't 1969), *aff'd mem.,* 28 N.Y.2d 755, 269 N.E.2d 912, 321 N.Y.S.2d 368 (1971); City of Buffalo v. George Irish Paper Co., 31 A.D.2d 470, 299 N.Y.S.2d 8 (4th Dep't 1969), *aff'd mem.,* 26 N.Y.2d 869, 258 N.E.2d 100, 309 N.Y.S.2d 606 (1970); Beaux Arts Props., Inc. v. United Nations Dev. Corp., 68 Misc. 2d 785, 328 N.Y.S.2d 16 (Sup. Ct. 1972), *aff'd mem.,* 39 A.D.2d 844, 332 N.Y.S.2d 1008 (1st Dep't 1972); *In re* 572 Warren St., 58 Misc. 2d 1073, 298 N.Y.S.2d 429 (Sup. Ct. 1968).

198. *See* City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 249, 269 N.E.2d 895, 900, 321 N.Y.S.2d 345, 352 (1971); Cicci v. State, 31 A.D.2d 733, 297, N.Y.S.2d 291 (4th Dep't 1968).

199. 76 Crown St. Corp. v. City of N.Y., 35 A.D.2d 1005, 317 N.Y.S.2d 978 (2d Dep't 1970).

de facto taking in New York because none of these activities fall within the narrow definitions of "physical invasion" or "direct legal restraint." The Michigan courts, in contrast, do not confine the definition of de facto taking to amorphous concepts such as "ouster" and "dominion and control." The emphasis on the actual impact of governmental activity is certainly more realistic from the perspective of the aggrieved property owner to whom it is of little consequence whether the value of private property is damaged or destroyed by the operation of a statute or by less formal government pronouncements.

B. *Diminution in Value*

Although Michigan courts require the actions of the government to cause a "substantial" or "significant" reduction in the value of private property in order to find a de facto taking,[201] the extent of diminution that is necessary is not definitely ascertainable. This assessment must depend on a consideration of the burden upon government that will result if the government is compelled to pay just compensation to every property owner whose land is adversely affected by governmental activity. To inhibit the progress of urban renewal and land development is not in the public interest; nevertheless, the costs of government inefficiency and inability to formulate coherent land use plans should not unduly burden the individual property owner. The Michigan courts evidently balance these factors by finding that a de facto taking may be effectuated by the government when its deliberate actions cause unwarranted damage or destruction of private property.

Although Michigan has not devised a rigid test, analysis of the cases indicates that a decrease in property value of approximately 60%, accompanied by deliberate government actions, is sufficient to warrant just compensation for a de facto taking.[202] Admittedly, the New York courts do not completely ignore the reductions in property value that may result from physical invasion or direct legal restraints. The condemnation blight concept is an attempt to minimize the economic distress that may result from governmental activity, but even substantial condemnation blight cannot be the basis of a de facto taking in New York. Furthermore, as has been demonstrated, consideration of condemnation blight to value property more realistically during eminent domain proceedings, does not adequately compensate the property owner for all of his losses.[203] The Michigan approach, however, permits significant condemnation blight to support an independent cause of action for a de facto taking; it also provides just compensation when

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200. Fisher v. City of Syracuse, 78 Misc. 2d 124, 355 N.Y.S.2d 239, *aff'd*, 46 A.D.2d 216, 361 N.Y.S.2d 773 (4th Dep't 1974), *appeal denied*, 36 N.Y.2d 642, 368 N.Y.S.2d 1025, *cert. denied*, 423 U.S. 833 (1975); Cinco v. City of N.Y., 58 Misc. 2d 828, 296 N.Y.S.2d 26 (Sup. Ct. 1968).

201. Thom v. State Highway Comm'r, 376 Mich. 608, 628, 138 N.W.2d 322, 331 (1965); Heinrich v. City of Detroit, 90 Mich. App. 692, 282 N.W.2d 448 (1979).

202. In *Cassese*, the decrease in value of the property was at least 80%. 376 Mich. at 314, 136 N.W.2d at 898; *see* notes 170-181 *supra* and accompanying text. In Madison Realty Co. v. City of Detroit, 315 F. Supp. 367 (E.D. Mich. 1970), the decrease in the value of the claimant's property was about 40%. *Id.* at 369.

203. *See* notes 43-51 *supra* and accompanying text.

government improvements for the public benefit diminish the value of private property. This approach recognizes that government interferences with private property that render it unsuitable for private use should result in a compensable taking. Moreover, it diminishes the possibility that the government can benefit from its own misconduct to the detriment of the private citizen.

IV. CONCLUSION

The de facto taking issue is not a question capable of a precise answer in most cases. It requires not merely an appraisal of the impact of particular governmental activity upon private property, but an evaluation of the relationship between private rights and public order. Certainly, "no property is an economic island, free from contributing to the welfare of the whole of which it is but a dependent part. The limits are that unfair or disproportionate burdens may not, constitutionally, be placed on single properties or their owners."[204] To this end, the New York courts should adopt the more flexible approach to de facto takings developed by the Michigan courts, and thus further the pursuit of just compensation.

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204. Fred F. French Investing Co. v. City of N.Y., 39 N.Y.2d 587, 600, 350 N.E.2d 381, 389, 385 N.Y.S.2d 5, 12, *cert. denied*, 429 U.S. 990 (1976).