PROTECTING THE ELDERLY FROM DISPLACEMENT BY CONDOMINIUM CONVERSIONS: *TROY, LTD. v. RENNA*

Although condominium conversion[1] offers cities a chance for urban revitalization[2] and extends the benefits of home ownership[3] to individuals, it also may disrupt the lives of elderly persons[4] by displacing them from their homes into a limited rental housing market.[5] In response, state and local governments have enacted laws that protect the elderly

1. Condominium conversion is defined as "a change in the legal form of a multifamily rental property from single ownership by a landlord to multiple ownership." U.S. DEP'T OF HOUS. AND URB. DEV., THE CONVERSION OF RENTAL HOUSING TO CONDOMINIUMS AND COOPERATIVES 1, 1-6 (1980).

2. Principally, condominium conversion revitalizes cities by encouraging resettlement and thereby increasing the property tax base. Note, *Fifth Amendment Takings and Condominium Conversion Regulations That Restrict Owner Occupancy Rights*, 62 B.U.L. REV. 467, 470 (1982). In addition, conversion may encourage the improvement of neighborhoods. *Id.* Studies also show that the presence of property owners in an area enhances neighborhood stability. *Id.*

3. Individuals benefit from home ownership by acquiring an equity interest, deducting mortgage and property tax payments from federal taxes, and profiting from appreciation of their property. Note, *The Condominium Conversion Problem: Causes and Solutions*, 1980 DUKE L.J. 306, 310. Because converted condominiums are less expensive than both single family homes and new condominiums, they allow a larger group of persons to own homes. *Condominium Housing Issues: Hearings on S.612 Before the Subcomm. on Banking, Housing and Urban Affairs*, 96th Cong., 1st Sess. 100 (1979) (report of the National Council of Senior Citizens) [hereinafter cited as *Hearings*].

4. *Hearings, supra* note 3, at 106.

5. *Id.* at 108. Because many elderly tenants cannot afford the necessary down payment and carrying charges on a condominium, they are forced to move out. *Id.* at 113. Although the availability of rental housing fluctuates, it is generally low. *Id.* at 103. The "rental vacancy rate," the percentage relationship of vacant year-round units for rent compared to the total rent inventory, for the nation is 7.1%. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, GENERAL HOUSING CHARACTERISTICS, U.S. SUMMARY, PART 1, 1-59 (1980). Standard Metropolitan Statistical Areas average rates of 6.7%, but some areas range as low as 1.2%. *Id.* The scarcity of rental housing often forces the elderly to devote large portions of their income to rent. Thus, the amount left to pay for food, medical and utility bills is decreased. *Hearings, supra* note 3, at 114-15. Conversion has not caused the housing shortages, but exacerbates them by narrowing the housing options available to elderly renters. Note, *supra* note 3, at 312.

from the harmful effects of condominium conversion.[6] These laws have prompted challenges by condominium developers and purchasers under the impairment of contracts[7] and fifth amendment takings[8] clauses. The challengers urge courts to articulate frameworks that will consistently impose limits on a state's power to impair contracts and clearly differentiate between takings compensable under the fifth amendment and uncompensable takings under regulations enacted in the public interest. In *Troy, Ltd. v. Renna*,[9] the Court of Appeals for the Third Circuit rejected such a challenge by condominium developers and purchasers. The court held that a New Jersey statute retroactively protecting elderly tenants constituted a proper exercise of the state's regulatory power rather than an unconstitutional taking or impairment of contract.[10]

Troy, Ltd. (Troy), owner of the Troy Hills apartment complex, sold its rental property to East Coast Condo Tech, Inc. (East Coast). East Coast subsequently converted the units into condominiums[11] and exe-

6. *See* Michigan (MICH. STAT. ANN. §§ 26.50 (204a) - (204e) (Callahan 1984)). *See also* New Jersey (N.J. STAT. ANN. §§ 2A:18-61.22-.39 (West Supp. 1983)) and New York (N.Y. GEN. BUS. LAW § 352-eeee (McKinney 1980)) (protects the elderly from conversion-related evictions by granting them extended tenancy periods). In addition, local governments also protect elderly tenants by passing ordinances regulating conversions. Note, *supra* note 2, at 471-72.

These local regulations fall into three categories. *Id.* First, conversion bans prohibit conversions entirely. Cities often enact them as temporary, emergency measures during a housing crisis. *Id.* at 471. Second, removal controls allow municipalities to control the removal of rental housing from the market. *See, e.g.*, CAMBRIDGE, MASS., ORDINANCE 966 (1981). Third, eviction controls limit the ability of owners to evict tenants. Note, *supra* note 2, at 472. These latter types of controls vary widely. One local ordinance initially required that owners obtain "certificates of eviction" before evicting tenants. BROOKLINE, MASS., BY-LAWS, art. XXXVIII (1979). The city later toughened its standard by prohibiting *all* evictions when the tenant continuously occupied the unit prior to the filing of the condominium master deed. BROOKLINE, MASS., BY-LAWS art. XXXVIII, § 9(a) (1979).

7. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . . U.S. CONST. art. I, § 10, cl. 1.

8. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V, cl. 4.

9. 727 F.2d 287 (3d Cir. 1984).

10. *Id.* at 303.

11. *Id.* at 293. Several laws govern the conversion process in New Jersey. The New Jersey Condominium Act, N.J. STAT. ANN. §§ 46:8B-1 to 30 (West Supp. 1983), requires converters to file a master deed to effect the changeover from rental property to condominiums. The converter must then comply with the Anti-Eviction Act, N.J. STAT. ANN. § 2A:18-61.1 to 61.12 (West Supp. 1983). This compliance includes serving tenants with a three-year notice of termination. Eighteen months after such notice,

cuted sales contracts with two of the plaintiffs.[12] One month later, the New Jersey Legislature enacted the Senior Citizens and Disabled Protected Tenancy Act (Tenancy Act).[13] The Tenancy Act grants certain[14] elderly and disabled tenants residing in buildings slated for conversion a forty year protective tenancy. Section fourteen[15] permits courts to grant protective tenancies retroactively to persons in units

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tenants may request the landlord to locate and offer "comparable housing." *Id.* at § 2A:18-61.11(a). If the landlord does not comply, New Jersey courts can issue up to five one-year stays of eviction. *Id.* The landlord, however, can elect to pay a tenant a "hardship relocation compensation" after the first stay of eviction. This payment precludes a court from issuing further stays. *Id.* § 2A:18-61.11(c). East Coast properly effected the changeover and served all tenants with the three-year notice. 727 F.2d at 293.

12. *Id.* When these purchasers executed sales contracts they expected tenants to vacate according to the terms of the Anti-Eviction Act—eight years at the latest.

13. The Tenancy Act, N.J. STAT. ANN. §§ 2A:18-61.22 to 61.39 (West Supp. 1983), is an extension of the Anti-Eviction Act, designed to more fully protect the elderly and disabled from displacement into a severely limited housing market. 727 F.2d at 290. New Jersey has one of the worst rental vacancy rates in the nation at 4.8%. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, GENERAL HOUSING CHARACTERISTICS—NEW JERSEY, PART 32, 32-9 (1980). Springfield Township, where Troy Hills is located, has an extremely low vacancy rate of 1.2%. *Id.* at 32-214. Because the legislature found that displacement of the elderly adversely affected communities, it granted senior citizens special protection. N.J. STAT. ANN. § 2A:18-61.23 (West Supp. 1983). This protection took the form of a "protected period of tenancy, during which [the elderly and disabled] are entitled to the fair enjoyment of the dwelling unit . . . to continue for such time, up to 40 years, as the conditions and circumstances which make necessary such protected tenancy shall continue." *Id.* A landlord can still evict these tenants for failure to comply with terms of the lease. 727 F.2d at 298. Although rent increases are allowed, costs of conversion that fail to add services not previously provided for cannot be passed on to protected tenants. Tenancy Act, § 2A:18-61.31.

14. Senior citizens must meet age and income requirements to qualify for this protection. *See* § 2A:18-61.30.

15. Section fourteen is one of the most controversial provisions of the Tenancy Act. It states:

> [T]he court may invoke some or all of the provisions of the "Senior Citizens and Disabled Protected Tenancy Act" and grant to a tenant, pursuant to that amendatory and supplementary act, a protected tenancy period upon the court's determination that:
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> (1) The tenant would otherwise qualify as a senior citizen tenant or disabled tenant pursuant to that amendatory and supplementary act, except that the building or structure in which the dwelling unit is located *was converted prior to the effective date* of that amendatory and supplementary act; and
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> (2) The granting of the protected tenancy period as applied to the tenant, giving particular consideration to whether a unit was sold on or before the date that the amendatory and supplementary act takes effect to a bona fide individual purchaser who intended personally to occupy the unit, would not be violative of concepts of fundamental fairness or due process.

converted prior to the Tenancy Act's effective date, notwithstanding the interests of purchasers intending to occupy the unit. The remaining two plaintiffs executed sales contracts with East Coast to purchase condominiums after the Tenancy Act's effective date.[16] Fearing the adverse effects the Tenancy Act might have on their interests, East Coast and Troy filed an action for declaratory and injunctive relief against enforcement of the Act.[17] Several months later, the four condominium unit purchasers joined East Coast and Troy as plaintiffs to test their rights as purchasers against the Tenancy Act.[18] Plaintiffs alleged that the retroactive operation of section fourteen of the Tenancy Act was an impairment of contract and a taking of property without just compensation.[19] The federal district court agreed and awarded plaintiffs partial summary judgment under both theories.[20] On appeal, the Third Circuit Court of Appeals reversed, finding no taking or impairment of contract by the statute's operation.[21]

Fearing abusive state actions that would affect both private contracts and property use, the Framers of the Constitution fashioned the contract clause[22] and the taking clause[23] as limits upon such state actions.

N.J. STAT. ANN. § 2A:18.61.11 (West Supp. 1983) (emphasis added).

Thus, although purchasers of units converted prior to the law would not expect the law to apply to them, courts may retroactively impose it.

16. 727 F.2d at 293. All four purchaser-plaintiffs closed contracts after the effective date of the Tenancy Act. *Id.* Two individuals, however, executed agreements before the legislature passed the Tenancy Act. The record does not indicate whether these purchasers were buying for investment or occupancy purposes. *Id.*

17. *Id.* at 293. They named as defendants the New Jersey Community Affairs Commission, the New Jersey Attorney General and three elderly tenants who allegedly claimed benefits under the Tenancy Act. *Id.* These tenants did not have protected status under the Tenancy Act at the time suit was filed because no protections were available to them when they received their three-year notice to quit. *Id.* at 294. They claimed such status retroactively under § 14.

18. *Id.* at 294.

19. *Id.* at 293-94.

20. Troy v. Renna, 580 F. Supp. 69, 72 (D.N.J. 1982). The district court held that the provisions of the Tenancy Act contravened the contract clause because of its serious disruption of the grantee's expectations. *Id.* (citing *United States Trust v. New Jersey*). The court also found a taking because the retroactive operation of the Act "would be an act of government placing in a private party the exclusive right to physical possessions of specific property for an extended period of time." *Id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.*).

21. Troy v. Renna, 727 F.2d 287, 303 (3d Cir. 1984).

22. Attempts by states to sequester debts owed to British creditors prompted enactment of the contract clause. *See* Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 422-23 (1934).

Although the Framers intended the contract clause to prohibit state interference with contracts between private individuals,[24] the Supreme Court soon expanded the clause's application to prevent states from repudiating their own contracts.[25] Despite some erosion of this expanded application of the contract clause,[26] the Court consistently applied rigorous scrutiny to state interference with private contracts[27] until the landmark case of *Home Building and Loan Association v. Blaisdell*.[28]

In *Blaisdell*, creditors challenged under the contract clause a Minnesota law that delayed mortgage foreclosures.[29] Enacted as a temporary,[30] emergency[31] measure, the law granted mortgagors an extended period for redeeming real property from foreclosure and sale, but required them to pay reasonable rent and interest during the period.[32] The United States Supreme Court upheld the law as a proper exercise

23. Virtually no history exists to explain why the Framers enacted the takings clause. Scholars indicate it may stem from controversies during the colonial period, especially the case of Respublica v. Sparhawk, 1 Dall. 357 (S. Ct. of Pa., 1788). The Continental Congress passed an emergency wartime law requiring that landowners contribute provisions to nearby depots. One such depot subsequently fell to the British, and after the war, plaintiff unsuccessfully demanded compensation. *See generally* F. BOSSELMAN, P. CALLIES & J. BANTA, THE TAKING ISSUE 87 (1973). Others suggest the intellectual bases for the clause are rooted in the Magna Carta, English common law and the work of Sir William Blackstone. *Id.* at 100-04.

24. B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 15-16 (1938).

25. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). In *Fletcher*, the Court invalidated a Georgia law that repealed a previous grant of land to several companies. *See also* Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (New Hampshire could not put its hand-picked trustees on the college board by increasing the board size because this contravened the royal charter of the college).

26. Gradually, courts allowed states some flexibility to alter their own contracts. *See* Stone v. Mississippi, 101 U.S. 814 (1880) (state can change the remedies of a contract as long as it does not destroy the underlying obligation); *cf.* Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843) (court held that a state can change the remedies in a contract as long as the obligation is not destroyed as a result).

27. *See, e.g.*, Green v. Biddle, 21 U.S. (8 Wheat.) 1, 84-85 (1823) ("[a]ny deviation from a [contract's] terms . . . however minute or apparently immaterial, in their effect . . . impairs the obligation").

28. 290 U.S. 398 (1934).

29. *Id.* at 415-16.

30. *Id.* at 421 n.3.

31. Economic conditions during the Depression caused widespread mortgage foreclosures and subsequent execution of sale prices greatly below real market values. *Id.*

32. *Id.* at 445.

of state police power.[33] The Court evaluated the law by first examining whether the legislation addressed a legitimate end, and second, whether the measures taken to achieve the end were reasonable and appropriate.[34] Balancing the rights of individuals against the public welfare,[35] the Court found the law reasonable because it was only a temporary response[36] to an emergency,[37] did not create advantages for particular individuals or groups[38] and contained conditions fair to all parties.[39] Finally, the Court deferred to the legislature's choice of policy.[40] *Blaisdell's* balancing approach became the litmus test for contract clause cases; few successful challenges have resulted from this test.[41]

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33. The police power stems from the sovereignty of the states. *Id.* at 437. As such, its power to "protect the lives, health, morals, comfort and general welfare of the people" is not prevented by the contracts clause, even if it affects private contracts. *Id.* This power is "read into [all] contracts as a postulate of the legal order." *Id.* at 435.

34. *Id.* at 438.

35. *Id.* at 442.

36. Most emergency laws explicitly are limited either for a specific period of time or until the end of the emergency. *See, e.g.*, East New York Bank v. Hahn, 326 U.S. 230 (1945) (New York moratorium law precluded foreclosures on mortgages for one year); Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922) (two year rent controls). *Blaisdell* suggests, however, that allowing a law to continue until the end of the emergency is not fatal to its constitutionality, for "[i]t is always open to judicial inquiry whether the exigency still exists . . . ." *Blaisdell*, 290 U.S. at 442. *See also* Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-48 (1924) (a law will cease to operate if the emergency ceases or facts change); Newell v. Rent Control Board, 378 Mass. 443, 449, 392 N.E.2d 837, 840 (1979) ("The continuing existence of an emergency is a question that may be presented for further consideration, not only to the Legislature and the city, but also to the courts.").

37. *See also* Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922) (an emergency housing law allows holdover tenancies and rent controls); Marcus Brown Holding Co. v. Geldman, 256 U.S. 170 (1921) (a housing emergency caused by World War I justified prohibiting landlords from evicting holdover tenants); Block v. Hirsh, 256 U.S. 135 (1921) (a housing shortage caused by World War I justified lease extensions and rent controls).

38. 290 U.S. at 445.

39. *Id.* at 446. The relief afforded by the statute gave due "regard to the interest of mortgagees as well as to the interest of mortgagors" because it did not destroy a creditor's remedy and required rental payments. *Id. Cf.* East New York Savings v. Hahn, 326 U.S. 230, 234 (there was no "studied indifference to the interest of the mortgagor or to his appropriate protection").

40. 290 U.S. at 447-48.

41. *See* Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32 (1940). In *Veix*, the Court upheld a New Jersey law that regulated the rights of savings and loan members to withdraw funds. *Id.* at 41. There was a legitimate public need to regulate and the legislature had done so before. *Id.* at 39. *See also* City of El Paso v. Simmons, 379 U.S.

In *United States Trust v. New Jersey*,[42] the Court expanded the *Blaisdell* balancing test and reinvigorated contract clause protections. In *United States Trust*, the Court held that contracts which a state had previously entered into cannot be modified at will for legitimate public purposes.[43] In 1974, New Jersey retroactively repealed a 1962 agreement with Port Authority bondholders providing that the state would not allocate bond revenues for unprofitable rail operations.[44] Bondholders challenged the repeal as a contract impairment in violation of the contract clause.[45] The Court expanded the *Blaisdell* test by examining whether the impairment was both reasonable and necessary to serve an important public purpose.[46] The Court noted that it owed less deference to legislation that impaired state contracts because states likely will act in their own self-interest.[47] Although recognizing the importance of the state's interest,[48] the Court held repeal of the covenant was a serious impairment[49] that was neither necessary[50] nor reasonable[51] to serve the state's interests.

Just as *United States Trust* promised greater success for challenges

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497 (1965). Texas imposed a time limit, when none previously existed, for reinstating title to forfeited lands. *Id.* at 499. Since the time Texas originally sold the land, oil had been discovered on it. *Id.* at 511. Despite this element of self-interest, the law was upheld as a valid exercise of the police power because the law stabilized an inefficient system of land titles. *Id.* at 513. *But see* W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1934). In *Kavanaugh*, the City of Little Rock issued bonds and mortgage benefit assessments as security. *Id.* at 57. Thereafter, in response to an emergency, the state passed laws greatly diminishing the remedies for recouping those securities. *Id.* at 58-59. The Court deemed that change unreasonable, oppressive and indifferent to the interests of the mortgagee. *Id.* at 62. Changes were not reasonable when they made the remedy a "mere shadow." *Id.*

42. 431 U.S. 1 (1977).

43. *Id.* at 21.

44. *Id.* at 9, 14. The state claimed that it needed the funds to finance public commuter rail systems. *Id.* at 29.

45. *Id.* at 3.

46. *Id.* at 25.

47. *Id.* at 25-26.

48. *Id.* at 28.

49. *Id.* at 29-31.

50. *Id.* The Court found that the repeal of the convenant was unnecessary because less drastic alternatives than total repeal were available, such as amending the covenant to divert only *new* revenues for subsidizing mass transit. *Id.* at 30 n.28.

51. *Id.* at 31-32. The Court held that the repeal was unreasonable because the conditions that justified the repeal in 1974, existed when the covenant was made in 1962. *Id.* The Court noted that "the need for mass transportation in the New York metropolitan area was not a new development, and the likelihood that publicly owned commuter

to impairments of state contracts, *Allied Structural Steel Co. v. Spannaus*[52] signaled greater success for challenges to impairments of private contracts. In *Allied Steel*, the Court invalidated a Minnesota law that imposed a pension funding charge on certain employers who terminated their pension plans or closed their Minnesota offices.[53] The Court held the law unreasonable as a substantial impairment of a company's contractual obligations to employees under its pension plan.[54] As in *United States Trust*, the Court added several factors to the balancing test. First, the Court found the impairment substantial because the law changed employer obligations in an area in which employee reliance was vital.[55] Furthermore, this change was completely unexpected.[56] After characterizing the law as unreasonable, the Court noted that Minnesota's statute was dissimilar to state laws surviving previous contract clause challenges.[57] In distinguishing *Blaisdell*, the Court emphasized that the Minnesota legislature did not enact the law to deal with broad, generalized economic or social problems.[58] The statute only burdened a small group of employers who established for employees a voluntary private pension plans that qualified under section 401 of the Internal Revenue Code.[59]

Energy Reserves Group, Inc. v. Kansas Power and Light Co.[60] indicated that the contract clause does not offer the bite that *Allied Steel* promised. Energy Reserves Group (ERG), a gas supplier, challenged the Kansas Natural Gas Price Protection Act, which imposed maxi-

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railroads would produce substantial deficits was well known . . . . It was with full knowledge of these concerns that the 1962 covenant was adopted." *Id.*

52. 438 U.S. 234 (1978).

53. *Id.* at 250-52. The law applied only to private employers with pension plans. *Id.* at 238.

54. *Id.* at 245.

55. *Id.* at 246. The company had carefully calculated its risks to ensure an adequate supply of funds to pay all pensionees. *Id.* The new law imposed a $185,000 charge on the company, which the court considered "disabling." *Id.* at 247.

56. The measure was completely unexpected because no previous regulation existed in the area. *Id.* at 250.

57. *Id.* The Court found it significant that the law dealt with a narrow class rather than a general social interest. *Id.* The Court also recognized that it was a severe, permanent change. *Id.*

58. *Id.* "[I]ts narrow aim was leveled, not at every Minnesota employer, not even at every Minnesota employer who left the state, but only at those who had in the past . . . voluntarily [agreed] to establish pension plans for their employees." *Id.*

59. *Id.* at 248.

60. 459 U.S. 400 (1983).

mum prices for intrastate gas.[61] ERG asserted that this law, unlike federal law,[62] prohibited it from using a price escalator clause contained in its contract with Kansas Light and Power.[63] In three short steps, the Court disposed of plaintiff's claims.[64] First, the Court found no substantial impairment because ERG's "reasonable expectations" were not impaired.[65] Unlike *Allied Steel*, all parties were fully aware of the heavy regulation within this field and the potential for further regulatory change.[66] The Court next held that the law served legitimate public purposes.[67] Given a legitimate public purpose, the Court then found that the conditions "adjusting the rights and responsibilities of all parties" were reasonable.[68] In discussing the reasonableness requirement, the Court stressed that it owed great deference to the legislature's judgment.[69]

United States Trust, Allied Steel and *Energy Reserves* demonstrate that although the Court once again has made it more difficult for states to impair their own contracts, it merely redefined the balancing process

61. *Id.* at 408. Intrastate gas denotes gas produced in-state that is not committed to interstate commerce. *Id.*

62. The Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 (1982 ed., Supp. V) allowed price ceilings on gas to rise monthly.

63. 459 U.S. at 408.

64. *Id.* at 413-19.

65. *Id.* at 416.

66. *Id.* at 413.

67. *Id.* at 416-17. It protected consumers against price increases caused by federal deregulation and corrected the imbalance between interstate and intrastate markets. *Id.* at 417.

68. *Id.* at 418.

69. *Id.* This summary treatment of contract clause challenges is evident in recent cases. *See* Exxon Corp. v. Eagerton, 103 S. Ct. 2296 (1983). In *Exxon*, Alabama raised the severance tax for oil and and gas and prohibited companies from passing the tax on to customers. *Id.* at 2299. The Court held that the Act was not a substantial impairment because the area previously was regulated and parties knew beforehand that all contracts were subject to regulations. *Id.* at 2307 n.14. Even if it were a substantial impairment, the Court held that the law was still valid because it had a broad public purpose. *Id.* at 2306. The law applied equally to all oil and gas producers. *Id.* Finally, the Court expressed its desire not to interfere with the state's decision-making authority. *Id. See also* Sollenne v. Seiden, 118 Misc. 2d 541, 463 N.Y.S.2d 131 (1983). In *Sollenne*, state law prevented a purchaser of a condominium unit from evicting a senior citizen so the purchaser could personnally occupy the unit. *Id.* at 542, 463 N.Y.S.2d at 132. The court found the law protecting the senior citizen reasonable and legitimate. As a result, the petitioner's rights were subordinate to the "superior possessory rights" of the tenant. *Id.* at 542-43, 463 N.Y.S.2d at 132.

used in impairment challenges for private contracts.[70] As a result, courts continue to decide cases on an ad hoc basis, with varying results.[71]

The Constitution prohibits the appropriation of private property for public use without payment of just compensation.[72] To advance legitimate public interests, however, a state can regulate the use of private property without paying just compensation.[73] Whether a court labels an action a regulation or a taking depends on the facts of each case.[74] Typically, courts balance various factors and then label the action either a taking or a regulation in order to arrive at a certain result.

Pennsylvania Coal Co. v. Mahon[75] illustrated that when a state goes too far in regulating property interests, the state must compensate property owners. In *Pennsylvania Coal*, a coal company claimed that state law[76] prevented it from excavating coal located beneath a house it

70. Factors in this redefinition include the concepts of prospectivity, generality and sensitivity to impairment of public contracts. Note, *Rediscovering the Contracts Clause*, 97 HARV. L. REV. 1414, 1426-31 (1984). With regard to prospectivity, both *United States Trust* and *Allied Steel* involved unexpected impairments in areas in which parties placed great reliance on their pre-existing legal rights. *Id.* at 1416. *But cf. Energy Reserves* and *Veix* (areas were already heavily regulated, thus it was foreseeable that further regulation could follow).

Similiarly, in *Allied Steel* the Court was concerned that the new law burdened a narrow class. *See Allied Steel*, 438 U.S. at 250. The laws in dispute in *Exxon* and *Energy Reserves*, however, were aimed at broad groups. *See generally* Note, *supra* note 70, at 1419 (the contract clause does not invalidate "generally applicable rules of conduct" advancing broad public interests).

The Court also revived its distinction concerning the levels of scrutiny required for impairments of public and private contracts. *Id. Compare United States Trust*, 431 U.S. at 26 (no automatic deference to state legislation when a state's self-interest is involved) *with* El Paso v. Simmons, 379 U.S. 497 (1965) (deference is the norm, even when a state repudiates its own bad deals).

71. For criticisms of the ad hoc balancing approach see Note, *A Procedural Approach to the Contract Clause*, 93 YALE L.J. 918, 919-23 (1984) (balancing allows excessive discretion, which distorts the law and generates uncertainty; ad hoc decision making also gives judges an opportunity to exercise bias when no clear rules serve to guide them).

72. U.S. CONST. amend. V, cl. 4.

73. *See* Hadacheck v. Sebastian, 239 U.S. 394, 404 (1915) (town prohibited brickmaker from manufacturing bricks within city limits to protect citizens from the plant's noxious fumes).

74. "There is no set formula to determine where regulation ends and taking begins." Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).

75. 260 U.S. 393 (1922).

76. Kohler Act, 1921 Pa. Laws 1198. The legislature enacted the Act to prevent the subsidence of housing caused by mining. 260 U.S. at 412.

had sold to plaintiffs. The Court held that the state caused a compensable taking when it deprived plaintiff of the opportunity to mine its coal. The Court first labelled the act a legitimate use of state regulatory power because it protected the public by preventing the subsidence of streets.[77] The Court then held that the public should pay for the loss because the act greatly diminished the value of the property.[78]

The Court expanded the *Pennsylvania Coal* test in *Penn Central Transportation Co. v. New York City*.[79] In *Penn Central*, a landmark preservation law prohibited Penn Central from building a multistory office building on top of its terminal.[80] The company unsuccessfully charged that the restrictions amounted to an uncompensated taking.[81] The Court stated that a taking analysis was essentially an ad hoc inquiry that should focus on two sets of factors: (1) the character of the action,[82] and (2) the 'nature and extent of the interference with rights in the parcel as a whole."[83] The first set of factors helps a court to properly label the disputed action. The Court stated that it more likely would depict physical invasions of property as takings, but view schemes that redistributed economic benefits for the public good as regulations.[84]

The second set of factors enables a court to determine whether the regulation should be compensable. Factors that gauge the regulation's impact on the property as a whole include the extent of interference with reasonable investment-backed expectations[85] and the extent to

77. *Id.* at 415.

78. The court stated that to make it impracticable to mine the coal was tantamount to confiscating or destroying it. *Id.* at 414-15. "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 416.

79. 438 U.S. 104 (1978).

80. *Id.* at 117-18. The Landmarks Preservation Commission denied Penn Central permission to construct the building due to its incongruity with the terminal's architecture. *Id.*

81. *Id.* at 107, 138.

82. *Id.* at 130.

83. *Id.* at 130-31.

84. *Id.* at 124. The Court relied on United States v. Causby, 328 U.S. 256 (1946), in which the Court held that frequent airplane flights over plaintiff's property destroyed its use as a chicken farm, to differentiate between regulations that limited the right to use property from those that amounted to physical invasions. 438 U.S. 104, 128. In *Causby*, the Court found a taking even though the regulation did not completely destroy the plaintiff's use of the property. 328 U.S. 256, 261. The *Causby* Court reached this result because the government physically invaded the farm. *Id.*

85. *Id.* at 124. The law did not prohibit plaintiffs from receiving a fair return on

which the regulation denies plaintiff use of its property.[86] Dinimution in property value alone is not determinative.[87] Because the *Penn Central* regulation was not a physical invasion, did not interfere with plaintiff's use of the parcel as a whole, and was necessary for the general welfare, the Court found no taking.[88]

In *Kaiser Aetna v. United States*,[89] the Court expanded the *Penn Central* test by stressing that the type of right subject to regulation was crucial in resolving the taking issue.[90] In *Kaiser Aetna*, the owner of a shallow lagoon dredged it in order to develop a private marina.[91] The government considered the pond navigable water[92] and ordered that the owner provide public access to it.[93] The Court held that the power to exclude was such a fundamental property right[94] that the government could not impair it without compensation.[95] The owner's characterization of the action as a physical invasion of property also influenced the Court's decision.[96]

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their property. *Id.* at 136. It simply prevented them from using it in the most profitable manner. *Id.* at 125.

86. *Id.* at 136. Plaintiff was not denied all use of its air space. Additionally, its air rights were transferrable to nearby parcels of property. *Id.*

87. The potential loss of income from the restriction, standing alone, did not establish a taking. *Id.* at 131. *Cf.* Hadacheck v. Sebastian, 239 U.S. at 397 (an 87½% diminution in value caused by a zoning ordinance did not constitute a taking).

88. *Id.* at 138.

89. 444 U.S. 164 (1979).

90. *Id.* at 179-80.

91. *Id.* at 166.

92. *Id.* at 168. The government controls navigable waterways. *Id.*

93. *Id.*

94. *Id.* at 179-80.

95. *Id.* Although *Penn Central* implied that regulations that merely limited an owner's economic rights were not takings, while those that affected fundamental possessory rights were takings, this distinction was not formalized. *See* Note, *supra* note 2, at 477.

Andrus v. Allard, 444 U.S. 51 (1979), articulated this distinction. According to the terms of the Eagle Protection Act, plaintiff could not sell Indian artifacts made from protected bird feathers. *Id.* at 54. He challenged the Act as a taking. *Id.* at 55. The Court viewed property rights as a bundle of strands of varying importance, and found it crucial that the plaintiff retained "possessory rights." *Id.* at 65-66. The law only denied plaintiff the right to economically exploit his property. *Id.* at 66. The Court emphasized that it was concerned with how regulations affected property as a whole. *Id.* at 66. *See also* Agins v. Tiburon, 447 U.S. 255 (1980) (zoning ordinance restricting use of plaintiff's land was valid because it allowed the owner beneficial use of his land and did not extinguish any fundamental attributes of ownership).

96. 444 U.S. at 180.

The Court heightened the importance it affords to possessory rights, and violation of such rights through physical invasion, in *Loretto v. Teleprompter Manhattan CATV Corp.*[97] In the interests of the public,[98] the State of New York allowed cable television companies to install cable equipment on private property for a nominal fee.[99] Upon discovering that her building housed cables and taps for defendant's cable service, a landlord successfully challenged the law as a taking. The Court stated that when a regulation authorized the "permanent[100] physical occupation" of property, it constituted a taking regardless of the public interest served.[101] In effect, the Court rejected the balancing approach when an action resulted in the permanent physical occupation of property. *Loretto*, however, affirmed the principle that states retain broad powers to regulate housing conditions and landlord-tenant relationships without compensating all economic injuries.[102]

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97. 458 U.S. 419 (1982).

98. This did not amount to an emergency regulation. The state enacted the law in order to "develop and offer to the public a means of communication having important educational and community aspects." *Id.* at 425.

99. A one-time, one dollar fee was the fixed rate of compensation for landlords. *Id.* at 423-24.

100. The Court distinguished permanent physical occupations, physical invasions short of an occupation (as in *Causby*) and regulations merely restricting the use of property (as in *Penn Central*). *Id.* at 430-35.

The Court stated that a permanent occupation "chops through the bundle" of property rights, taking a piece of each strand. *Id.* at 435. It destroys the owner's right to possess the space himself and renders him powerless to exclude the occupier. *Id.* Permanent occupation also forbids the owner from making any nonpossessory use of the property. *Id.* The Court recognized that even when an owner retained the right to control use of the space, that right was an empty one if the space was occupied permanently. *Id.*

101. *Id.* at 434-35. The Court characterized the occupation as permanent because it lasted until Teleprompter elected to remove the equipment. *Id.* at 439.

102. This power encompasses regulations governing discrimination in housing, rent control, emergency housing laws, fire protections, utility connections and building codes. *Id.* at 440. The Court views these as appropriate restrictions on the use of property. As long as these regulations do not require the landlord to "suffer the physical occupation of a portion of his building by a third party," they should be analyzed under the *Penn Central* balancing test. *Id.* at 440.

Several recent cases illustrate the exception granted to states in the housing context by courts. In Grace v. Brookline, 379 Mass. 43, 399 N.E.2d 1038 (1979), a severe housing shortage caused the city to impose a six-month moratorium on all evictions stemming from condominium conversions. *Id.* at 45 n.4, 399 N.E.2d at 1039 n.4. Several plaintiffs bought their condominiums before the law went into effect but were barred from personally occupying them. *Id.* at 47-48, 399 N.E.2d at 1040. The Supreme Judicial Court of Masschusetts did not consider the moratorium a taking. First, it labelled the law a regulation necessary to protect the public interest. *Id.* at 50-

Recently, in *Fresh Pond Shopping Center, Inc. v. Acheson Callahan*,[103] the Supreme Court had the opportunity to review a taking's challenge within the housing context. In *Fresh Pond*, the Cambridge rent board denied a landlord permission to evict the sole occupant of a building slated for demolition.[104] On appeal, the United States Supreme Court dismissed the case for lack of a substantial federal question.[105] Rehnquist's vigorous dissent[106] did not persuade the Court that this result was inconsistent with *Loretto*.[107]

In *Troy*, the Third Circuit Court of Appeals first held that the Tenancy Act did not violate the contracts clause. It rejected the lower

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51, 399 N.E.2d at 1042-43. The court then stated that the law's impact on the property was not excessive, for although it temporarily redistributed property rights, owners continued to receive reasonable rent from tenants. *Id.* at 57, 399 N.E.2d at 1046. The court considered the duration of the regulation important, insofar as a longer period might be considered confiscatory. *Id.*

In Flynn v. City of Cambridge, 383 Mass. 152, 418 N.E.2d 335 (1981), the same court used essentially the same process to reach similar results. In response to a local housing shortage, the city controlled the removal of rental properties from the market. *Id.* at 155, 418 N.E.2d at 337. After rental property owners converted their rental units to condominiums, the city denied requests to remove the units from the market. *Id.* at 154-55, 418 N.E.2d at 337. The court found that the city ordered the denial in order to protect the renting public. *Id.* at 156-57, 418 N.E.2d at 337-38. The denial did not interfere with the owners' rights in the parcel as a whole because they could still obtain a reasonable return on their investment. *Id.* at 160-61, 418 N.E.2d at 340.

The ordinance at issue in *Grace* later was modified and became the focus of a takings challenge in Loeterman v. Brookline, 524 F. Supp. 1325 (D. Mass. 1981). *Loeterman* involved emergency regulations that indefinitely barred condominium purchasers from evicting tenants who had lived in units for a certain period of time. *Id.* at 1327 n.1. Plaintiff wanted to evict a tenant so that he could personally occupy the unit. *Id.* at 1327. The federal district court upheld the regulations even though they granted tenants potential life-time tenancies. *Id.* at 1330. The Court reasoned that tenants still paid plaintiffs fair rent and that the emergency was not permanent. *Id.* The court indicated that both the city and the courts could repeal the ordinance if situations changed. *Id.*

103. 464 U.S. 875 (1983), *dismissing appeal from* 388 Mass. 1051, 446 N.E.2d 1060 (1983).

104. *Id.* at 875 (Rehnquist, J., dissenting).

105. *Id.* at 876-77 (Rehnquist, J., dissenting).

106. *Id.* at 875. This denial reaffirms and clarifies the Court's position in *Loretto* regarding states' broad powers to redistribute property interests, especially during emergencies. Takings challenges in these situations will be unsuccessful.

107. *Id.* at 875-78 (Rehnquist, J., dissenting). His arguments emphasized that this occupation was much more severe than in *Loretto*. *Id.* The occupation was permanent like in *Loretto* because only the occupier could end the tenancy. Furthermore, there was no end to the emergency in sight. *Id.* Like *Loretto*, the precious right of a property owner to exclude others was shattered completely. *Id.*

court's assertion that *United States Trust* controlled the outcome.[108] *United States Trust*, the court reasoned, dictated a higher degree of scrutiny only when states repudiated their own contracts.[109] The court of appeals instead used the *Energy Reserves* test, which specifically applied to impairments of private contracts.[110] Because the contracting parties knew beforehand that their rights already were regulated heavily,[111] the court held it unlikely that an extension of such regulation amounted to a substantial impairment.[112] The court next held that the conditions imposed by the Act were reasonable because purchasers received fair rent with allowable increases.[113] Additionally, it was possible that the extended tenancy would terminate prematurely.[114] Even if the Tenancy Act's conditions amounted to a substantial impairment, the court found that the housing emergency justified the impairment.[115] Like the Supreme Court in *Energy Reserves*, the Third Circuit did not question the reasonableness of legislative choice.[116] The court implied, however, that if the emergency subsided, or policy choices ameliorated the housing crisis, courts could use discretion in deciding whether to confer benefits on eligible tenants.[117]

Applying the principles of *Loretto*, the court next concluded that the Tenancy Act did not constitute a taking of private property. First, the Tenancy Act did not authorize a permanent occupation because either landlord or tenant could terminate the lease.[118] In addition, the court relied on dicta from *Loretto* that approved of legislation that authorized extended tenancies.[119] The court further noted that unlike *Loretto*,

108. 727 F.2d 287, 296.

109. *Id.*

110. *Id.*

111. *Id.* at 297. For example, the Anti-Eviction Act allowed tenants a maximum eight-year tenure. *Id.* at 290.

112. *Id.* at 297.

113. *Id.* at 298.

114. *Id.* The tenancy could terminate if the tenant voluntarily moved, was evicted for cause, had a significant income change or ceased making the unit his main residence. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* The Tenancy Act gave courts discretion in deciding to confer protections on eligible tenants. *Id.*

118. *Id.* at 301. The court also reasoned that the occupancy would not be permanent because the average age of protected tenants was 70. *Id.*

119. *Id.*

Troy did not involve the public use of plaintiff's property.[120] Instead, the Tenancy Act merely regulated use of the property. The Court in *Loretto*, the court reasoned, recognized this historic distinction, especially when housing regulation was concerned.[121] The Supreme Court's dismissal of *Fresh Pond* was further proof to the Third Circuit that *Loretto* did not prohibit regulations granting extended tenancies.[122] Because *Troy* involved a regulation rather than a public use of the property, and because the court found no permanent invasion, no violation of the taking clause occurred.[123]

The tension between interpretations of the balancing test in the contracts clause and the taking clause makes *Troy* a difficult case to decide. The Supreme Court recently reinvigorated contract clause protections.[124] At the same time, however, both the Supreme Court and lower courts have rejected most fifth amendment taking challenges to housing regulations involving grants of extended tenancies.[125] This suggests that a court potentially could hold the same law valid under a taking challenge but invalid under a contract clause challenge.

The Third Circuit could have reached such a conclusion in *Troy*. One of the primary tests, as announced in *Allied Steel*, is whether the regulation's burdens are applied equally to the regulated group.[126] In *Troy*, the Tenancy Act clearly causes similar effects on the contractual relationships of all condominium developers. It is not clear, however, that the Tenancy Act falls with equal effect on all unit purchasers.[127] Some purchasers buy to invest and others buy for personal occupancy.

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120. *Id.*

121. *Id.* The court cited *Loretto*'s approval of cases such as Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922) and Block v. Hirsh, 256 U.S. 135 (1921) (each case involved limits on a landlord's right to evict holdover tenants during housing shortages).

122. 727 F.2d at 303.

123. *Id.*

124. *See supra* notes 42-71 and accompanying text (discussing *United States Trust, Allied Structural Steel* and *Energy Reserves*).

125. *See supra* notes 97-107 and accompanying text (discussing *Loretto, Fresh Pond* and *Grace*). On its face, *Loretto* indicates that the Court will not condone the permanent occupation of an owner's property in any context. *See supra* notes 100-02 and accompanying text. *Fresh Pond* appears to contradict this by authorizing regulations that allow tenants to remain in an owner's unit indefinitely. The Court evidently does not characterize emergency housing laws, no matter how indefinite, as permanent. *See cf. supra* notes 37-38.

126. 438 U.S. at 248.

127. *See* Note, *Defining Property Rights: The Constitutionality of Protecting Tenants From Condominium Conversion*, 18 HARV. C.R.-C.L.L. REV. 179, 222 (1983) ("Condo-

Under the Tenancy Act, an investment purchaser's interests are not substantially impaired because he still receives rent, although reduced, as planned. The Tenancy Act does, however, substantially impair the interest of the occupancy purchaser. It shatters the important expectations of occupancy[128] that induced the individual to purchase in much the same way that New Jersey's repeal of its 1962 contract in *United States Trust* destroyed the expectations that induced bondholders to buy.[129] Although the housing area was regulated heavily,[130] occupancy purchasers reasonably could expect to occupy their unit within four years at the earliest.[131] By retroactively conferring protected status on a tenant, the court destroys a purchaser's expectation of occupancy within a reasonable time. Given *Loretto's* emphasis on the importance of the right to exclude,[132] as well as *Allied Steel's* prohibition against change in areas in which the element of reliance is vital,[133] the Tenancy Act imposed a substantial impairment on the rights of occupancy purchasers. On the whole, the "adjustment of rights and responsibilities" that *Energy Reserves* stressed is not based on "reasonable conditions."[134] Arguably, the *Troy* court could have considered the contract clause challenge more fully and reached a different result.

The court correctly concluded the takings issue. Given the dicta in *Loretto* granting states broad power to regulate housing conditions, as well as the *Fresh Pond* decision, even emergency housing laws that protect tenants indefinitely through extended tenancies are not takings. The Third Circuit correctly categorized the Tenancy Act as a regulation, but should have proceeded further and determined whether the regulation was compensable. As *Pennsylvania Coal Co.*[135] pointed out, regulations are sometimes takings. Therefore, the court should have

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minium conversion . . . affect[s] investment and occupancy interests in ways which differ in kind and in degree.").

128. *Id.* at 225. ("Reliance is more important in cases involving occupancy interests than in cases involving investment interests."). *See supra* note 20 and accompanying text.

129. 431 U.S. at 19.

130. The Anti-Eviction Act, N.J. STAT. ANN. §§ 2A:18-61.1 to 61.12 (West Supp. 1983) (regulated the rights of the parties before the state passed the Tenancy Act).

131. The Anti-Eviction Act, N.J. STAT. ANN. § 2A:18-61.11(c).

132. 458 U.S. at 435 ("The power to exclude has traditionally been considered one of the most treasured . . . property rights.").

133. *Allied Steel*, 438 U.S. at 233.

134. *Energy Reserves Group*, 459 U.S. at 412.

135. 260 U.S. 393 (1922).

applied the multifactor *Penn Central* test as *Loretto* advises. Under this analysis, however, there is no taking. Although purchasers expecting to occupy property may be unable to do so for an indefinite period of time, modern courts see these setbacks as merely temporary in nature.[136] Additionally, use of the property is not destroyed completely, because owners still receive reasonable rent. Finally, the court in *Troy* would find no taking on physical invasion grounds because *Loretto* and *Fresh Pond* provide that housing regulations permitting extended tenancies during housing emergencies are not considered physical invasions.

Troy demonstrates that the search for clear frameworks to analyze taking and contract clause challenges is an elusive one. The court's reliance on an evolving balancing test provides little certainty for individuals staking their financial resources and personal expectations on private contracts. The court's discretion to emphasize selected factors in the balancing test fosters varied outcomes dependent largely upon the skill of attorneys and the values of courts. This process provides flexibility, but may have a long-range detrimental impact. Condominium conversions provide many direct advantages for the public.[137] Because of the uncertainty in their right to possess, individuals may hesitate to invest in condominiums. Lack of a clear analytical framework thus may create negative incentives for investment, which in turn may change the positive role condominiums have played in revitalizing urban areas.[138] In this sense, the court's framework affects not only an individual's rights and expectations, but also may set in motion policy consequences that are detrimental to the public welfare.[139]

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136. *See Fresh Pond*, 464 U.S. 875; Loeterman v. Brookline, 524 F. Supp. at 1330.

137. *See generally* Note, *Condominium Conversion Legislation: Limitation on Use or Deprivation of Rights? A Re-examination*, 15 NEW ENG. L. REV. 815, 834 (1980) (condominiums stabilize neighborhoods, generate an influx of capital and are the only viable method of home ownership for many persons); *see supra* note 3.

138. Note, *supra* note 137, at 835.

139. These consequences become more undesirable in light of research showing that conversion only superficially causes displacement. Note, *supra* note 3, at 312. A national shortage of low-income housing, coupled with a growing poverty class, is at the heart of the displacement problem. Note, *supra* note 137, at 835. The most effective solutions to the displacement problem are those aimed at its sources, not symptoms. *Id.* at 835. The efficacy of a policy discouraging conversions appears minimal.

RECENT DEVELOPMENTS