Access for CATV Meets the Taking Clause: The Per Se Takings Rule of *Loretto v. Teleprompter Manhattan CATV Corp.*

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The United States Constitution expressly forbids the government's taking of private property for public use without payment of just compensation.[1] To enforce this constitutional provision, courts must determine whether the particular government action or regulation at issue constitutes a "taking."[2] Although the United States Supreme Court has frequently addressed the "taking" issue,[3] the Court has found the determination a difficult one[4] and has admitted it is unable to develop any set formula to recognize a "taking."[5] Instead, the Court simply looks to the facts of each

1. The pertinent part of the fifth amendment of the United States Constitution states, "nor shall private property be taken for public use, without just compensation." This protection is made applicable to the states through the fourteenth amendment. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980); Chicago Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 235-41 (1897). Most states have similar constitutional provisions. *See, e.g.*, N.Y. CONST. art. I, § 7(a); OR. CONST. art. I, § 18; WIS. CONST. art. I, § 13. Some states require just compensation for damaged property in addition to "taken" property. *See, e.g.*, ARIZ. CONST. art. II, § 17; CAL. CONST. art. I, § 14; TEX. CONST. art. I, § 17.

2. Since the fifth amendment does not specify any guidelines for determining which state intrusions should be recognized as "takings," courts must necessarily make this determination based on the facts of each case. *See Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1464 (1978) [hereinafter cited as *Zoning*].

3. The "taking" issue has been considered in many contexts. *See, e.g.*, PruneYard Shopping Center v. Robins, 447 US. 74 (19890) (no taking when shopping center owner was required to allow petition circulators to have access to his property); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (no taking where city's landmark preservation law prevented property owner from adding office tower to property); United States v. Pewee Coal Co., 341 U.S. 114 (1951) (taking found where government took control of mine during war); United States v. Causby, 328 U.S. 256 (1946) (taking found where airplane overflights destroyed use of plaintiff's property as a commercial chicken farm); Portsmouth Harbor Land and Hotel Co. v. United States, 260 U.S. 237 (1922) (taking found where government repeatedly fired coastal defense guns over plaintiff's resort property during peacetime); Richards v. Washington Terminal Co., 233 U.S. 546 (1914) (no taking where railroad produced noise, smoke and cinders that damaged plaintiff's property); Pumpelly v. Green Bay and Miss. Canal Co., 80 U.S. (13 Wall.) 166 (1872) (taking found where government actions resulted in flooding of plaintiff's land).

4. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123 (1978). *See also Zoning*, *supra* note 2, at 1464 ("decisional law under the clause has been hopelessly confused").

5. Loretto v. Teleprompter Manhattan CATV Corp., 102 S. Ct. 3164, 3179 (1982) (Blackmun, J., dissenting) [hereinafter cited as *Loretto II*]; Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962). *See also* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) ("this is a question of degree—and therefore cannot be disposed of by general propositions").

case.[6] In *Loretto v. Teleprompter Manhattan CATV Corp. (Loretto II)*,[7] the United States Supreme Court departed from its seemingly ad hoc approach in "taking" cases that involve a physical invasion of property.[8] The *Loretto II* Court held that a permanent physical invasion of property will always constitute a "taking" within the meaning of the fifth amendment.[9] This per se test applies regardless of the size or significance of the property taken.[10]

The *Loretto II* case involved section 828 of the New York Executive Laws[11] which was passed to ensure residential tenants access to cable television.[12] The statute provided that landlords could not interfere with the

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6. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); United States v. Caltex, 344 U.S. 149, 156 (1952).

7. 102 S. Ct. 3164 (1982).

8. *See id.* at 3180 (Blackmun, J., dissenting).

9. *Id.* at 3179.

10. *Id.* at 3177-78 n.16 and accompanying text. ("[w]hether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a bread box").

11. N.Y. EXEC. LAW § 828 (McKinney 1982) provides:

1. No landlord shall

a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require:

i. that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants;

ii. that the cable television company or the tenant or a combination thereof bear the entire cost of the installation, operation or removal of such failities; and

iii. that the cable television company agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities.

b. demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable; or

c. discriminate in rental charges, or otherwise, between tenants who receive cable television service and those who do not.

2. Rental agreements and leases executed prior to the effective date of this article may be enforced notwithstanding this section.

3. No cable television company may enter into any agreement with the owners, lessees or persons controlling or managing buildings served by cable television, or do or permit any act, that would have the effect, directly or indirectly of diminishing or interfering with existing rights of any tenant or other occupant of such building to use or avail himself of master or individual antenna equipment.

Three other states have statutes similar to N.Y. EXEC. LAW § 828; however, these state laws do not provide for any possibility of compensation for landlords unless the installation causes damage. *See, e.g.*, CONN. GEN. STAT. ANN. § 16-333a (West Supp. 1982); MASS. ANN. LAWS ch. 166, § 35, ch. 166A, 522 (Michie/Law. Co-op 1979); N.J. STAT. ANN. § 48:5A-49 (West Supp. 1983).

12. *See Loretto II*, 102 S. Ct. at 3169; Loretto v. Teleprompter Manhattan CATV Corp., 53 N.Y.2d 124, 139-42, 423 N.E.2d 320, 327-29 (1981) [hereinafter cited as *Loretto I*]. The *Loretto I* court cited JONES, REGULATION OF CABLE TELEVISION BY THE STATE OF NEW YORK, which stated, "In the electronic age, the landlord should not be able to preclude a tenant from obtaining CATV service." The *Loretto I* court further emphasized that the legislature had determined that CATV was a vital service for the community and business, and that it should be protected from restraints in order to assure maximum and speedy penetration of the market. 53 N.Y.2d at 139-40, 423 N.E.2d at 327. Apparently, before adoption of N.Y. EXEC. LAW § 828, landlords were gouging cable television companies by charging outrageous fees for access to their property. *Id.* at 141, 423 N.E.2d at 328. A common demand, apparently agreed to in many cases, was for the cable company to pay the landlord five percent of the gross revenues from the property. *See Loretto II*, 102 S. Ct. at 3169. Hence, the legislature passed § 828 to proscribe interference with cable installations in order to achieve the state's goal of maximum and speedy penetration. *See Loretto I*, 53 N.Y.2d at 141-42, 423 N.E.2d at 327-28.

installation of cable television facilities on rental property.[13] In addition, landlords were prohibited from charging or accepting any sum of money from their tenants or the cable television company, except for an amount specified as reasonable compensation by the New York Commission on Cable Television.[14]

In 1971, Jean Loretto purchased a five story apartment building in midtown Manhattan.[15] The previous owner had granted the defendant, Teleprompter Manhattan CATV Corp. (Teleprompter) permission to install a cable on the building and the exclusive privilege of furnishing future cable television (CATV) services to the tenants.[16] In 1970, Teleprompter installed a cable on the building's roof.[17] This cable did not service the particular building but was a "crossover" line that was part of a network of cable lines serving the general area.[18] Although Loretto inspected the property, she did not discover the cable prior to her purchase.[19]

Two years after Loretto's purchase and after section 828 became effective, Teleprompter dropped a line down the front of Loretto's building to a tenant's apartment.[20] Upon discovery of the installation, Loretto filed suit against Teleprompter alleging that the installation made under the authority of section 828 amounted to a taking without just compensation.[21]

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13. N.Y. EXEC. LAW § 828(1)(a). For text of this section, *see supra* note 11. The statute provided protection for the landlord in that he could require the installation to be made such that the premises would be safe, and the appearance and functioning of the premises would be preserved, § 828(1)(a)(i), and the cable company was required to indemnify the landlord for any damage caused by the installation of the facilities. § 828(1)(a)(iii).

14. N.Y. EXEC. LAW. § 828(1)(b). "The Commission has ruled that a one-time $1 payment is the normal fee to which a landlord is entitled." *Loretto II*, 102 S. Ct. at 3170. Procedures were also adopted permitting a landlord to demonstrate a right to greater damages. *Id.* Section 828 also provided that the cable company or tenant must pay for the "cost of installation, operation or removal of the facilities." § 828(1)(a)(ii).

15. *Loretto II*, 102 S. Ct. at 3168.

16. *Loretto I*, 53 N.Y.2d 124, 134, 423 N.E.2d 320, 324 (1981). The previous owner was paid $50.00 for the grant of permission. *Id.* Although the agreement was not recorded, it might have been binding on Loretto if she had constructive notice of it by an open and visible CATV installation. *Id.* at 135, 423 N.E.2d at 324. The New York Court of Appeals, however, found that this agreement, even if binding, would not have precluded Loretto from challenging the constitutionality of § 828. *Id.* at 135-36, 423 N.E.2d at 325.

17. *Id.* at 135, 423 N.E.2d at 324. The cable, which was approximately one-half inch in diameter, thirty-four to thirty-six feet long and secured by 4-inch cubic directional tapes at each end of the roof, ran along the length of the building about eighteen inches over the roof top and was connected to an adjoining building. *Id.*

18. *Loretto II*, 102 S. Ct. at 3169. A "crossover" does not serve the property over which the lines are placed. *See id.* A crossover may occur in three situations:

> When (1) the line servicing the tenants in a particular building is extended to adjacent or adjoining buildings, (2) an amplifier which is placed on a building is used to amplify signals to tenants in that building and in a neighboring building or buildings, and (3) a line is placed on a building, none of the tenants of which are provided CATV services, for the purpose of providing service to an adjoining or adjacent building.

Loretto I, 53 N.Y.2d at 133 n.6, 423 N.E.2d at 323 n.6.

19. 53 N.Y.2d at 135, 423 N.E.2d at 324.

20. *See Loretto II*, 102 S. Ct. at 3169.

21. *Id.* at 3170. Loretto sued for damages and an injunction. *Id.* This type of suit is commonly called an "inverse condemnation" action in that it is brought by a property owner to recover just compensation when his property has been "taken" without the instigation of a formal condemnation proceeding by the government entity. *See* United States v. Clarke, 445 U.S. 253, 257 (1980); Thornburg v. Port of Portland, 233 Or. 178, 180 n.1, 376 P.2d 100, 101 n.1 (1962). *See generally* United States v. Clarke, 445 U.S. 253, 255-58 (1980) (outlining the legal and practical differences between condemnation and inverse condemnation proceedings); Mandelker, *Inverse*

The New York Supreme Court, Special Term,[22] granted summary judgment against Loretto.[23] The court upheld section 828 as constitutional in both "crossover" and "non-crossover" situations.[24] The appellate division affirmed.[25]

In *Loretto v. Teleprompter Manhattan CATV Corp. (Loretto I)*, the New York Court of Appeals also upheld the statute, viewing it as a valid regulation of the landlord-tenant relationship.[26] Following recent United States Supreme Court cases such as *Penn Central Transportation Co. v. New York City*,[27] *Kaiser Aetna v. United States*[28] and *PruneYard Shopping Center v. Robins*,[29] the New York court applied a balancing test to determine whether section 828 was a valid exercise of the police power or whether it was a compensable "taking."[30]

The factors to be balanced under this test are: the character of the governmental action, its economic impact and its interference with reasonable investment-backed expectations.[31] Considering these factors, the *Loretto I* court first determined that section 828 authorized a physical invasion of Loretto's property.[32] The court noted, however, that the character of the invasion is only one of many factors to be weighed and that a physical invasion authorized by the state in the community interest, but not directly for a governmental purpose, need not necessarily amount to a compensable taking.[33]

The *Loretto I* court next considered the economic impact of the CATV installations. The court found that the installation did not affect Loretto's ability to receive a fair return on her property, that the installation did not unreasonably impair the value or use of the property, and that when the interference with Loretto's property rights was viewed in light of the aggregate of her property rights, the interference was relatively slight and insubstantial.[34]

Finally, the *Loretto I* court noted that section 828 would not frustrate investment-backed expectations in the property since Loretto did not show that any investment was made in the expectation that fees would be derived from CATV installations.[35] Based on the balance of these factors, the *Loretto I* court concluded that section 828 was not state action amounting to a compensable taking.[36]

Condemnation: The Constitutional Limits of Public Responsibility, 1966 WIS. L. REV. 3, 4-6 (1966) (explaining how inverse condemnation suits arise).

22. In New York's Judiciary structure, this is the trial court.
23. *Loretto II*, 102 S. Ct. at 3170.
24. *Id.*
25. *See id.* (citing 73 A.D.2d 849 (1979) (mem.)).
26. *Loretto I*, 53 N.Y.2d at 143-44, 423 N.E.2d at 329-30 (1981).
27. 438 U.S. 104 (1978).
28. 444 U.S. 164 (1979).
29. 447 U.S. 74 (1980).
30. *Loretto I*, 53 N.Y.2d at 144-151, 423 N.E.2d at 330-34.
31. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
32. 53 N.Y.2d at 145-46, 423 N.E.2d at 330.
33. *Id.* at 145-48, 423 N.E.2d at 330-32.
34. *Id.* at 148-50, 423 N.E.2d at 323-33.
35. *Id.* at 150-51, 423 N.E.2d at 334.
36. *Id.* at 151, 423 N.E.2d at 334.

The United States Supreme Court did not agree. In reversing the *Loretto I* decision, the Court[37] held that the balancing test enunciated in previous cases does not apply when a government action results in an actual and permanent physical invasion of the owner's property.[38] The Court held that permanent physical invasions are the equivalent of a "taking" per se, regardless of the economic significance or size of the invasion.[39]

This Note will first trace the history, role and importance of the physical invasion concept in the law of takings. Next, the application of the per se rule adopted in *Loretto II* will be evaluated both in light of its facts and in relation to various factual situations that have arisen under the "takings" clause. Finally, the effect of the *Loretto II* decision on states wishing to achieve objectives similar to those of New York regarding the development of CATV will be discussed, with suggested alternatives to the statute struck down in *Loretto II*.

Tracing the Takings Clause; The Physical Invasion Test

The original concept of a fifth amendment taking was limited to a physical invasion in the strictest sense; a taking encompassed only the actual appropriation of property by the government.[40] This interpretation lasted until the late nineteenth century.[41]

In 1872, the concept of a physical invasion was broadened in the landmark case of *Pumpelly v. Green Bay Co.*[42] In *Pumpelly*, the construction of a dam, pursuant to a state statute, resulted in the permanent flooding of the plaintiff's land.[43] The Court determined, in light of the purpose of the fifth amendment,[44] that this permanent flooding amounted to a taking despite the absence of a formal appropriation.[45] The *Pumpelly* Court enunciated a rule that a taking occurs when real estate is actually invaded by foreign materials or artificial structures which cause a destruction or impairment of the property's usefulness.[46]

This holding was applied and refined in several United States

37. Justice Marshall wrote the opinion of the Court, joined by five Justices. Justice Blackmun, joined by Justice Brennan and Justice White, dissented.

38. *Loretto II*, 102 S. Ct. at 3174-76.

39. *Id.* at 3180 (Blackmun, J., dissenting).

40. *See* F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 51, 106 (1973) [hereinafter cited as BOSSELMAN]; *Zoning*, *supra* note 2, at 1466 (1978). The action was required to be an actual or constructive acquisition of title by the state. *Id.* at 1466. For a review of state court cases following this rule, see BOSSELMAN, *supra* at 106-14.

41. BOSSELMAN, *supra* note 40, at 51.

42. 80 U.S. (13 Wall.) 166 (1872).

43. *Id.* at 176-77.

44. The fifth amendment was "adopted for protection and security to the rights of the individual as against the government." *Id.* at 177. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) (the fifth amendment "was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). *Cf.* United States v. Willow River Power Co., 324 U.S. 499-502 (1945) (the fifth amendment undertakes to redistribute economic losses inflicted by public improvements, but does not undertake to socialize all loss).

45. *Pumpelly*, 80 U.S. (13 Wall.) at 181.

46. *Id.*

Supreme Court cases following *Pumpelly*.[47] Although the Court, in these cases, refused to find a taking where only consequential damage resulted from the government action,[48] it continued to find a taking when state action resulted in permanent physical invasion by flooding.[49] In *United States v. Cress*,[50] the developing permanency requirement was relaxed. The *Cress* Court found a partial taking where, due to the construction of a dam, the plaintiff's land was subject to frequent overflows from an adjoining river.[51] Unlike *Pumpelly*, the land in *Cress* was not *permanently* flooded.[52] The Court, however, found that the land had been physically invaded and substantially damaged.[53] This led the Court to announce an oft quoted rule:[54] "[I]t is the character of the invasion, not the amount of damage resulting from it, *so long as the damage is substantional*, that determines whether it is a taking."[55]

When courts apply the physical invasion test, two elements have been deemed crucial. First, the invasion must be of a permanent or continuously recurring nature.[56] Second, the invasion must be distinguishable

47. *See, e.g.*, Sanguinetti v. United States, 264 U.S. 146 (1924); United States v. Cress, 243 U.S. 316 (1917); Bedford v. United States, 192 U.S. 217 (1904). *See generally* Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L. REV. 221, 223-37 (1931).

48. Sangunetti v. United States, 264 U.S. 146, 149 (1924) (Flooding must constitute an actual permanent invasion and not merely an injury to the property. "Appellant was not ousted, nor was his customary use of the land prevented, unless for short periods of time."); Bedford v. United States, 192 U.S. 217, 224 (1904) (court must distinguish between damage and taking); Northern Transp. Co. of Ohio v. Chicago, 99 U.S. 635, 642 (1879) (temporary blocking of access to property without actual entry onto the property is not a physical invasion).

49. *See, e.g.*, United States v. Dickinson, 331 U.S. 745, 748 (1947) (taking when completion of dam caused permanent flooding of land); United States v. Welch, 217 U.S. 333, 338 (1910) (taking when government action resulted in permanent flooding of private right of way); United States v. Lynah, 188 U.S. 445 (1903) (taking when government dam resulted in permanent flooding of rice plantation, rendering plantation an irreclaimable bog), *overruled on other grounds in* United States v. Chicago, M., S.P. and Pac. R.R. Co., 312 U.S. 592 (1941).

50. 243 U.S. 316 (1917).

51. *Id.* at 327-28.

52. *Id.* at 327.

53. *Id.* at 328.

54. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 149-50 (1978) (Rehnquist, J., dissenting); United States v. Causby, 328 U.S. 256, 266 (1946); *Loretto I*, 53 N.Y.2d 124, 146 n.19, 423 N.E.2d 320, 331 n.19 (1981).

55. United States v. Cress, 243 U.S. 316, 328 (1917) (emphasis added). The requirement of substantial damage, as stated in *Cress*, is seemingly in direct conflict with the holding of *Loretto*. The *Loretto* test, which the Court characterized as a reaffirmance of prior case law, would find a taking upon a permanent physical invasion regardless of the amount of damage. *Loretto II*, 102 S. Ct. at 3176-77. The *Cress* test, so far as its language requires substantial damage as a prerequisite for a taking, is therefore impliedly overruled by *Loretto II*. The *Loretto II* Court, however, would characterize *Cress* as a case in which *temporary* physical invasion had occurred and would therefore use a balancing test, not a per se test, in its taking determination. *Id.* at 3172.

56. *See supra* notes 48-49 and accompanying text; City of St. Louis v. Western Union Tel. Co., 148 U.S. 92, 98-99 (1893). Permanent invasions can include single acts which have been repeated continuously. Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329-30 (1922) (repeated firing of coastal defense guns over plaintiff's resort property was a taking). *Compare* Portsmouth Harbor Land & Hotel Co. v. United States, 250 U.S. 1, 2 (1919) (mem.) (sporadic firing was not a taking). *See also* Jensen v. United States, 305 F.2d 444, 447 (Ct. Cl. 1962) (frequency of flights over property is a factor in determining a taking); Adaman Mutual Water Co. v. United States, 181 F. Supp. 658 (Ct. Cl. 1958) (no taking until greater frequency of flights started); County of Winnebago v. Kennedy, 60 Ill. App. 2d 408, 412, 208 N.E.2d 612, 614 (1965) (whether flooding is of such regularity and frequency to constitute a taking is a question of fact).

from an act which merely causes damages, because damage alone will not trigger the fifth amendment.[57] Once these threshold elements are met, the courts will find a taking of the property actually invaded even if the economic damages are nominal.[58]

The physical invasion test, then, is firmly implanted in the law of the takings clause.[59] The courts, however, have not explicitly stated why a physical invasion is the talisman for finding a taking. One argument has been that the actual language of the takings clause suggests that a physical invasion is required in all taking cases.[60] Because the clause contains the words "property" and "taking," which conjure up the image of a physical appropriation of a thing owned, it is argued that a physical invasion requirement is intended.[61]

Upon closer examination, however, this language argument is found to be dependent on agrarian concepts which stressed title and dominion as the basis of property.[62] The modern conception of property is that of a "bundle of rights."[63] This "bundle" includes both the tangible right of dominion over one's land and less tangible rights, including those of use and enjoyment.[64] The language argument fails to recognize that these less tangible property rights can be "taken" without the slightest physical inva-

57. United States v. Willow River Power Co., 324 U.S. 499, 502 (1945). *See supra* note 49 and accompanying text.

The courts have been uniform in holding, under this rationale, that nuisance type causes of damage, such as sound waves, shock waves, smoke, vibrations and fumes from activities conducted on adjacent property, are not considered physical invasions. *See* Richards v. Washington Terminal Co., 233 U.S. 546, 551-52 (1914) (gas and smoke from adjoining railroad not a taking); Avery v. United States, 330 F.2d 640, 644-45 (Ct. Cl. 1964) (sound and shock waves from airport not a taking); Batten v. United States, 306 F.2d 580, 585 (10th Cir. 1962) (smoke, sound and shock waves from airport not a taking), *cert. denied* 371 U.S. 955 (1963); Nunnally v. United States, 239 F.2d 521, 523-24 (4th Cir. 1956) (shock waves from practice bombing on adjacent land not a taking); Bartholomae Corp. v. United States, 253 F.2d 716, 718 (9th Cir. 1957) (damage from nuclear testing not a taking).

58. *See Loretto II*, 102 S. Ct. at 3175-76; Ryan v. Weiser Valley L & W Co., 20 Idaho 288, 118 P. 769, 772 (1911) (property rights are so important that it makes no difference whether the value is one dollar or one million, the owner must be protected); 2 J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 6.21, p. 6-50 (rev. 3rd ed. 1982). This rule has frequently been applied to actions of utility companies. *See, e.g.*, Western Union Tel. Co. v. Penn R. Co., 195 U.S. 540, 573-74 (1904) (telegraph lines installed over railroad's right of way were an intrusion not authorized by federal statute); Lovett v. West Va. Cent. Gas Co., 65 W. Va. 739, 742-43, 65 S.E. 196, 198 (1909) (using land to lay gas line was a taking despite lack of "a great injury"); Southwestern Bell Tel. Co. v. Webb, 393 S.W.2d 117, 121 (Mo. App. 1965) (laying underground cable in unused area of property was a taking). *Cf.* Butler v. Frontier Tel. Co., 186 N.Y. 486, 79 N.E. 716, 718 (1906) (action in ejectment allowed for wire strung 30 feet above plaintiff's property, without any structures on the ground).

59. For another example, *compare* United States v. Eureka Mining C., 357 US. 155 (1958) (war-time government order for gold mine to cease operations was not a taking) *with* United States v. Pewee Coal Co., 341 U.S. 114 (1951) (war-time government seizure of mine was a taking).

60. *See* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1185 (1967); *Zoning*, *supra* note 2, at 1469.

61. Michelman, *supra* note 60, at 1185.

62. *Zoning*, *supra* note 2, at 1468.

63. *See* Kaiser Aetna v. United States, 444 U.S. 164, 176, 179 (1979); United States v. Virginia Elec. & Power Co., 365 U.S. 624, 638 (1961) (Douglas, J., concurring). *See also* RESTATEMENT OF PROPERTY ch. 1, Introductory Note (1936) ("property" is used in the Restatement to denote the legal relations between persons with respect to a thing).

64. *See Zoning*, *supra* note 2, at 1468.

sion of a parcel of land.[65] The language rationale, then, precludes the recognition of a taking for an entire class of property rights when it requires a physical invasion as a prerequisite to the payment of just compensation.[66]

A more persuasive reason for the weight given to a physical invasion is the desire to protect the dominion and control one may exercise over his property.[67] Physical possession of property is a cherished prerogative and a dramatic indicator of ownership.[68] A direct physical invasion is viewed as an encroachment upon the sanctity of the property and its owner.[69] The physical invasion test attempts to satisfy the need of individuals to rely on a sphere of protectable interests in their property.[70]

Despite the test's predictability,[71] it has been commonly criticized for being arbitrary and for requiring decisions concerning property rights based solely on fortuitous circumstances.[72] Most commentators agree that the proper function of the test should be merely to identify certain situations in which it is clear that a taking has occurred.[73] The lack of a physical invasion, however, should not be the sole criterion to *preclude* the finding of a taking, because such a rule can lead to unjust results.[74]

These unjust results are exemplified in cases dealing with the taking of avigation easements by airport activity.[75] In *United States v. Causby*[76] and *Griggs v. Allegheny County*,[77] the United States Supreme Court found takings of avigation easements when frequent, low altitude flights directly over property precluded plaintiffs from using their land.[78] Subsequent

65. *See* Michelman, *supra* note 60, at 1186-87. The linguistic argument is not persuasive because it fails to recognize such rights in property as negative easements or servitudes, which may, for example, prohibit a landowner from building any structure on his land. *Id. See also Zoning*, *supra* note 2, at 1469.

66. Michelman, *supra* note 60, at 1186-87.

67. Note, *Finding A Taking: Standards For Fairness*, 16 U.S.F.L. REV. 743, 746-47 (1982); *Zoning*, *supra* note 2, at 1468.

68. Michelman, *supra* note 60, at 1228.

69. *See Zoning*, *supra* note 2, at 1468.

70. *Id. See* Michelman, *supra* note 60, at 1228. *See also* Note, *supra* note 67, at 747 (property owners should be protected against state intrusions that breach their privacy and security).

71. The test has been defended on the grounds that it is predictable and that it will keep settlement costs low. *See* Michelman, *supra* note 60, at 1227.

72. *Id.* at 1226-29. The test puts form over substance, ignoring the effects of a government action. *Id.* at 1186. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 47-48; *Zoning*, *supra* note 2, at 1469.

73. See Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165, 172 (1974) (only utility of the test is to decide when compensation should be paid, but never when compensation should be denied); Michelman, *supra* note 59, at 1228 (test is a convenience for identifying *clearly compensable* occasions and cannot justify dismissal of action of *clearly noncompensable*) (emphasis in original). *But see* BOSSELMAN, *supra* note 40, at 255 (recommending a return to the physical invasion test to permit a broader scope for environmental zoning). *Cf.* Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 163 (1971) (under suggested analysis of takings, one should sometimes be required to tolerate a physical invasion of the surface of his land without being entitled to compensation).

74. *See Zoning*, *supra* note 2, at 1469.

75. *See generally* Berger, *Nobody Loves an Airport*, 43 S. CAL. L. REV. 631, 640-46, 654-60 (1970); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 86-87.

76. 328 U.S. 256 (1946).

77. 369 U.S. 84 (1962).

78. United States v. Causby, 328 U.S. 256, 259, 265 (1946) (result of frequent and direct overflights by army and navy aircraft was to destroy use of property as a chicken farm); Griggs v.

cases have interpreted *Causby* and *Griggs* to impose a requirement of physical invasion by direct flight over the plaintiff's property.[79] The result in these cases is that plaintiffs recover damages only if they are fortunate enough to be able to prove that the airplanes pass directly over their property.[80] Plaintiffs not so fortunate are denied recovery even if their property is damaged by noise and shock waves of the same magnitude as affects their neighbors in the direct flight path.[81]

As society moved from its agrarian base to a modern commercial setting, government intrusions of a nonphysical nature became the rule rather than the exception.[82] The physical invasion test became inappropriate because it did not allow courts to find takings when governmental regulations destroyed property rights without physically intruding on any property.[83] In 1922, the United States Supreme Court departed from adherence to the physical invasion requirement in *Pennsylvania Coal Co. v. Mahon*.[84] In *Pennsylvania Coal*, the Court, Justice Holmes writing, held that the application of a federal statute prohibiting a coal company from mining its coal resulted in a taking.[85] Holmes stated that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[86]

Thereafter, cases premised on regulations "going too far" flooded the courts.[87] To deal with these cases, the Supreme Court developed over the years a balancing test which was most clearly formulated in *Penn Central*

Allegheny County, 369 U.S. 84, 87-89 (1962) (direct flights over plaintiff's property at low altitudes forced him to move).

79. *See, e.g.*, Batten v. United States, 306 F.2d 580, 582-84 (10th Cir. 1962) (on their facts, *Causby* and *Griggs* involved flights directly over plaintiff's property), *cert. denied*, 371 US. 955 (1963); Moore v. United States, 185 F. Supp. 399, 400 (N.D. Tex. 1960); Freeman v. United States, 167 F. Supp. 541, 543 (W.D. Okla. 1958). Some state courts have not required physical invasions in airport cases under their state constitutional provisions, which often allow compensation for taken or damaged property. *See* Martin v. Port of Seattle, 64 Wash. 2d 309, 318, 391 P.2d 540, 546 (1964), *cert. denied*, 379 U.S. 989 (1965); Thornburg v. Port of Portland, 233 Or. 178, 187, 376 P.2d 100, 104 (1962).

80. *See, e.g.*, Jensen v. United States, 305 F.2d 444, 446 (Ct. Cl. 1962); Matson v. United States, 171 F. Supp. 283 (Ct. Cl. 1959); Ackerman v. Port of Seattle, 55 Wash. 2d 400, 412, 348 P.2d 664, 667 (1960). *See also* Speir v. United States, 485 F.2d 643, 646-47 (Ct. Cl. 1973) (helicopter flights).

81. *See supra* note 79 and accompanying text. In rejecting this result, the Washington Supreme Court has stated, "we are unable to accept the premise that recovery for interference with the use of land should depend upon anything 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." Martin v. Port of Seattle, 64 Wash. 2d 309, 316, 391 P.2d 540, 545 (1964), *cert. denied*, 379 U.S. 989 (1965). The physical invasion requirement is not a necessary conclusion to be drawn from *Causby* or *Griggs*. Durham, *supra* note 75, at 87. Although the facts in both cases involved physical invasions (direct overflights), the finding of a taking was really based on the interference with use and enjoyment caused by noise, vibration and fear of injury. *Id.*; Berger, *supra* note 75, at 659-660. *Accord*, Martin v. Port of Seattle, 64 Wash. 2d 309, 316-17, 391 P.2d 540, 545 (1964), *cert. denied*, 379 U.S. 989 (1965);Thornburg v. Port of Portland, 233 Or. 178, 185-90, 376 P.2d 100, 104-06 (1962).

82. *Loretto II*, 102 S. Ct. at 3182 (Blackmun, J., dissenting). *See Zoning*, *supra* note 2, at 1468; BOSSELMAN, *supra* note 40, at 123.

83. *See Zoning*, *supra* note 2, at 1468.

84. 260 U.S. 393 (1922). For an in-depth discussion of the background of the *Pennsylvania Coal* decision, see BOSSELMAN, *supra* note 40, at 124-38.

85. 260 U.S. 393, 414-15 (1922).

86. *Id.* at 415.

87. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); Goldblatt v.

Transportation Co. v. New York City.[88] This test requires a case by case consideration of the character and economic impact of the governmental intrusion, the extent to which it interferes with investment-backed expectations and any social benefits arising from the government action.[89] The inquiry focuses on the interference with rights in a total parcel of property and not on "discrete segments of rights."[90]

At issue in *Penn Central* was the application of New York City's Landmark Preservation Law to Grand Central Terminal, one of midtown Manhattan's most famous buildings.[91] Pursuant to the law, the terminal was designated a "landmark."[92] This designation resulted in the owner of the terminal being denied the permission necessary to build a proposed office tower as an addition to the terminal.[93] The United States Supreme Court, applying its balancing test, determined that denial of such permission did not amount to a taking under the fifth and fourteenth amendments.[94]

The Court first noted that New York City's social objective, to preserve the character and the desirable aesthetic features of the city, was constitutionally recognized as legitimate.[95] Next, the Court noted that an examination of the character of the invasion is not limited to a particular segment of the property but applies to the parcel as a whole. The owner's claim that all of his rights in his airspace had been taken was therefore rejected.[96] The Court also determined that the economic impact of the regulation must be judged on the entire parcel and its remaining uses.[97] As to the Court's final factor, the regulation's interference with investment-backed expectations, the Court noted that the terminal could still operate

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Town of Hempstead, 369 U.S. 590 (1962); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

88. 438 U.S. 104, 124 (1978).

89. *Id.* at 114, 124. This test has been both praised as clarifying a confused area of legal doctrine, *see* Note, *Police Power and Compensable Takings—A Landmark Decision Clarifies The Rules: Penn Central Transportation Co. v. City of New York*, 11 CONN. L. REV. 273, 289 (1979), and criticized for adopting an eclectic approach which is based on criteria pulling in different directions. *See* Comment, *Penn Central Transportation Company v. New York City: Easy Taking-Clause Cases Make Uncertain Law*, 1980 UTAH L. REV. 369, 380.

90. Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978). *But cf. Loretto II*, in which the Court found a taking when a "discrete segment" of plaintiff's property was taken. 102 S. Ct. at 3179.

91. 438 U.S. 104, 115 (1978). The terminal, built in a French beaux-arts style, was constructed in 1913 and "is regarded . . . as providing an ingenious engineering solution to the problems presented by urban railroad stations." *Id.*

92. *Id.* The New York Landmarks Preservation Commission, pursuant to its statutory function, *see id.* at 110-11, designated the terminal a "landmark" after a public hearing. *Id.* at 115-16. Penn Central Transportation Co., the owner of the terminal, challenged the designation before the Commission, but did not seek judicial review of the confirmation of the decision by the Board of Estimate. *Id.* at 116.

93. *Id.* at 116-18. Penn Central did not challenge the denial in court. *Id.* at 118. The designation as a "landmark" also imposes affirmative duties and other restrictions on the property owner. *See id.* at 111-12. The law benefits the property owner, though, in that it allows a transfer of developmental rights to other parcels owned by the same party near the "landmark" site. *Id.* at 113-15.

94. *Id.* at 138.

95. *Id.* at 129.

96. *Id.* at 130-31.

97. *Id.* at 131.

as a railway terminal and make a reasonable return to its investment, which the Court found must have been the owner's primary expectation concerning the parcel.[98]

The *Penn Central* balancing test, then, was developed to determine whether state action, in the form of regulation, resulted in a "taking." A question remaining after *Penn Central* was whether the balancing test should also be applied when determining whether a physical invasion amounted to a "taking."

Two United States Supreme Court cases decided prior to *Loretto II* seemed to apply the balancing test to factual situations involving physical invasions. The first of these cases was *Kaiser Aetna v. United States*.[99] In *Kaiser Aetna*, a developer's private marina had been physically invaded because it became open to the public as a navigable waterway under federal water law.[100] The Court mentioned, and seemed to apply, the *Penn Central* balancing test in its determination that a "taking" had indeed occurred.[101]

The second case apparently applying the *Penn Central* balancing test to a physical invasion of property was *PruneYard Shopping Center v. Robins*.[102] In *PruneYard*, a shopping center owner claimed that being required, by California law, to allow access to persons wishing to circulate petitions on his premises denied him the right to exclude others from his property, and hence, a taking had been effected.[103] Stating that the existence of a physical invasion was not determinative of the taking issue,[104] the Court explicitly applied the balancing test.[105] The Court further stated that no evidence of an adverse economic impact or of interference with investment-backed expectations had been suggested.[106] The Court, therefore, ruled that no taking had occurred.[107]

Following these cases, the New York Court of Appeals understandably applied the *Penn Central* balancing test to the facts of *Loretto I*.[108] The United States Supreme Court, in *Loretto II*, however, distinguished these cases on the basis that the balancing test was applied only because of the limited or temporary nature of the physical invasions at issue.[109] *Kaiser Aetna* was characterized as involving only a taking of an easement of passage and not a permanent occupation of land.[110] Similarly, *PruneYard*

98. *Id.* at 136.
99. 444 U.S. 164 (1979).
100. *Id.* at 165-66.
101. *Id.* at 178-80. The Court did seem to rely more heavily on the fact that the marina had been physically invaded and that the owner had lost his right to exclude others from his property. *Id.* at 179-80.
102. 447 U.S. 74 (1980).
103. *Id.* at 82.
104. *Id.* at 84. *See* Note, *Finding A Taking: Standards for Fairness*, 16 U.S.F. L. REV. 743, 748 n.27 (urging that *PruneYard's* limitation on the physical invasion test be limited to the facts of the case).
105. PruneYard Shopping Center v. Robins, 444 U.S. 74, 82 (1980).
106. *Id.* at 83-84.
107. *See id.* at 84.
108. 53 N.Y.2d at 144-51, 423 N.E.2d at 330-34.
109. *See* 102 S. Ct. at 3174-76.
110. *Id.* at 3175. These distinctions are not convincing. Nowhere else does the Court suggest

was distinguished as involving only a temporary and limited abrogation of the property owner's right to exclude others.[111] The Court stated that only temporary physical invasions are to be judged by the balancing test because in such cases the owner's rights to use his property and to exclude others from it are not as severely affected as in permanent invasions.[112]

The status of the physical invasion test in "taking" jurisprudence is now clear. If a government action results in a permanent physical invasion of property, the government has committed a "taking" and must justly compensate the property owner.

Loretto II—*Applying a Per Se Takings Rule to CATV Installation*

The United States Supreme Court in *Loretto II* held that when government action results in a permanent physical invasion, the action amounts to a taking.[113] This rule applies no matter how small the area taken is in relation to the entire parcel.[114] The *Loretto II* Court admitted that recent cases had left the impression that a balancing test should be applied to all "taking" determinations.[115] But the Court made it very clear, in *Loretto II*, that no such balancing test should be applied when considering permanent physical invasions.[116]

The facts involved in the *Loretto II* case were particularly well suited to an application of the per se rule.[117] Basically, Teleprompter, under authority of state law, had made a physical attachment of CATV equipment to Loretto's property, permanently occupying a relatively small amount of space.

More specifically, the physical invasion at issue was Teleprompter's installation of a cable and two silver boxes on the roof and down the front of Loretto's apartment building.[118] The cables and equipment were at-

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that its per se rule is dependent on the physical invasion being made on *land*. *Kaiser Aetna* might be characterized as allowing sporadic physical invasions of the *marina*, which the Court may want to judge by using the balancing test. *Cf.* cases cited *supra* note 56 and accompanying text.

111. *Loretto II*, 102 S. Ct. at 3175.

112. *Id.* at 3176 n.12.

113. *Loretto II*, 102 S. Ct. at 3171.

114. *See id.* at 3177-78 n.16 (taking not dependent on whether volume of space occupied is "bigger than a bread box"). *But cf.* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978) ("taking" jurisprudence must focus on the effects of the action on the parcel as a whole—not on particular segments).

115. *Loretto II*, 102 S. Ct. at 3174. The *Loretto II* Court also pointed out that even these cases stressed the serious nature of a physical invasion and therefore did not imply that the balancing test should be applied to a permanent physical invasion. *Id. See* Kaiser Aetna v. United States, 444 U.S. 164, 180 (stressing that the imposition of a navigational servitude resulted in a physical invasion of a private marina); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) ("a taking may more readily be found when the interference with property can be characterized as a physical invasion"). *See also* Andrus v. Allard, 444 U.S. 51, 65 (1979) (Court stressed no physical invasion of property in government prohibition against sale of eagle feathers).

116. *See Loretto II*, 102 S. Ct. at 3175-76. *See also* Michelman, *supra* note 60, at 1184 ("the courts . . . *never* deny compensation for a physical takeover") (emphasis in original).

117. *Cf.* Delaware Lackawanna and Western R.R. Co. v. Town of Morristown, 276 U.S. 182 (1928). In this case, a city ordinance declared a portion of the plaintiff's driveway to be held open as a taxi stand. *Id* at 193. The Court found a "taking" under the guise of regulation. *Id.* at 194-95. Note that in *Delaware L.W.R.R.* and in *Loretto II*, the regulation authorized third parties to enter and thereby physically invade the plaintiff's property. *Id. Loretto II*, 102 S. Ct. at 3178-79.

118. 102 S. Ct. at 3169.

tached to the building's masonry by bolts, screws and nails.[119] Pursuant to section 828,[120] Loretto was precluded from charging either her tenants or Teleprompter any fee for the privilege of using her property and the space needed to attach the fixtures.[121] The statute limited her compensation to a reasonable fee, which the New York Commission on Cable Television had set at $1.00.[122]

At first, this fee seems to provide for "just compensation"—even if a taking had occurred, the property owner would receive the constitutionally mandated compensation.[123] The New York Court of Appeals' interpretation of the statute, which was binding on the United States Supreme Court, however, destroyed this argument.[124] First, the New York court interpreted the statute as not requiring any compensation for "crossover" wiring.[125] The United States Supreme Court, however, held that both "crossover" and "non-crossover" intrusions effect a fifth amendment "taking."[126] Therefore, the New York statute, by permitting noncompensable "crossover" wiring, allowed a taking without compensation. Second, the New York court's interpretation of the statute, as applied to "non-crossovers," was that any compensation for these intrusions was permitted but not required.[127] Furthermore, under the statute the amount of compensation was left to the determination of the New York Commission on Cable Television.[128] The United States Supreme Court concluded that these provisions for compensation were not sufficient in themselves to uphold the statute.[129]

The *Loretto II* holding distinguishes between temporary and permanent physical invasions.[130] While temporary invasions are to be measured for constitutional significance by the *Penn Central* balancing test,[131] permanent invasions will always amount to a taking.[132]

In *Loretto II*, Teleprompter argued that the invasion was temporary, because it was use dependent[133] in that, unlike the installation of telephone or electrical lines, if Loretto's property was ever converted from residential rental use to some other use, the occupation would no longer be protected by section 828.[134] The Court rejected this argument.[135] Although the

119. *Id.*
120. N.Y. EXEC. LAW § 828 (McKinney 1982); *see supra* note 11 for full text of statute.
121. See § 828(1)(b), *supra* note 11.
122. *Id.*; *Loretto II*, 102 S. Ct. at 3170.
123. *See Loretto I*, 51 N.Y.2d at 155, 423 N.E.2d at 326 (Gabrielli, J., concurring) (would uphold statute on the basis that it provides for just compensation).
124. *See* General Trading Co. v. State Tax Comm'n, 322 U.S. 335, 337 (1944) (application by a court of its local laws is controlling).
125. *See Loretto I*, 51 N.Y.2d at 139, 423 N.E.2d at 327.
126. *Loretto II*, 102 S. Ct. at 3178.
127. *See* Appellant Loretto's Brief to the United States Supreme Court at 17.
128. *See Loretto I*, 51 N.Y.2d at 162-63, 423 N.E.2d at 340 (Cooke, C.J., dissenting). The level of compensation was not required to be at the fifth amendment level of "just compensation." *Id.*; Appellant's Brief at 17.
129. 102 S. Ct. at 3177-79.
130. 102 S. Ct. at 3174-75 and n.12.
131. *Id.* at 3176, n.12. *See supra* text at note 89 for factors balanced in this test.
132. *Loretto II*, 102 S. Ct. at 3176.
133. *Id.* at 3178 and n.17.
134. *Id.*; Appellee Teleprompter's Brief at 33-34.
135. *Loretto II*, 102 S. Ct. at 3178, and n.17.

Court did not directly address the issue of whether the use dependency made the invasion temporary, the Court refused to allow a landlord's ability to rent his property to be conditioned on the forfeiting of the right to compensation for a physical invasion.[136] The Court envisioned that a number of greater types of intrusions could be justified under the use dependency theory.[137] Since the Court refused to classify the invasion as temporary, the per se rule was applied.[138]

Justice Blackmun, dissenting, made several arguments against applying a per se test[139] to the facts in *Loretto II*.[140] First, Blackmun argued that the intrusion at issue was so minimal that it did not rise to a level of constitutional significance.[141] The majority of the Court, however, refused to allow the size of an area permanently occupied to be determinative of whether a "taking" had occurred.[142] In the majority view, the extent of an occupation is relevant only in determining the amount of compensation due.[143]

Blackmun's next argument was that the installation of CATV in Loretto's apartment building actually raised the value of her property, and therefore, it was not a "taking."[144] The majority rejected this argument on two grounds. First, on the record, such a conclusion was speculative and contradicted by evidence.[145] Second, like the size of the area occupied, any change in property value was evidence on the question of compensation, and not evidence of a "taking."[146]

Another fact significant to Blackmun was that Loretto admitted she had no plans to use the small amount of space supposedly "taken."[147] The majority opinion, however, points out that Loretto owned the space at issue,[148] and the fact that she did not occupy it was constitutionally irrele-

136. *Id.* (argument would effect a manipulation of the right to exclude others from one's property). *Contra*, *id.* at 3183 (Blackmun, J., dissenting) (intrusion is far from permanent because it only lasts as long as the property is used for residential rentals).

137. *Id.* at 3178, n.17 (vending machines and washing machines were mentioned).

138. *Id.* at 3177-78.

139. In addition to objecting to the Court's application of a per se takings test to the facts of *Loretto*, Justice Blackmun objected to the establishment of any per se rule based on physical invasions in the "taking" area. *See Loretto II*, 102 S. Ct. at 3182. Blackmun viewed the Court's "taking" cases as one long progression in which the Court's most recent authority requires application of the *Penn Central* balancing test to all fact patterns arising under the takings clause. *Id.* at 3184. The Court, Blackmun argued, abandoned the physical invasion requirement to avoid metaphysical determinations over whether property had been physically touched. *Id.* The new rule will reopen the Court's struggle to make that determination and encourage litigants to "shoehorn insubstantial takings" into the physical invasion formula. *Id.* The Court's holding, according to Blackmun, is an "archaic judicial response to a modern social problem." *Id.* at 3186.

140. *Id.* at 3182-3187 (Blackmun, J., dissenting).

141. *Id.* at 3183, n.6 (Blackmun would hold that an intrusion occupying the space of a child's building block is a *de minimus* deprivation entitled to no compensation).

142. *Id.* at 3177.

143. *Id.*

144. *Id.* at 3185 and n.9 (Blackmun, J., dissenting).

145. 102 S. Ct. at 3177, n.15.

146. *Id.*

147. *Id.* at 3165-86 (Blackmun, J., dissenting).

148. *See id.* at 3177 n.16. "[A] landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land." *Id.* (quoting United States v. Causby, 328 U.S. 256, 264 (1946)). The common law doctrine, that a landowner's property stretched to the

vant.[149] Once again, the Court concluded that this was a factor relevant only to a determination of compensation.[150]

The major argument made in favor of the constitutionality of section 828 was that the statute was merely a regulation of the use of rental property.[151] The statute was likened to other New York statutes which require landlords to make such physical attachments to their property as smoke detectors, fire escapes and fire sprinklers.[152] Although the Court admitted that statutes regulating housing conditions and landlord-tenant relationships have been consistently upheld,[153] the statute at issue in *Loretto* was distinguishable because, unlike other regulations,[154] the invasions authorized by section 828 were made by *third parties* with their *own equipment*.[155]

The *Loretto II* Court's characterization of the attachment of cables and other equipment to Loretto's apartment building as a permanent physical invasion triggered the Court's application of its per se takings rule.[156] By applying this rule to the facts of *Loretto II*, the Court respected the purposes of the fifth amendment.[157] The rule reaffirms that government must compensate individual property owners when property is taken for public purposes—even the advancement of new technology.

The clear-cut rule of *Loretto II* seems to be a ray of light in the otherwise shadowy area of "takings" law.[158] The rule, however, has been criticized for being based on outdated precedent.[159] It has also been criticized for reducing the issue in "taking" cases to a metaphysical determination of whether a property has been touched,[160] or to a quibble over what constitutes a permanent occupation as opposed to a temporary invasion.[161] The courts, however, will surely be competent to make this latter distinction when cases come before them.[162] In addition, the *Loretto II* rule should be easier to administer, in the limited situations in which it will apply, than the more complex *Penn Central* balancing test.[163] The *Loretto II* rule,

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periphery of the universe, was abrogated by Congress. United States v. Causby, 328 U.S. 256, 264 (citing 49 U.S.C.A. § 180 (1951) (repealed 1958)). This abrogation recognized the modern need for airspace, as a public highway, to facilitate the growth of air travel. 328 U.S. at 260-61.

149. *Loretto II*, 102 S. Ct. at 3177.

150. *Id.* at 3177 n.15.

151. *Id.* at 3183-84 (Blackmun, J., dissenting).

152. *Id.* at 3183 n.7 and accompanying text.

153. *Id.* at 3178 ("States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.").

154. *See, e.g.*, Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946) (fire regulations upheld); Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922) (emergency housing law upheld); Block v. Hirsh, 256 U.S. 135 (1921) (rent control law upheld).

155. *Id.* at 3178-79. *Cf. supra* note 117. The Court stated that regulations that do not authorize physical invasions will be evaluated by the *Penn Central* balancing test. 102 S. Ct. at 3179.

156. *Id.* at 3177.

157. *See supra* note 44.

158. See *supra* note 5 and accompanying text.

159. *See Loretto II*, 102 S. Ct. at 3182 (Blackmun, J., dissenting) (even if the precedent rooted in an agrarian society has any value today, the rule is not suited for the modern urban age).

160. *Id.* at 3184 (Blackmun, J., dissenting).

161. *Id.* at 3180 (Blackmun, J., dissenting).

162. *Cf. id.* at 3176 n.12.

163. *See* Comment, *supra* note 89, at 380.

however, does have far reaching effects both in other taking situations and in the CATV industry.

The Application of the Loretto II *Rule to Other Cases in "Taking" Jurisprudence*

The per se takings rule for permanent physical invasions announced in *Loretto II* serves to clarify the decisionmaking process in a small group of taking cases. The *Loretto* court reinforced the prevailing view[164] that a physical invasion should serve only as a conclusive indicator of when a taking has occurred. The enunciated rule, however, may have ramifications for other types of taking cases.

One type of case which may be affected by the *Loretto* rule is the airport activity case.[165] In applying United States Supreme Court precedents, the lower federal courts have required both a physical invasion by direct overflight *and* a total destruction of the owner's ability to use his property as prerequisites to finding a "taking."[166] The *Loretto II* rule eliminates any consideration of the amount of damage from a "taking" determination.[167] A direct overflight, therefore, should be considered a "taking" regardless of the economic consequences,[168] if the courts are willing to classify overflights as *permanent* invasions.[169]

Because of *Loretto II*'s stress on physical invasion, disgruntled property owners may also be tempted to claim that sound waves, shock waves or smoke have physically invaded their property. Traditionally, the United States Supreme Court has characterized these claims as nuisance actions, rejecting any "taking" claim by holding that the property involved has been merely damaged.[170] The *Loretto II* rule, however, may open the door for metaphysical determinations of what constitutes a physical invasion[171] and, therefore, may give new life to nuisance type suits as "taking" claims. These ramifications of the per se rule were not envisioned by the *Loretto II* majority and may prove to be a new source of interesting litigation.

The Effects of Loretto II *on CATV Installations—How Can States Assure Access?*

The statute struck down in *Loretto II* was intended to foster the speedy installation of CATV throughout New York.[172] The New York

164. *See supra* note 73 and accompanying text.
165. *See supra* notes 75-81 and accompanying text.
166. Berger, *supra* note 75, at 659-60. *See* Batten v. United States, 306 F.2d 580 (10th Cir. 1962); Moore v. United States, 185 F. Supp. 399 (N.D. Tex. 1960); Freeman v. United States, 167 F. Supp. 541 (W.D. Okla. 1958).
167. *See supra* text at note 146.
168. *Id.* The only qualification would be that flights still must be lower than heights which Congress has designated public airways. *See* Griggs v. Allegheny County, 369 U.S. 84, 88-89 (1962).
169. *Compare* cases, *supra* note 56.
170. *See supra* note 57 and accompanying text.
171. *See supra* note 140.
172. See *supra* note 12 and accompanying text.

legislature attempted to shield CATV companies from property owners demanding excessive compensation for allowing access to their property.[173] In Arizona, CATV companies are in the position of relying on private negotiations with property owners regarding access to their property for installations.[174] The Arizona legislature may determine that Arizona CATV companies, therefore, are subject to the same obstacles which the New York legislature identified.[175] If the Arizona legislature determines that fostering speedy CATV installation is a valid goal,[176] the question, in light of *Loretto II*, is what legislation could be passed to alleviate these problems. Several alternatives are available.

The first alternative would be for the legislature to pass a statute requiring landlords to provide cable installation upon the request of a tenant. The distinction between this type of regulation and the regulation at issue in *Loretto II* is that with the alternative regulation, the landlord would own the installed equipment, and, therefore, no physical invasion by a third party would be involved.[177] The *Loretto II* court itself suggested that this type of regulation would be upheld.[178] The key factor for the Court was that ownership would give the landlord first-hand control over the location and physical effects of the installation.[179] The landlord would have the power to minimize the physical and aesthetic effects of the installation and would not be limited to a statutory indemnification provision to remedy any damage caused by a third party.[180] Enactment of such an outright requirement over suspected public disapproval, however, might be difficult.

Another alternative, broadly stated, is to give CATV companies the power of eminent domain. Under this alternative, property owners are presumably on notice that if private negotiations break down, the CATV company has the alternative to condemn the property interest needed for CATV access, and a court will determine an award of just compensation. Because the owner knows he will be limited to an award of just compensation, he should be more willing to agree on a reasonable price.

Under Arizona's present eminent domain statutes, no express authority exists for bringing a condemnation suit for the purpose of installing

173. See *supra* notes 13-14 and accompanying text.

174. In Arizona, a CATV company may be granted a license to operate a CATV system within a city or unincorporated area by the appropriate licensing authority of a city, town, or county. ARIZ. REV. STAT. ANN. § 9-506A (1977). The license allows the CATV company to use only *public* streets, roads and alleys. *Id.* No express authority exists, in Arizona's statutes, for the exercise of the power of eminent domain to condemn property to be used for CATV purposes. *See* ARIZ. REV. STAT. ANN. § 12-1111 (1982).

175. *See supra* notes 12-14 and accompanying text.

176. The validity of such a determination, considered in light of the influence of any CATV lobbyists, is beyond the scope of this Note.

177. *See Loretto II*, 102 S. Ct. at 3179 n.19 and accompanying text. This approach might still be attacked in that even if the landlord owns the equipment, his property is still being physically invaded by a third party's electronic signals. *Id.* at 3184 (Blackmun, J., dissenting).

178. *See Loretto II*, 102 S. Ct. at 3179 n.19 and accompanying text. The Court suggested that such a regulation would be evaluated as a regulation of the landlord-tenant relationship. *Id.*

179. *Id.*

180. *Id.*

CATV.[181] The statute does, however, authorize condemnation for "[t]elegraph and telephone lines and conduits for public communication,"[182] and the argument could be made that CATV is a "conduit for public communication." Other jurisdiction have held that similar language included CATV.[183] Such an interpretation, however, would not be made under Arizona law. First, the statute listing the purposes for which eminent domain may be exercised has been narrowly construed to include only those purposes apparent from the text of the statute itself.[184] Furthermore, CATV can be distinguished from the two other "conduits for public communication" listed in the text.[185] Telephone and telegraph provide inter-personal private communication; CATV provides public communication to a mass audience.[186] Absent the previously suggested interpretation of the existing statute, the Arizona legislature would have to pass an amendment to the statute expressly allowing the exercise of eminent domain for the purpose of installing CATV cables and equipment.[187]

Conclusion

In *Loretto v. Teleprompter Manhattan CATV Corp.*, the United States Supreme Court considered whether a New York statute forbidding landlords from interfering with, or charging fees for, installation of facilities on their property by cable television companies constituted a "taking" under the fifth amendment. The Court characterized the state-authorized intrusion at issue as a permanent physical invasion of a part of the landlord's property. In holding that a "taking" had occurred, the Court announced a per se rule: all permanent physical invasions are takings within the fifth amendment regardless of the size or economic importance of the intrusion.

The *Loretto II* Court reached its decision by first reviewing the role of the physical invasion test throughout the history of "taking" jurisprudence.

181. *See* ARIZ. REV. STAT. ANN. § 12-1111.

182. *Id.* at § 12-1111(9).

183. *See, e.g.*, Harper v. City of Kingston, 17 Misc. 2d 627, 629-31, 188 N.Y.S.2d 577, 579-81 (Sup. Ct. 1959) (CATV is a "Telegraph and Telephone Corporation" within New York's Transportation Corporation's Law).

184. *See* City of Phoenix v. Donofrio, 99 Ariz. 130, 133-34, 407 P.2d 91, 93 (1965). In *Donofrio*, the court held that ARIZ. REV. STAT. ANN. § 12-1111(3), allowing for condemnation of buildings and grounds for the city's use, did not include parking lots. *Id.* The court stated it would not "inflate, expand, stretch or extend" the statute to matters not expressly stated. *Id.*

185. CATV has been distinguished from telephone and telegraph communication systems by courts determining whether CATV falls within their state's public utility classification. *See* Television Transmission, Inc. v. Public Utilities Comm'n, 47 Cal. 2d 82, 88, 301 P.2d 862, 865 (1956); Illinois-Indiana Cable Television Assoc. v. Illinois Commerce Comm'n, 55 Ill. 2d 205, 220-21, 302 N.E.2d 334, 341-42 (1973).

186. *See* Television Transmission, Inc. v. Public Utilities Comm'n, 47 Cal. 2d 82, 88, 301 P.2d 862, 865 (1956) (service by television is more like theatres and music halls than that of either telephone or telegraph).

187. It is notable that at least one New York Court had held, as early as 1959, that under New York law CATV companies could exercise the power of eminent domain. *See* Harper v. City of Kingston, 17 Misc. 2d 627, 630-31, 188 N.Y.S.2d 577, 581-82 (Sup. Ct. 1959). Despite this power, the legislature passed N.Y. EXEC. LAW § 828—the statute at issue in *Loretto*. The most likely explanation for these two apparently inconsistent actions is either that the *Harper* case is not reliable case law, or that the transaction costs which would arise when CATV companies repeatedly went through formal condemnation proceedings were impracticable, or the CATV companies succeeded in lobbying for a better deal.

The Court determined that it had always found a taking for *permanent physical invasions* of property. The Court limited the circumstances under which its previously announced *Penn Central* balancing test would apply to situations involving regulations which do not authorize or result in a physical invasion, or which authorize or result in a physical invasion of only a temporary nature. The Court concluded that recent cases affirmed the special significance of a permanent physical invasion in "taking" jurisprudence.

Effects of the *Loretto II* decision on other "taking" situations are apparent. Although the per se rule is one which commentators generally agreed was the law prior to *Loretto II*, the Supreme Court has succeeded in providing at least one bright line rule in an area of constitutional law which has, by the Court's own admission, been devoid of clarity. The new rule might have rippling effects in the area of airport activity cases and other nuisance type cases. The main effect, however, is to provide clear-cut guidance to legislatures as to which state actions may be struck down as "takings." The clarity of the decision is a welcomed development in "taking" jurisprudence, even though it is subject to the criticism that it invites metaphysical determinations as to when property has been permanently invaded.

The *Loretto* rule also has an immediate effect upon states which desire to foster the speedy development of cable television. Those states are left with two choices after *Loretto*. First, they may pass statutes requiring landlords to supply tenants with cable television installations which the landlord would own. Second, they may find or grant the right of eminent domain to cable television companies within the state's constitutional or statutory framework. The *Loretto II* rule will, however, require legislatures to be more careful when authorizing permanent physical invasions of private property.