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Loretto v. Teleprompter Manhattan CATV Corp.: The Propriety of a Per Se Rule in Takings Claims, 16 J. Marshall L. Rev. 419 (1983)

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CASENOTES

LORETTO v. TELEPROMPTER MANHATTAN CATV CORP.:* THE PROPRIETY OF A PER SE RULE IN TAKINGS CLAIMS

The fifth and fourteenth amendments to the Constitution prohibit governments from “taking” private property without payment of just compensation.¹ Distinguishing such takings from the lawful, yet noncompensable, exercise of a government’s police power² has been continuously frustrated by the

* — U.S. —, 102 S. Ct. 3164 (1982).

1. U.S. CONST. amends. V, XIV. The fifth amendment provides as follows: “[N]or shall private property be taken for public use; without just compensation.” The Supreme Court has held that this requirement is incorporated into the fourteenth amendment, thereby binding state and local governments. *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980); *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 241 (1897). The above provision will hereafter be referred to as the Takings Clause.

2. The power of government to take private property for public use without the owner’s consent is the power of eminent domain. 1 NICHOLS, *THE LAW OF EMINENT DOMAIN* § 1.11 (J. Sackman ed. 1981). Both the federal government and the individual state governments possess this power, which is generally classified as incidental to a government’s sovereignty and is a means by which it can fulfil its responsibilities. *Id.* at §§ 1.23—1.24. Although the Federal Constitution contains no express grant of the power of eminent domain, the Court has found that power, by negative implication, in the Takings Clause. See *United States v. Carmack*, 329 U.S. 230, 241-42 (1946). The term “police power” is used by the courts to identify those powers reserved by the states to protect the health, safety, welfare and morals of the community. See *Berman v. Parker*, 348 U.S. 26, 32 (1954); *Munn v. Illinois*, 94 U.S. 113, 146 (1876) (Field, J., dissenting). The federal government may also exercise such police power as is necessary to properly exercise powers which are specifically enumerated in the Constitution. NICHOLS, *supra*, at § 1.42[6].

The police power has been viewed by the Court as a qualification to the Takings Clause, permitting interferences with private property rights without compensation. *Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911); *Kratovil & Harrison, Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596, 608 (1954). The Court generally follows two theories when distinguishing between compensable takings, which result from an exercise of a government’s eminent domain power, and noncompensable exercises of its police power. The earlier theory, articulated by the first Justice Harlan, viewed the taking requirement literally. He believed that compensation was not owed unless the government physically appropriated a proprietary

"crazy-quilt pattern"³ of Supreme Court decisions on the issue. In *Loretto v. Teleprompter Manhattan CATV Corp.*,⁴ the United States Supreme Court re-examined this problem and expressed its view that any "permanent physical occupation" of an owner's property constitutes a *per se* compensable taking.⁵

On January 1, 1973, section 828 of the Executive Law of New York⁶ became effective. It prohibited all landlords from interfer-

interest in the claimant's property. See *Mugler v. Kansas*, 123 U.S. 623 (1887); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871); Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964). The second view, held by Justice Holmes, focused not on the form of the governmental action, but rather on the magnitude of harm imposed upon the claimant. When a regulation went too far, it constituted a taking. Thus, a compensable taking of property may occur even when no *physical* invasion has taken place. See *Tyson & Brother v. Banton*, 273 U.S. 418 (1927); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908). The Supreme Court recently surveyed its prior interpretations of the Takings Clause in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Justice Brennan, writing for the majority, expressed the Court's view that the compensation issue is no more than a balancing of public and private rights to the use of land. *Id.* at 123-24. Disputes arising under the Takings Clause are to be resolved by principles of equity; no black-letter rules of law would suffice in this area. *Id.* The Court did, however, retain both traditional approaches for establishing a taking, but only as factors to consider in applying the balancing test:

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. . . . So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when [the] interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id. at 124 (citations omitted). See *infra* note 30. A more detailed discussion of the impact of *Penn Central* is found in Note, *Police Power and Compensable Takings—Landmark Decision Clarifies the Rules*, 11 CONN. L. REV. 273 (1979) and Note, *From Zoning to Landmark Preservation: The Grand Central Terminal Decision Signals a Shift in Land Use Regulation*, 25 N.Y.L. SCH. L. REV. 39 (1979).

3. Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 63. Another commentator noted that "the predominant characteristic of this area of the law is a welter of confusing and apparently inconsistent results." Sax, *supra* note 2, at 37.

4. — U.S. —, 102 S. Ct. 3164 (1982).

5. *Id.* at —, 102 S. Ct. at 3175-76.

6. N.Y. EXEC. LAW § 828 (McKinney 1982).

Landlord-tenant relationship:

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

ing with the installation of cable television facilities upon their premises and made it unlawful for any landlord to demand or accept compensation in excess of the amount which the New York State Cable Television Commission⁷ determined by regulation to be "reasonable."⁸ Pursuant to the statute, the Commission ruled that a one-time payment of one dollar would be the proper fee to which a landlord would be entitled upon the installation of a cable-television company's facilities on his property.⁹

In February of 1976, Jean Loretto, landlord of a five-story apartment building in Manhattan,¹⁰ brought a class action suit¹¹

and appearance of the premises, and the convenience and wellbeing 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 facilities; 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.

Id.

Comparable statutes in Connecticut and Massachusetts were affected by the *Loretto* decision insofar as they proscribed payment to an owner of a multi-unit residential building. See CONN. GEN. STATS. ANN., tit. 16, § 16-333a (Supp. 1982); MASS. GEN. LAWS ANN., ch. 166A, § 22 (West 1979).

7. The Commission was created pursuant to the same statute. N.Y. EXEC. LAW § 814 (McKinney 1982).

8. *Id.* at § 828 1.b.

9. *Loretto v. Teleprompter Manhattan CATV Corp.*, — U.S. —, 102 S. Ct. 3164, 3170 (1982).

10. When Mrs. Loretto purchased the building in 1971, the defendant, Teleprompter Manhattan CATV Corporation, had already installed cable television facilities on the roof. The building's previous owner, Sharie Wald, had entered into an agreement with Teleprompter in January of 1968 granting it permission to install a cable for a flat fee of \$50. The agreement was for a term of five years and was automatically renewable, even if the property was transferred, unless such transferee gave notice of the transfer to Teleprompter within six months of such transfer. *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 134-35, 423 N.E.2d 320, 324, 440 N.Y.S.2d 843, 847 (1981).

In 1970, Teleprompter installed a cable approximately thirty-five feet long and one-half inch in diameter along the length of the building's roof. Directional taps, approximately 4 x 4 x 4 inches, were installed at the front and rear of the roof. Two silver boxes were also installed on the roof. At this time, the cable facilities did not service the plaintiff's building, but were rather part of a cable "highway" which circled the city block. When a tenant desired service, Teleprompter would attach an additional cable to a directional tap on the roof and connect it to the tenant's television. *Loretto*, — U.S. at —, 102 S. Ct. at 3169. Loretto testified that, prior to closing her purchase agreement with Ms. Wald, she had been on the roof to inspect the installation of a new roof, but that she had not noticed the cable facilities

challenging the compensation provision of section 828.¹² On behalf of the class, Loretto alleged that Teleprompter Manhattan CATV Corporation, in so far as it acted pursuant to section 828, violated the fifth and fourteenth amendment rights of the plaintiffs to receive just compensation for the taking of their property.¹³ The trial court entered summary judgment against the class and upheld the constitutionality of the statute, concluding that it was a proper exercise of the state's police power.¹⁴ Both the Appellate Division¹⁵ and the New York Court of Appeals¹⁶ affirmed the order.

The United States Supreme Court, noting probable jurisdic-

until service was provided to one of her tenants sometime after the effective date of § 828. 53 N.Y.2d 124, 135, 423 N.E.2d 320, 324, 440 N.Y.S.2d 843, 847.

11. The class action suit was originally brought on behalf of all owners of real property in the state of New York on which Teleprompter had placed any cable television components. Class action status was granted, however, only after the class was modified to exclude owners of single family dwellings. 53 N.Y.2d at 132, 423 N.E.2d at 322-23, 440 N.Y.S.2d at 845-46.

12. *Id.* at 135, 423 N.E.2d at 325, 440 N.Y.S.2d at 847. In addition, the class sought damages for Teleprompter's alleged trespass, as well as injunctive relief against its continuance. *Id.* at 131, 423 N.E.2d at 322, 440 N.Y.S.2d at 845.

13. Appellant's Brief at 17, *Loretto v. Teleprompter Manhattan CATV Corp.*, — U.S. —, 102 S. Ct. 3164 (1982).

14. *Loretto v. Teleprompter Manhattan CATV Corp.*, 98 Misc. 2d 944, 415 N.Y.S.2d 180 (1979). The trial court reasoned that "the obvious public advantage sought to be served by the legislation under attack greatly outweighs the insignificant nature of the physical use of private property permitted by statute." *Id.* at 945, 415 N.Y.S.2d at 182.

15. *Loretto v. Teleprompter Manhattan CATV Corp.*, 73 A.D.2d 849, 422 N.Y.S.2d 550 (1979). The order was affirmed without opinion.

16. 53 N.Y.2d 124, 423 N.E.2d 320, 440 N.Y.S.2d 843 (1981). The court followed the *Penn Central* approach and noted that there are no "bright-line standards" for differentiating permissible police power regulations from unconstitutional taking. Instead the court examined the facts unique to the case at hand "to determine the private and social balance of convenience." *Id.* at 144-45, 423 N.E.2d at 330, 440 N.Y.S.2d at 853 (quoting *French Investing Co. v. City of New York*, 39 N.Y.2d 587, 596, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976)). It upheld the statute's constitutionality, noting that the substantial educational and community aspects of cable television justify its rapid development and maximum penetration. 53 N.Y.2d at 143-44, 423 N.E.2d at 329, 440 N.Y.S.2d at 852. See also N.Y. EXEC. LAW § 811 (*McKinney* 1982).

Significant to this conclusion were the three factors set out in the *Penn Central* decision: the economic impact upon the landlord, the interference with his "reasonable investment-backed expectations," and the "character of the government action." 53 N.Y.2d at 145, 423 N.E.2d at 330, 440 N.Y.S.2d at 853 (quoting *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980)). See also *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

The court found no showing by plaintiff Loretto that she was deprived of a fair return from her property due to the CATV installations, and was therefore able to dismiss the economic impact factor. 53 N.Y.2d at 149, 423 N.E.2d at 333, 440 N.Y.S.2d at 856. Likewise, the absence of a showing by Loretto that any investment was made in expectation that fees would be

tion,¹⁷ reversed the New York Court of Appeals' decision and remanded the case for further proceedings.¹⁸ Justice Marshall, writing for the majority, addressed the question of whether the New York statute, in so far as it authorized the appropriation of a portion of a landlord's property by a private cable television corporation, constituted a taking which constitutionally required payment of just compensation.¹⁹ The Court held that "any permanent physical occupation" sanctioned by a government is considered a taking without regard to whether the authorized action serves an important public purpose,²⁰ has only minimal economic impact upon the owner of the property,²¹ or occupies only a relatively insubstantial amount of space.²² The

derived from CATV installation allowed the court to dismiss the second factor. *Id.* at 151, 423 N.E.2d at 334, 440 N.Y.S.2d at 856-57.

With regard to "the character of the government action," the court quoted *French Investing Co. v. City of New York*, 39 N.Y.2d 587, 593, 350 N.E.2d 381, 384, 385 N.Y.S.2d 5, 8 (1976):

[G]overnment interference [with the use of private property] is based on one of two concepts—either the government is acting in its enterprise capacity, where it takes unto itself private resources in use for the common good, or in its arbitral capacity, where it intervenes to straighten out situations in which the citizenry is in conflict over land use or where one person's use of his land is injurious to others (*Sax, Takings and the Police Power*, 74 *YALE L.J.* 36, 62, 63). Where government acts in its enterprise capacity, as where it takes land to widen a road, there is a compensable taking. Where government acts in its arbitral capacity, as where it legislates zoning or provides the machinery to enforce noxious use, there is simply noncompensable regulation.

53 N.Y.2d at 145, 423 N.E.2d at 330, 440 N.Y.S.2d at 853.

The court concluded that since the New York legislature acted in its arbitral capacity, a taking had not occurred: "[T]he State has acted not in furtherance of any governmental program normally carried on by government . . . [r]ather it seeks in the interest of education and development of an additional system of communication to adjust the 'benefits and burdens of economic life to promote the common good'." *Id.* (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

The court further found that Loretto would not be bound by the Wald-Teleprompter agreement unless the cable facilities were sufficiently "open and visible to put her to inquiry and charge her with constructive notice of the agreement." 53 N.Y.2d at 135, 423 N.E.2d at 324, 440 N.Y.S.2d at 847. The court side-stepped this factual issue, however, by finding that it was relevant only to the plaintiff's trespass action, and not to her declaratory judgment action regarding the constitutionality of § 828. *Id.* at 135-36, 423 N.E.2d at 325, 440 N.Y.S.2d at 847-48.

17. *Loretto v. Teleprompter Manhattan CATV Corp.*, — U.S. —, 102 S. Ct. 472 (1982).

18. — U.S. at —, 102 S. Ct. at 3168.

19. *Id.*

20. *Id.* at —, 102 S. Ct. at 3171. *See also infra* note 42.

21. — U.S. at —, 102 S. Ct. at 3175-76.

22. *Id.* at —, 102 S. Ct. at 3173. A permanent appropriation of a portion of land, even as insubstantial as the installation of a telephone or telegraph wire, has generally been recognized as a taking. J. LEWIS, *A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES* 197 (1888). This view is analogous to the "breaking of the close" approach to common-law trespass

Court concluded that because section 828 authorized such an occupation, it allowed a taking of a portion of Loretto's property, thereby requiring payment of just compensation.²³

The majority opinion indicated that all taking claims must be analyzed by first classifying the type of governmental interference with private ownership into one of three categories:²⁴ (1) permanent physical occupation;²⁵ (2) temporary physical invasions;²⁶ or (3) nonphysical interferences, such as regulations that restrict the use of the property.²⁷ Interferences of the first type were deemed *per se* compensable takings, while those of the second and third types invoked an application of the balancing test as set out in *Penn Central Transportation Co. v. City of New York*.²⁸ *Penn Central* required an *ad hoc* inquiry into the equities unique to the particular case.²⁹ Compensation would be awarded when "justice and fairness" dictated that economic injuries caused by public action should not remain disproportionately concentrated on the individual claimant.³⁰

actions. See *United States v. Causby*, 328 U.S. 256, 260-61 (1946). See generally W. PROSSER, *THE LAW OF TORTS* 68-75 (1971).

23. — U.S. at —, 102 S. Ct. at 3179.

24. *Id.* at —, 102 S. Ct. at 3172-73.

25. *Id.* at —, 102 S. Ct. at 3171-77. See, e.g., *United States v. Lynah*, 188 U.S. 445 (1903) (permanent flooding of plaintiff's land); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871) (same).

26. — U.S. at —, 102 S. Ct. at 3171-76. See, e.g., *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (intermittent "invasions" of persons authorized by government); *Transportation Co. v. Chicago*, 99 U.S. 635 (1878) (temporary flooding of plaintiff's property).

27. — U.S. at —, 102 S. Ct. at 3173. See, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (landmark preservation law prohibited construction on plaintiff's land); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning ordinance prohibited industrial use of plaintiff's property).

28. 438 U.S. 104, 123-24 (1978).

29. *Id.* at 124. See also *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *United States v. Caltex, Inc.*, 344 U.S. 149, 156 (1952); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

30. The *per se* rule, though purportedly consistent with the *Penn Central* decision, directly conflicts with that decision's unequivocal refusal to construct a set formula for resolving compensation disputes. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). As a result, circumstances which give rise to an application of *Loretto's per se* rule create an exception to the *Penn Central* balancing test. See *Loretto v. Teleprompter Manhattan CATV Corp.*, — U.S. —, 102 S. Ct. 3164, 3170-71 (1982).

Justice Brennan, writing for the majority in *Penn Central*, cited three factors of particular significance when applying the balancing test: the economic impact of the regulation on the claimant; the extent to which the regulation interferes with "distinct investment-backed expectations" and, the "character of the governmental action." 438 U.S. at 124. With regard to the last factor, Justice Brennan explained that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, . . . than when [the] interference arises from some public program adjusting the benefits and burdens of economic

Justice Marshall justified the inflexibility of the *per se* rule by noting the seriousness of a permanent physical occupation of an owner's property as compared to the other types of interference. Only a permanent physical interference was seen to effectively destroy all three of the traditionally recognized rights incident to the ownership of tangible property: the power to exclusively possess, the power to control the use, and the power to dispose absent loss in value.³¹ Equally compelling was the ease of administration that accompanies a *per se* rule. Abstract line-drawing problems inherent in the balancing test³² would be

life to promote the common good." *Id.* (citation omitted). The interpretation of this statement proved crucial to the outcome of the *Loretto* decision.

In *Loretto*, the New York Court of Appeals saw this statement as a formal adoption of Professor Sax's enterprise-arbitration distinction for classifying governmental acts. *See* 53 N.Y.2d at 145, 423 N.E.2d at 330, 440 N.Y.S.2d at 853. Under Sax's theory,

when an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of governmental activity which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required; but when the challenged act is an improvement of the public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required.

Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 67 (1964).

It is clear that such an interpretation was indeed adopted by Justice Brennan in *Penn Central* as evidenced by his application of Sax's approach to the facts of the case. In denying the claimant in *Penn Central* compensation for the governmental interference with his property, Justice Brennan held that the law "neither exploits appellants' parcel for city purposes . . . nor arises from any entrepreneurial operations of the city." 438 U.S. at 135. Earlier in the opinion, Justice Brennan gave examples of what types of governmental actions characterized takings. "[A]cquisitions of resources to permit or facilitate *uniquely public functions* have often been held to constitute 'takings'". *Id.* at 128 (emphasis added). He cited several opinions involving governmental actions which could be characterized as entrepreneurial rather than arbitrational. *See, e.g.,* *United States v. Causby*, 328 U.S. 256 (1946) (government use of flight path for military base over claimant's farm destroyed property). Justice Brennan also cited Professor Sax's article itself. Despite this seemingly unequivocal intention to adopt Sax's theory, the Supreme Court majority in *Loretto* limited the application of the theory to cases of temporary and non-physical interference. Justice Brennan joined the dissenters. *See Loretto v. Telepromoter Manhattan CATV Corp.*, — U.S. at —, 102 S. Ct. at 3174 n. 9.

31. *Id.* at —, 102 S. Ct. at 3176-77. *See also* *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (claimants' retention of their right to possess held crucial to finding of no taking). The Court views the latter two rights as derivative of the right to exclusive possession. *See infra* text accompanying notes 47-49. This was illustrated in a decision less than a year after *Andrus v. Allard*, where the Court found that the destruction of the right to exclusive possession was sufficient to constitute a taking independent of any discussion regarding the rights to control the use and to dispose of the property. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). *But see The Supreme Court, 1979 Term*, 94 HARV. L. REV. 77, 209 n.34 (1980) (the right to exclusive possession can be viewed as a derivative of the right to use).

32. *See infra* note 62.

avoided by focusing on the more formalistic principles of traditional property law. Ascertainment of the extent of harm³³ to the claimant would be deferred until the issue of compensation is addressed.³⁴

Justice Blackmun's lengthy dissent expressed the minority's deep concern with the inherent inconsistencies of the majority's formulation. The *per se* rule would compel compensation for even a *de minimus* interference³⁵ so long as it could be classified as permanent and physical, whereas in the case of interferences that are temporary or nonphysical, the balancing test could result in denial of compensation for a substantial intrusion.³⁶ To eliminate the possibility of such an anomalous result, the dissent advocated applying the balancing test to all taking claims, regardless of the type of interference.³⁷ Blackmun rejected the claim that all three of the landowners' traditional property rights had been destroyed by the invasion,³⁸

33. The extent of harm is an important consideration when applying the balancing test set out in *Penn Central*. See *supra* note 30 and accompanying text.

34. — U.S. at —, 102 S. Ct. at 3177. See *infra* notes 52, 53 and accompanying text.

35. Justice Blackmun persuasively described the invasion in *Loretto* as *de minimus*. "At issue are about 36 feet of cable one-half inch in diameter and two 4"x4"x4" metal boxes. Jointly, the cable and the boxes occupy only about one-eighth of a cubic foot of space on the roof. . . ." — U.S. —, —, 102 S. Ct. 3164, 3180 (Blackmun, J., dissenting). Blackmun approvingly quoted Professor Michelman's comment regarding the Court's policy of compensating for *de minimus* invasions: "[The rule's] capacity to distinguish, even crudely, between significant and non-significant losses is too puny to be taken seriously." *Id.* at —, 102 S. Ct. at 3182 (Blackmun, J., dissenting) (quoting Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1227 (1967)).

36. — U.S. at —, 102 S. Ct. at 3182-84 (Blackmun, J., dissenting). Non-physical interferences frequently have been upheld under the balancing test despite substantial economic losses incurred by the landowner. See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (zoning ordinance limiting land's profitability); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (landmark preservation law prohibited profitable construction venture); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (zoning ordinance prevented continuance of plaintiff's quarry mining); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (restriction on improvements on portion of property).

37. *Loretto v. Teleprompter Manhattan CATV Corp.*, — U.S. —, —, 102 S. Ct. 3164, 3179-80 (1982) (Blackmun, J., dissenting).

38. Blackmun asserted that neither a landlord's right to control the use of his property nor his right to exclusively possess it were destroyed by section 828 because the segment occupied by the cable television facilities would be once again available if the landlord decided to no longer use the land for rental purposes. For the same reason, a landlord's dispositional rights could be preserved because any purchaser of the land would have the option to convert the property to a nonrental use. — U.S. at —, 102 S. Ct. at 3184-85 (Blackmun, J., dissenting).

and also rejected the notion that a landowner's right to possess is absolute, urging instead that "social circumstances" be considered to justify legislative modification of this right.³⁹

The inquiry into whether a governmental interference constitutes a taking or is a proper exercise of the police power involves a more comprehensive conflict between public and private interests in land use.⁴⁰ This conflict requires a determination of when, in justice and fairness, a government may implement a public program which places a disproportionate share of its associated costs on individual landowners.⁴¹ The *Loretto* decision in effect avoids this inquiry whenever the governmental interference permanently and physically appropriates the owners' property.⁴² Although the *per se* rule stated by the Court is consistent with traditional takings law,⁴³ the rule uncompromisingly assumes that it is unfair, regardless of the public interest, to subject a landowner to even a *de minimus* occupation of a portion of his property. This assumption is made despite the numerous denials of compensation to previous claimants who have suffered greater economic detriment because of the overriding public interest in the particular governmental action.⁴⁴

39. To support this point, Justice Blackmun quoted Justice Marshall's own comments in a recent takings case:

[The appellant's] claim in this case amounts to no less than a suggestion that the common law of trespass is not subject to revision by the State If accepted, that claim would represent a return to the era of *Lochner v. New York*, 198 U.S. 45 (1905), when common-law rights were also found immune from revision by State or Federal Government. Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstances.

Id. at 3186 (quoting *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93 (1980) (Marshall, J., concurring)).

40. For an in-depth discussion of the various philosophies on the taking issue, see generally B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* (1973); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 456-65 (1978); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Taking, Private Property and Public Rights*, 81 YALE L.J. 149 (1971) [hereinafter cited as *Private Property*]; Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

41. See *supra* text accompanying note 30.

42. While recognizing the legitimacy of the important public service offered by the cable television industry, the Court indicated that "[i]t is a separate question . . . whether an otherwise valid regulation so frustrates property rights that compensation must be paid." *Loretto v. Teleprompter Manhattan CATV Corp.*, — U.S. —, —, 102 S. Ct. 3164, 3170-71. It then concluded that a permanent physical occupation is a taking without regard to the public interest. *Id.*

43. See *supra* notes 2 & 22.

44. See *supra* note 36 and accompanying text.

Although it is possible that the *Loretto* Court implicitly decided the case on the equities, the opinion is devoid of any such indication. Instead, the Court relied on a qualitative notion of severity of the impact of a governmental action, thereby distinguishing all previous denials of compensation to claimants suffering greater economic losses.⁴⁵

The Court criticized the dissenters' objection to the *per se* rule by asserting that the qualitative distinction between the traditional types of property rights is determinative of the taking issue.⁴⁶ Only a permanent physical occupation of the claimant's property is deemed capable of destroying the fundamental and most treasured right of exclusive possession.⁴⁷ The Court viewed this type of deprivation as qualitatively more severe than the deprivation of the right to control the use of property⁴⁸ or any other right incident to property ownership. This qualitative hierarchy of severity is, in theory, legitimate. To be deprived of the right to control the use of property, while still entitled to exclusive possession, leaves the owner with the option of enjoying the property through some other permitted use. The deprivation of the right to exclusive possession leaves no such options to the owner because the right to control the use of property is necessarily subsumed within the expropriated possessory rights.⁴⁹

The major flaw in this reasoning is that the property owner, in the vast majority of cases, would be more willing to relinquish his right to exclusive possession of an insubstantial portion of his property than to relinquish his right to control the use of the whole.⁵⁰ Although the owner would no longer have any interest

45. *Loretto v. Teleprompter Manhattan CATV Corp.*, — U.S. —, —, 102 S. Ct. 3164, 3171 (1982). See also *infra* notes 46 & 48.

46. "[The] physical occupation of another's property . . . is perhaps the most serious form of invasion of an owner's property interests. . . . [T]he character of the invasion is *qualitatively* more intrusive than perhaps any other category of property regulation." — U.S. at —, 102 S. Ct. at 3176, 3179 (emphasis added). See also *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979); *Andrus v. Allard*, 444 U.S. 51, 66 (1979).

47. — U.S. at —, 102 S. Ct. at 3176.

48. "[S]uch an occupation is qualitatively more severe than a regulation of the *use* of property." *Id.* (emphasis in original).

49. See *supra* note 31.

50. The proposition is illustrated by *Andrus v. Allard*, 444 U.S. 51 (1979). The claimants were in the business of selling Indian artifacts, a number of which were decorated with feathers of birds protected by certain conservation statutes. The statutes prohibited all commercial transactions in the body parts of the birds even if they were legally killed prior to the statutes' effective date. The claimants asserted that to bar the sale of birds killed before the effective date constituted a taking. The Court denied the claim on the basis that the mere prohibition of the sale of the artifacts did not deprive the owners of their possessory rights, only of their right to dispose.

in the physically occupied segment, it is possible that he might be wholly indifferent toward the occupation if it posed no interference with his overall use of the property.⁵¹ The Court's confined inquiry into only the qualitative effect on the landowner ignores the true overall impact of the government's action.

One glaring example of how this shortcoming defeats any practical application of the Takings Clause occurs in the related issue of computing just compensation after a taking has been established.⁵² It is well settled that the award of compensation must approximate the actual loss in value of the affected land to the landowner.⁵³ The *per se* rule, as stated in *Loretto*, renders unavoidable the possibility that an owner who has been deprived of his right to control the use of his property might receive a greater amount of compensation than the amount received by an owner who has been deprived of his right to exclusive possession of his property. It is difficult to conceive how the Court could reconcile the fact that the "more severely" deprived owner, by the *Loretto* majority's own definition,⁵⁴ could be given less compensation than the "less severely" deprived owner. Had the Court addressed the taking issue with a conception of property valuation similar to that employed in its determination of just compensation, this potential inconsistency would have never been created.

The single thread that ties each qualitatively distinctive property right together is its corresponding economic valuation. The owner's interests which are at risk when a government interferes either physically or nonphysically would be more accurately appraised in an economic or *quantitative* sense, rather

The Court relied solely on this qualitative distinction despite the nearly complete destruction of the value of the artifacts to the claimants. *Id.* at 64-65.

51. Although the named plaintiffs in *Loretto* were displeased with Teleprompter's invasion, Mrs. Loretto conceded at a deposition that other landlords felt that the cable's presence enhanced the market value of the buildings. — U.S. at —, 102 S. Ct. at 3185 n.9 (Blackmun, J., dissenting).

52. The taking issue may be thought of as analogous to the liability issue in a common-law tort action. The just compensation issue is analogous to the damage issue. Thus, the constitutional guarantee of just compensation is not a limitation on the power to take, but rather a condition of its exercise. *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685, 689 (1897).

53. *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910) (Holmes, J.) (test is "what has the owner lost, not what has the taker gained"). The courts normally look to the market value of the property to approximate the value to the owner. *See, e.g., United States ex rel. TVA v. Powelson*, 319 U.S. 266, 275 (1943). The Supreme Court has recognized, however, that the market value may not always be the best approximation of what the owner lost. *United States v. Cors*, 337 U.S. 325, 336 (1949) (claimant awarded an amount over and above market value to account for personal labor and other expenditures made on the property).

54. *See supra* note 48 and accompanying text.

than in the *qualitative* sense expressed in *Loretto*.⁵⁵ A quantitative view recognizes that the right to exclusive possession of one's property has an economically definable value even if the owner has no commercial purpose behind his desire to possess it. It follows that the right to control the use of property as well as any other right incident to property ownership can be similarly valued.⁵⁶ It is irrelevant that these rights are *qualitatively* distinguishable from one another, because both rights are subject to an economic valuation which can serve as an accurate approximation of the owner's true interest in the litigation. Furthermore, by more accurately appraising the owner's economic interest, the Court would be better equipped to ascertain a proper balancing of the equities in determining whether fairness requires compensation for the public action.⁵⁷

In *Penn Central Transportation Co. v. New York City*,⁵⁸ the Court recognized that fairness may dictate a denial of compensation to a claimant despite a complete diminution of the value of the property to that claimant.⁵⁹ Thus, the severity of the deprivation of the claimant's property interests, whether defined qualitatively or quantitatively, may have little bearing on the taking issue if, in the interest of equity, there is some overriding public purpose that is furthered by the governmental action. The issue of severity of the deprivation of the claimant's interests, therefore, is merely one factor to consider in determining whether it would be inequitable to impose the costs of public

55. See *supra* note 46.

56. A purchaser of a parcel of land burdened by an easement of passage would be inclined to bargain for a lesser price than if there had been no such easement. Similarly, land that is zoned for residential use only would have little value to an industrial purchaser, assuming that the lot would have no resale value to that purchaser. In the first example, the price differential between a burdened and nonburdened parcel would be a fair estimate of the purchaser's right to exclusive possession of the property. In the second example, the price that the industrial purchaser would be willing to pay for a similar lot which is zoned industrial would approximate the value of this landowner's right to control the use of the land.

57. The *Penn Central* majority suggested three distinct factors of particular significance in balancing public and private rights to property. See *supra* note 30. At issue in *Loretto* was an interpretation of one of these factors, the character of the governmental action. Once it is recognized that the impact of any type of governmental interference on the owner can be expressed in quantitative terms, it becomes necessary to distinguish the "character of the governmental action" factor from the "economic impact on the claimant" factor. Because the latter factor provides adequately for a determination of the impact on the owner, the former factor is meaningless unless it represents some other consideration. It is for this reason that "the character of the governmental action" is more appropriately defined in terms of Professor Sax's enterprise—arbitration distinction. See *supra* note 30.

58. 438 U.S. 104 (1978).

59. *Id.* at 124-25. See *supra* note 36.

benefit on the owner.⁶⁰

The leading authorities on compensation suggest that conflicting claims between public and private rights to land can be resolved by focusing on efficient use of resources.⁶¹ This goal is obtained through government action that "maximiz[es] . . . the output of the entire resource base upon which competing claims of right are dependent."⁶² The proper allocation of the costs incurred by a particular governmental action is initially dependent upon whether this net benefit can still be obtained if every incidentally burdened owner is compensated for his losses.⁶³ If compensating every such owner would cause the program to fail, it must then be determined whether the program would generate a net benefit if implemented without compensation to the burdened few.⁶⁴ If the uncompensated owners will lose more than the beneficiaries of the governmental action will gain, such regulation must fail as unconstitutional.

It is crucial to an accurate application of the efficiency maximization analysis that the policy-making body first ascertain the incidental costs to the burdened landowner. If all such costs

60. 438 U.S. at 123-25.

61. See *TRIBE*, *supra* note 40, at 463-65; Michelman, *supra* note 40, at 1172-83; *Private Property*, *supra* note 40, at 172-86.

62. *Private Property*, *supra* note 40, at 172. Professor Michelman describes this goal as one which "maximizes the total amount of welfare, of personal satisfaction, in society." Michelman, *supra* note 40, at 1173. "Efficiency" is defined as the "augmentation of the gross social product where it has been determined that a change in the use of certain resources will increase the net payoff of goods (however defined or perceived) to society 'as a whole'." *Id.*

Professor Sax admits that a net benefit analysis for all property interests in conflict seems "horrifying in its potential complexity and cumbersome." *Private Property*, *supra* note 40, at 173. For this reason, he believes that the inquiry is primarily one for the legislature. "Judicial intervention . . . ought to be limited to those cases in which the court is satisfied that the legislat[ive] determination is sufficiently distorted as to constitute an abuse of the police power; that the legislature has subordinated a judgment about maximization of social benefits to the advancement of private gains." *Id.* at 176. See also Michelman, *supra* note 40, at 1167.

63. See *supra* note 62.

64. Professor Michelman has articulated the argument for a policy of compensation to the limits of feasibility:

[T]o insist on full compensation to every interest which is disproportionately burdened by a social measure dictated by efficiency would be to call a halt to the collective pursuit of efficiency. It would require a tracing of all impacts, no matter how remote, speculative, or arguable, and a valuation of all burdens, no matter how idiosyncratic or imponderable. If satisfactory performance of such an obligation is not absolutely impossible, at least it is clear that in many situations its costs would be prohibitive. The expense of maintaining and operating whatever settlement machinery was deemed adequate would more than eat up the gains which seemed to make the measure efficient.

Michelman, *supra* note 40 at 1178-79.

were appraised quantitatively, a far more meaningful application of this analysis could be employed. Not only does the *Loretto* majority's qualitative appraisal of these costs distort the true impact of the governmental action on the claimant,⁶⁵ its *per se* rule precludes any rational inquiry into the net benefit to society whenever the character of the government's action can be described as a permanent physical occupation.

Fortunately, the *per se* rule is narrowly limited to the infrequently litigated circumstance of permanent physical occupation authorized by government.⁶⁶ Its precedential value, however, may be greater than these narrow limits suggest. The Court apparently accepted jurisdiction in anticipation of a flood of litigation over cable television installations. This can be inferred from the emphasis that the majority placed on the ease of administration of the *per se* rule.⁶⁷ By declaring that a permanent physical occupation will constitute a taking without regard to the abstract considerations necessary in applying the balancing test,⁶⁸ the Court created a useful simplifying mechanism for claimants who allege permanent physical occupations by a government. Although expediency is certainly a favorable goal in itself, no rule that espouses such niceties has significant value unless it is also supported by both logic and fairness. Yet, given the *Loretto* facts, one can easily imagine the possibility of attaining both expediency and rationality goals in a single holding. The Court could have stated plainly that the New York legislature overstepped its boundaries in that cable television simply does not sufficiently further the public's benefit to justify an appropriation of a landlord's private property without just compensation.⁶⁹ Such a decision would have created mandatory authority effectively binding all courts subsequently confronted with this issue.

The *per se* rule adopted by the Court in *Loretto* represents a reaffirmation of nineteenth-century theory on the Takings Clause.⁷⁰ It sacrifices substance for form by relying on qualitative distinctions that distort an owner's true risk when a govern-

65. See *supra* text accompanying notes 52-57.

66. The vast majority of the litigation regarding the Takings Clause arises in the context of the nonphysical interference, especially zoning. See generally F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* (1973).

67. See *supra* text accompanying notes 32-33.

68. See *supra* note 42 and accompanying text.

69. This, however, would be contrary to the New York Legislature's finding of a sufficient public benefit to justify uncompensated interference with the landlord's property. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 141, 423 N.E.2d 320, 328, 440 N.Y.S.2d 843, 850-51 (1981); N.Y. EXEC. LAW § 811 (McKinney 1982).

70. See *supra* note 2.

ment-authorized interference devalues his property.⁷¹ More seriously, the rule effectively precludes any inquiry into the larger policy issue of whether the particular governmental action has an overriding public importance that might have to be foregone if every incidentally burdened landowner were compensated.⁷² Instead, the rule irrationally assumes that no public program could ever be more important than the interest of the private landowner in being compensated for even a *de minimus* occupation of his land.

Although the scope of the rule is narrowly confined to governmentally authorized permanent physical occupation of land, its impact on the cable television industry is significant. Fortunately for that industry, the *Loretto* decision only made it unconstitutional for a state legislature to deny landlords the right to obtain just compensation. Any demand by a landlord in excess of what is just can still be prohibited by the state. It remains to be seen, however, whether the industry can bear the burden of even the costs of just compensation.

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71. See *supra* text accompanying notes 50-51.

72. See *supra* notes 63-64 and accompanying text.

