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# The Cable Act of 1984 - Why the United States Circuit Courts Are Getting It Wrong in Right of Access Litigation

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# COMMENT

# THE CABLE ACT OF 1984 - WHY THE UNITED STATES CIRCUIT COURTS ARE GETTING IT WRONG IN RIGHT OF ACCESS LITIGATION.

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## PURPOSE OF THE COMMENT

### *Introduction*

Commentaries regarding § 621(a)(2) of the Cable Act of 1984[1] provide an overview of the status of the Act as interpreted in various circuit and state court decisions.[2] Although these overviews

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1. Sec. 621(a)(2) is codified at 47 U.S.C. § 541(a)(2) (1995).

2. Russell G. Donaldson, Annotation, *Validity and Construction of Provision of Cable Act Allowing Cable Companies Access to Utility Easments on Private Property*, 113 A.L.R. Fed. 523 (1992); Frank W. Lloyd, *Cable Competition with SMATV/MMDS/Overbuilders: Access by Franchised Cable Operators to Private Apartment*

are helpful to the practicing attorney, they do not assist a student, or a court for that matter, to understand a prominent flaw within the reasoning of the majority of decisions when § 621(a)(2) is in question.[3] In fact, they overlook the very topic to be discussed herein.[4] By providing a right of access to certain easements and rights-of-way for cable franchisees, the Act creates a takings issue wherein a determination must be made regarding the scope of access contemplated by § 621(a)(2).[5]

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*Dwellings or Single Family Development,* P.L.I. (1992); Jean G. Howard, *Real Property Issues in CATV Use of Public Rights of Way and Easements*, 23 URB. LAW. 413 (1991). These annotations predated important decisions critiqued herein which were not published until 1993.

One note published in 1995 was styled similarly to Donaldson's in that it solely reviewed the current scope of access allowed by courts; however, it, too, did not engage in the critical analysis discussed herein. Deborah C. Costlow, *Access-to-Premises Litigation Under Federal, State and Local Law*, 405 P.L.I./Pat. 1111 (1995).

3. The general purpose of the Cable Act of 1984 is to establish a national policy concerning cable communications by creating franchise procedures that encourage the growth and development of cable systems. The Act also seeks to assure that cable communications provide a diversity of information sources and services to the public and promote competition in cable communications by minimizing regulations that would impose an undue economic burden on cable systems.

The pertinent sections of the 1984 act state:

> § 541. General Franchise Requirements
>
> (a) Authority to award Franchises; public rights-of-way and easements; equal access to service; time for provision of service; assurances.
>
> . . . .
>
> (2) Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure —
>
> (A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not adversely affected by the installation or construction of facilities necessary for a cable system;
>
> (B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and
>
> (C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

47 U.S.C. § 541 (1995).

4. Donaldson, *supra*, note 1 (The annotator states the purpose of the note is to address the constitutional validity of the Act. However, the author is of the view that if "[t]he term 'dedicated' is seen as referring to any utility easement, and not just 'public' ones, then to be constitutional, [the Act] must also contemplate just compensation of the owner." The preceding statement includes the same, inherent flaw existent in the majority of the circuits' interpretations of the Fifth Amendment.

5. The Telecommunications Act of 1996 at Title III § 301 reforms the Cable Act but does not affect the issue to be discussed herein. Because the Act of 1996 has the

*The Cable Act of 1984*

The Cable Act of 1984 provides cable owners franchised by local authorities a right of access to public rights-of-way and "dedicated" easements that are necessary to construct cable systems.[6] Congress stated in hearings that in drafting the Cable Act it recognized the Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*[7] Congress stated, however, that *Loretto* stuck down "a state statute affording cable operators access to premises on the grounds that there was no provision in this statute for granting affected property owners just compensation for the use of their property."[8] In its committee report, the House Committee on Energy and Commerce specifically stated:

> Subsection 621(a)(2) specifies that any franchise issued to a cable system authorizes the construction of a cable system over public rights-of-way, and through easements, which have been dedicated to compatible uses. This would include, for example, an easement or right-of-way dedicated for electric, gas or other utility transmission. Such use is subject to the standards set forth in section 633(b)(1)(A), (B) and (C). Consideration should also be given to the terms and conditions under which other parties with rights to such easements and rights-of-way make use of them. Any private arrangements which seek to restrict a cable system's use of such easements or rights-of-way which have been granted to other utilities are in violation of this section and not enforceable.[9]

*The Act and Takings Law*

The takings issue created by the Act is squarely presented with the interpretation of the scope of access intended to be provided to CATV operators. Clearly, a right of access to particular

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potential of creating additional demands for access to property by the telecommunications industry the problem to be addressed may ultimately be exacerbated if the Constitution is misapplied in the future cases as it has been here.

6. Cable Holdings of Ga. v. McNeil Real Estate Fund VI, Ltd., 988 F.2d 1071 (11th Cir. 1993) (Tjoflat, C.J., dissenting).

7. 458 U.S. 419 (1982).

8. H.R. REP. No. 934 98th Cong., 2d Sess. 80-81 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4717-18.

9. H.R. REP. No. 934, 98th Cong., 2d Sess. 59, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4696. Compare the last sentence of this statement to Kaiser Aetna v. United States, 444 U.S. 164 (1979) where the Court held that the government's infringement on the right of a property owner to exclude others from accessing her property results in a taking, discussed *infra*, note 83.

"rights-of-way" and certain "easements" is permitted.[10] The area of great contention throughout the circuits remains whether access to the interior of the dwellings situated on the property is allowed through "private" easements[11] which are not dedicated for public use.[12] For example, are CATV franchisees precluded from following telephone lines into each dwelling in order to provide services where those easements are "private," i.e. made between the telephone company and landowner, even after they have used "public rights-of-way" to gain access through the streets and up to the dwelling? Mere logic suggests that traversing the property without access through a "compatible" telephone or utility "private" easement into the dwelling makes the first action purposeless. Surely, Congress did not intend for cable operators to lay wires across the country through public or "dedicated" easements only to be denied access into dwellings to actually deliver services. This, unfortunately, is currently the condition in the CATV industry, due primarily to a poor understanding of takings law by courts and Congress.

Courts have avoided answering the takings issue presented by premising their decisions on the grounds that if the Act provides access in the latter situations without expressly providing just compensation, the Act is unconstitutional. These courts say the Act limits access to property dedicated for "public" use.[13] The decisions are premised on the incorrect belief that just compensa-

10. "Right-of-way" is used to describe a right belonging to a party to pass over land of another; as used with reference to the right to pass over another's land, it is only an easement and the grantee acquires only a right to reasonable and usual enjoyment of the easement with the landowner retaining rights and benefits of ownership consistent with an easement. Thus, all rights-of-way are easements but not all easements are rights-of-way. Minneapolis Athletic Club v. Cohler, 177 N.W.2d 786, 789 (Minn. 1970); Bouche v. Wagner, 293 P.2d 203, 209 (Ore. 1956) (en banc); Howard, *supra*, note 1, (discussing how these definitions appear in the context of the Act).

11. The Act contemplates "easements in gross" which are created to benefit their holder personally and are not connected with any ownership of the land, such as those made to utility companies or for street easements. ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 8.2 (3d ed. 1984).

12. A "dedication" is "[ ] transfer of an interest in land from a private owner to the public generally or to a public body, such as a municipal corporation." ROGER A. CUNNINGHAM ET AL., *supra* note 11, at § 11.6.

The issue stated can be found in Cable Holdings of Ga., Inc. v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600, 603 (11th Cir. 1992), *cert. denied,* 113 S.Ct. 182 (1992), *reh'g denied,* 988 F.2d 1071 (per curiam).

13. Among these many decisions are most notably, Cable Inv. v. Wooley, 867 F.2d 151 (3d Cir. 1989); Cable Holdings, 953 F.2d at 600; Media General Cable of Fairfax, Inc. v. Sequoyah Condo. Council of Co-Owners, 737 F. Supp. 903 (E.D. Va. 1990), *aff'd,* 991 F.2d 1169 (4th Cir. 1993).

tion for a private taking authorized by the government must be expressly provided in the legislation and that the Act, in subsection (2)(c), does not provide just compensation for a taking but merely for damages incurred during installation or removal over "public" rights-of-way or easements.[14] Therefore, these cases hold that allowing access to "private" easements would render the Act unconstitutional.[15] The failure of these courts to acknowledge the self-executing nature of the Just Compensation Clause can be traced primarily to a poor reading of *Loretto*. This approach to the Act — in an effort to avoid addressing a constitutional issue or to avoid construing the Act in an unconstitutional manner — actually addresses a constitutional issue, albeit wrongly.[16] Because of this initial flaw on a crucial point in takings law, the circuits employ judicial tools of statutory construction and canons of interpretation to "avoid" a constitutional issue.[17] Again, the circuits' interpretation leave a possible scenario where a CATV operator gains access to the property adjacent to an apartment dwelling via public easements but is prohibited from entering dwelling units via telephone or utility easements, even though these easements appear to be compatible with television cable. Such an interpretation frustrates the purpose of the Act. In light of the increase of demands for access likely to result from the Telecommunications Act of 1996, these errors will frustrate that Act, too.

In writing this comment, I will focus on the flawed reasoning by the circuits in their interpretation of § 621(a)(2) of the Act and misapplication of *Loretto*. The comment will not include an extensive listing of every decision dealing with the Act; however, persuasive arguments from courts and judges who exhibit an understanding of the self-executing nature of the Fifth Amendment will, of course, be highlighted. To follow is a brief explana-

14. *See* cases cited *supra* note 13.

15. *See* cases cited *supra* note 13.

16. These courts state that the Act must be interpreted in this manner to avoid addressing a constitutional issue. However in Lowe v. SEC, 472 U.S. 181 (1985), Justice White, concurring in the judgment, exposed the weakness of the canon to avoid constitutional issues when he stated that the canon "amounts to no more than a preference for implicitly deciding constitutional questions without explaining [the reasoning]." Furthermore, Judge Friendly stated in *Mr. Justice Frankfurter and the Reading of Statutes, Benchmarks*, that use of the rule to avoid constitutional questions is really just "constitutional nonadjudication."

17. It would be better for the courts interpreting the Cable Act to address the takings issue and find the Act unconstitutional than use the rule to avoid constitutional issues and construe the Act and takings law incorrectly. Invalidation would give Congress the impetus to amend the Act and make its intentions clear, if it so desires.

tion of the self-executing nature of the Just Compensation Clause, a discussion of *Loretto* and, finally, critical analysis of the primary circuit court decisions and the judicial tools employed by these courts to reach their conclusions.[18]

## THE JUST COMPENSATION CLAUSE

Through the Constitution, the United States government is given "police powers" to regulate land use. Federal regulation is limited by the "due process" and "taking" clauses of the Fifth Amendment[19] and as states are limited by the Fifth Amendment as made applicable to the them through the Fourteenth Amendment.[20] Landowners frequently challenge government land use regulations by claiming a "taking of private property without just compensation." Thus, a landowner who seeks relief under the Fourteenth Amendment really is asserting that the government has violated her substantative due process.[21]

Often, the remedy sought by the landowner who challenges land use regulations as amounting to taking without just compensation is the invalidation of the regulations.[22] Courts, however, began to offer the landowner the alternative remedy of just compensation for a successful challenge.[23] Soon, thereafter, the Supreme Court adopted the proposition that the Fourteenth Amendment mandates just compensation as a remedy for a landowner's action against a governmental regulatory taking.[24]

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18. Other courts of appeal have addressed the issue, but have relied, almost exclusively, on the decisions to be discussed herein. Therefore, to avoid redundancy in the arguments presented, each circuit will not be separately reviewed. Of course, where the circuits not addressed herein rely on the decisions critiqued, the same analysis is applicable. *Compare* Century Southwest Cable TV, Inc., v. CIIF Assoc., 33 F.3d 1068 (9th Cir. 1994); TCI of N. D., Inc. v. Schriock Holding Co., 11 F.3d 812 (8th Cir. 1993).

19. The pertinent portion of the amendment states: "No person shall . . . be deprived or life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. AMEND. V.

20. "[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . ." U.S. CONST. AMEND. XIV, § 1. Thus, the states' power to regulate land use is limited, too.

21. ROGER A. CUNNINGHAM ET AL., *supra*, note 11 at § 9.20.

22. William D. Stoebuck, *Police Power, Takings and Due Process*, 37 Wash. & Lee L. Rev. 1057 (1980).

23. San Diego Gas & Elec. Co. v. City of San Diego, 146 Cal Rptr. 103 (App. 1978), *rev'd on remand without published opinion*, 4 Civ. No. 16297 (filed June 25, 1979), *appeal dismissed*, 450 U.S. 621 (1981).

24. San Diego Gas & Elec. Co. v. City of San Diego, 450 US 621, 653 (1984).

*What Constitutes a Taking?*

In *Loretto*, the Supreme Court decided the constitutionality of a New York statute which provided that a landowner was required to permit a cable company to install CATV equipment upon its property and that the landowner may not demand payment from the company in excess of an amount determined as reasonable by a state commission. The Court held that the statute equalled a taking of the landowner's property and thus the landowner was entitled to just compensation under the Fifth Amendment, as made applicable to the states through the Fourteenth Amendment.

In *Loretto*, the cable company installed a TV cable and a crossover box on the apartment complex. The crossover box on the roof was secured by bolts into the masonry of the building. Although the total surface area affected was minimal, the Court was steadfast in its holding that any permanent physical occupation of real property is a taking.[25] Citing *Penn Central*, Marshall stated that "a taking may more readily be found when the interference with property can be characterized as a physical invasion by government, then when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[26]

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25. In Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) the Court noted that no set formula existed to determine when a taking had occurred and that the court must engage in an "ad hoc" inquiry. Among the factors to be considered were the economic impact of the regulation, the character of the governmental action and the degree of interference with investment backed expectations.

However, for the purpose of the Cable Act — when physical invasion "reaches the extreme form of a permanent physical occupation . . . the character of the government action is determinative" in finding the action works a taking. Justice Marshall noted that "[*Penn Central*] does not repudiate the rule that a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." Loretto, 458 U.S. at 427, 432 (alteration in original).

26. Furthermore, in Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) the Court held that the government imposition of a servitude denied the landowner his right to exclude others from accessing his property. This imposition amounted to a physical invasion of the privately owned property. *See* discussion, *infra* note 81, on the Act's prohibition of private agreements that prohibit a CATV operator's access to compatible easements, which, like *Kaiser Aetna*, is a taking by means of a government infringement on a landowner's right to exclude others from his property.

*See e.g.*,United States v. Causby, 328 U.S. 256, 265 (1946); Portsmouth Co. v. Untied States, 260 U.S. 327 (1922) (holding that even if the government's physical invasion only covers an easement, compensation must still be paid).

*Self-executing Nature of the Just Compensation Clause*

Mechanics of the Amendment

The Just Compensation Clause requires compensation when a taking occurs and "statutory recognition [of the obligation to provide just compensation] is not necessary."[27] The promise to pay when a taking occurs need not be express. It is implied because the duty to pay is required, automatically, by the Fifth Amendment.[28] In essence, "[the Just Compensation Clause] does not prohibit taking private property, but instead places a condition on the exercise of that power."[29] The Court has plainly stated that the amendment is not a limitation on the government but a vehicle to ensure compensation in the case where government interference amounts to a taking.[30] When compensation has not been paid by the government, of course, the Court has the option to invalidate the regulation.[31]

*Effect of the Self-executing Nature on Government Ordinances*

In *First English*, the landowner, a church, brought an action of inverse condemnation against the City of Los Angeles for the "temporary" taking of its land due to an ordinance which prevented the church from building along a stream. After addressing the issue of "temporary " and "permanent" takings, the Court addressed the City's contention that requiring compensation for denial of all use of land prior to invalidation of the ordinance is inconsistent with prior takings decisions which had held that in condemnation proceedings a taking does not occur until compensation is calculated and paid. The Court distinguished the situations, stating:

> [T]hese cases [the prior decisions] merely stand for the unexceptional proposition that the valuation of property which has been taken must be calculated as of the time of the tak-

27. Jacobs v. United States, 290 U.S. 13 (1943).

28. *Id.* at 16.

29. First English Evangelical Lutheran Church of Glendale v. County of L. A., 482 U.S. 304 (1987).

30. *Id.* at 305; *see e.g.,* Armstrong v. United States, 364 U.S. 40, 49 (1960).

31. *See* Duquesnce Light Co. v. Barasch, 488 U.S. 299, 308 (1989) (holding that if a regulated utility's rate does not provide adequate compensation, the State has effectuated a taking without paying just compensation and thus violated the Fourteenth and Fifth Amendments); *see also*, Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601-02 (1935) (voiding a federal statute for failing to provide for just compensation).

> ing . . . . The preliminary activity did not work a taking. It would require a considerable extension of these decisions to say that no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid.[32]

In fact, this is an illustration of the self-executing nature of the amendment. A negation of the Court's statement indicates that if compensation were not required when the taking occurs, then there would be no taking until the ordinance was declared invalid. Therefore, in *First English*, the Court remanded the action to determine if the ordinance effectuated a taking and if so, what compensation was due, regardless of the fact that the ordinance did not expressly provide for just compensation.[33] The Court stated, "Once a court has determined that a taking has occurred, the government retains the whole range of options already available — amendment of the regulation, withdrawl of the invalidated regulation, or exercise of eminent domain."[34]

It is important to remember that this reasoning in *First English* is based on *Loretto*, where, in 1982, the Court did not hold the New York statute invalid but merely remanded the case to determine what compensation was due. In *Loretto*, the ordinance contained a section on damages which did not expressly provide for compensation in regards to a taking.[35] The section closely resembled the Cable Act's damage section at § 621(a)(2)(C), where the

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32. 482 U.S. at 307.

33. 482 U.S. at 309; *see also* San Diego Gas & Elec. Co., 450 U.S. at 654 ("The just compensation requirement in the Fifth Amendment is not precatory: once there is a 'taking,' compensation must be awarded."). *Cf.* Geoffrey L. Harrison, Comment, *The Endangered Species Act and Ursine Usurpations: A Grizzly Tale of Two Takings*, 58 U. CHI. L. REV. 1101, 1107-08 (1991) ("The Takings Clause does not direct courts to invalidate legislation on the grounds that the legislation has disproportionate impact; it requires only that compensation be paid. The legislation remains valid and effective.").

34. 482 U.S. at 308.

35. The New York law 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 or 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 os such facilities; and that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both.

language indicates payment for damage to the property as a result of installation and not for a taking.[36] As stated, the Court did not find the placing of cable wires and transfer boxes impermissible. The Court merely required that just compensation be paid for the permanent physical occupation of the landlord's premises.[37] Furthermore, the Court did not invalidate the New York law because of its failure to expressly provide just compensation. Again, this is because the amendment is self-executing — compensation must be paid for any taking.

To follow is a critical analysis of the judicial tools employed by various circuits of the United States' courts of appeal. The issues addressed for each respective case were selected because: (1) the courts in that case placed great weight on these tools and techniques; (2) the circuits share ideas in interpreting the Act, including tools of statutory construction; and, (3) the theory of the note is more easily comprehended when the vast array of tools used by the judiciary in statutory construction are coupled with courts actually using such tools as opposed to discussing the tools in the abstract.

## JURISPRUDENTIAL TECHNIQUES OF THE UNITED STATES COURTS OF APPEAL

### *A Plain Language Interpretation of the Act.*

A plain language interpretation of the Act creates serious problems. The pertinent sections of the Act state:

> (a) Authority to award Franchises; public rights-of-way and easements; equal access to service; time for provision of service; assurances.
>
> . . . .
>
> (2) Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compati-

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> iii. that the cable television company agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

N. Y. EXEC. LAW § 828 (McKinney Supp. 1981-82).

36. *supra* note 3.

37. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

ble uses, except that in using such easements the cable operator shall ensure:
. . . .[38]

Apparently § 621(a)(2) is a legislative compromise and the final result is a poorly worded statute. The section begs the question of whether "public" modifies "rights-of-way" and "easements" and whether "easements" refers solely to other "easements of compatible uses," such as telephone lines. Courts commonly employ canons of statutory construction to determine the meaning of statutes. One such canon, the rule to avoid surplusage holds that no phrase should be construed to be redundant and that every word and phrase adds something to the statutory command.[39] Applying this canon to § 621(a)(2) illustrates that easements are not limited by the word "public." If "public" was applicable to "easements" then the phrase "over public rights-of-way, and through [public] easements . . . " is redundant. This is because rights-of-way, "as used with reference to the right to pass over another's land . . ." takes only the form of an easement.[40] Therefore, the phrase would be stating "over public rights-of-way [easements] and through [public] easements . . . ." Furthermore, "dedicated" must mean designated or devoted to - as defined in its ordinary usage - because easements for telephone wires and other "compatible uses" are not always in the form of easements which have been formally "dedicated" for "public use."[41]

Also, § 621(a)(2)(C) creates the issue of whether the Act does expressly provide just compensation.[42] None of the circuit courts have found that it does but some district courts take a different position from the circuits in regard to this subsection.[43]

In *Media General Cable of Fairfax, Inc. v. Sequoyah Condo. Council of Co-Owners*, the majority made a textual argument for supporting the position that § 621(a)(2) solely authorizes a CATV franchisee to use public lands, in the form of public rights-of-way

38. 47 U.S.C. § 541 (1995).

39. *E.g.*, Kungys v. United States, 485 U.S. 759, 778 (1988); Exxon Corp. v. Hunt, 475 U.S. 355, 369 n.14 (1986).

40. Minneapolis Athletic Club v. Cohler, 177 N.W.2d 786, 789 (Minn. 1970).

41. Dedicated, in its ordinary usage is defined as "[t]o set apart for or devote to a special purpose; to devote wholly or chiefly." WEBSTER'S NEW DICTIONARY, 153 (Concise Ed. 1990).

42. *Supra* note 3.

43. *See* Cable Holdings of Ga., v. McNeil Real Estate Fund VI Ltd., 678 F.Supp. 871 (N.D. Ga. 1986); *see also* Greater Worcester Cablevision, Inc. v. Carabetta Enters., Inc., 682 F.Supp. 1244, 1258 (D. Mass. 1985).

and easements that have been expressly dedicated to public use.[44] In *Media General*, the CATV franchisee brought a declaratory action under § 621(a)(2) of the Act seeking a declaration that it was entitled to install cable wires in "compatible easements" on the landowner's condominium common areas. Both the district court and Court of Appeals for the Fourth Circuit held that the Act does not permit a franchisee access to private utility easements to reach separate dwellings nor authorize or provide just compensation for such a taking. At the appellate level, the majority relied on the legal definitions of "dedicate" and "dedication" to hold that "dedicated," as used in the statute, has a more narrow and legally different definition from its ordinary usage.[45] The court found that Congress intended to use the technical, legal terms since the statute addressed real property issues.[46] Based on this premise, the court concluded that reading the phrase "over public rights-of-way, and through easements, which . . . have been dedicated for compatible uses" is "more consistent" when "dedicated" is given its legal definition than when "dedicated" includes private easements where rights-of-way are set aside for the public.[47] The circuits' plain meaning interpretations lead to an absurd result which cannot be enforced by courts.[48]

Oddly, a proper reading of takings law combined with this textual argument leads to a result the court seeks to avoid — addressing a constitutional issue. Because of the court's misunderstanding of takings law, it must make this textual argument or find the Act unconstitutional, since its position is that the Act does not expressly provide just compensation and the same must be expressly provided for the legislation to be valid. Notice, however, that if the court properly employs takings jurisprudence, that is, to allow for the fact that a taking may be authorized by the Act without express just compensation due to the self-executing nature of the Just Compensation Clause, an application of the

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44. 991 F.2d 1169 (4th Cir. 1993).

45. *Compare supra* note 34 to *supra* notes 7,9.

46. The court cited Corning Glass Works v. Brennan, 417 U.S. 188, 201 (1974), for the proposition that where Congress uses technical words, or terms of art, those words should be construed according to the art or science involved. *But cf.* United States v. Turkette, 452 U.S. 576, 581 (1981) (alluding that canons of interpretation are just aids to determining meaning and are not ironclad rules.) Thus, if a statute indicates a meaning contrary to [the canons'] presumptions, they [canons] have no value.

47. 991 F.2d at 1173.

48. United States v. Am. Trucking Ass'n., 310 U.S. 534, 543 (1940) (holding that the Court must look past the plain meaning interpretation of a statute when such interpretation leads to an absurd result).

ordinary meaning of "dedicated" does not make the statute unconstitutional, it merely provides for a taking. Thus, it could be argued that a correct application of takings law combined with the majority's plain meaning interpretation of the Act leads to an absurd result.[49] A court making a proper application of the Fifth Amendment could not construe the Act as did the majority in *Media General*.

Judge Kaufman, dissenting in *Media General,* took the more tenable position both that the Act does contemplate a taking and that the text supports such a position. Judge Kaufman explains that the Act contains the limiting language of "public rights-of-way."[50] This phrase would limit a CATV franchisee to solely the right to "pass over" the owner's property through easements already set aside for the public.[51] Judge Kaufman also notes that "public" does not appear in relation to "easements" nor within "dedicated for compatible uses." Furthermore, by applying the ordinary use of "dedicated", which is synonymous with "designated" or "granted," Judge Kaufman held that "easements" are not limited to "public easements" and that § 621(a)(2) therefore considers private easements.[52] This interpretation would find that the CATV operator accessing private compatible easements would be involved in a taking requiring just compensation.[53]

### *The Third Circuit's Reliance on Legislative History*[54]

The Court of Appeals for the Third Circuit looked to § 633 of the Act, which was proposed and rejected, to reach the conclusion that the Act could not provide mandatory access through private

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49. *See* Nix v. Hedden, 149 U.S. 304 (1983) (refusing to employ the specialized meaning of a word if doing so leads to an absurd result).

50. 991 F.2d at 1176.

51. This is because all rights-of-way are easements, *supra* note 7.

52. 991 F.2d at 1176. *See* 50 FED. REG. 18,647 (1987) (a Federal Communications Commission interpretation where "dedicated" was equated to "designated" or "granted"); *see also* FCC v. WNCN Listeners Guild, 450 U.S. 582, 598 (1981) (the Court stated that "[t]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . .") (quoting Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969)).

Here, the FCC's interpretation of the word "dedicated" can only be wrong if a court's position is that such a reading makes the Act unconstitutional by authorizing a taking.

53. 991 F.2d at 1180.

54. While this comment is not intended to be an analysis on the benefits and drawbacks of the forms of statutory interpretation, it would be error not to address the issue since the courts construing the Act rely on them so heavily to avoid the takings issue.

easements already in place within an apartment building, despite the fact that the court felt the language from the House committee "clarifies that a cable television franchisee may use easements dedicated for electric, gas or other utilities."[55] In *Wooley*, the cable operator sought to require the owner of two apartment buildings to allow access to the premises in order to provide service to the tenants.

The legislative history of the Act indicates that Congress originally included but then discarded § 633.[56] The proposed section would have provided a franchised cable company with a right of access to the interior of a multi-unit apartment house when service was so requested by a tenant, even if the landowner objected to the installation.[57] Section 633(b)(1)(A), (B) and (C) were adopted expressly into § 621 of the Act.[58] Other provisions in

55. Cable Invs., Inc. v. Wooley, 867 F.2d 151 (3d Cir. 1989). It is odd that the court concluded that a cable operator is permitted to use "compatible easements" such as electric, gas and utilities without access also being provided to the interior of the buildings and units, themselves, since these electric, gas and utility easements may be private. The court seems to suggest that Congress intended, in an effort to increase competition in the CATV industry and provide increased access to the "information superhighway," to give the CATV operators only the ability to piggyback solely existing "public" easements. I find it an impossible concept that the purpose of the Act is served by this reading, for it would not matter if ten CATV operators gained access to these easements without the ability to extend into individual units. There would only be additional cables underground, providing no services to anyone. Again, the reading of the Fifth Amendment is the crucible to understanding the Act, despite Congressional ignorance. By avoiding the constitutional issue with the use of legislative history, the court has merely affirmed Congress' mistakes.

56. Relying on *Wooley*'s use of legislative history, the *Media General* court observed that the "broad congressional purpose of the Cable Act was written before the final passage of the Act. It was part of the original bill which contained § 633." 991 F.2d at 1173. However, the *Media General* court fails to employ the whole act rule as part of its statutory interpretation. Under this rule of construction, the court should look not merely to a particular clause, but take into account the entire statute. Kokoszka v. Belford, 417 U.S. 642, 650 (1974). This is because "a legislature passes judgment upon the act as an entity, not giving one portion of the act any greater authority than another." 2A SUTHERLAND, STATUES AND STATUTORY CONSTRUCTION § 47.02 (5th Ed., Norman Singer ed. 1992).

Thus, the force of the whole act rule is that all provisions enacted must be given force. While the preamble is typically not given great weight by some courts where the enacting provision is unambiguous, it "may be resorted to to help discover the intention of the law maker . . ." where ambiguity exists, as is the case with the Cable Act. *Id.* at § 47.04. Therefore, the stated purpose of the Act, found in the preamble can be given weight to determine Congress' intent. *Supra* text accompanying note 6.

57. H.R. REP. No. 4103 98th Cong., 2d Sess. § 633 (1984); H.R. REP. No. 943, 98th Cong., 2d Sess. 79-81, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4716-18.

58. The enacted sections stated:

> (b)(1) A state or franchising authority may, and the [Federal Communications] Commission shall, prescribe regulations which provide

§ 633 were dropped prior to enactment.[59]

Congress, in what it described as a recognition of *Loretto*, included subsection (d) in § 633 to provide just compensation for the mandatory access into apartment complexes.[60] The House Committee Report stated that the ultimately unenacted subsection (d) of § 633 was created to provide for just compensation to property owners and that the compensation mechanism had been included "in order to comply with the constitutional requirements" of *Loretto*.[61] In *Wooley*, the court held that the absence of a mandatory access provision, which appeared only in the original § 633 and not the final bill, is an indication of Congressional intent not to provide access into individual dwellings through private easements.[62] The court continued, noting that the Chairman

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(A) that the safety, functioning, and appearance of the premises and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;
(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both;
(C) that the owner be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator. . . .

*Compare* § 621(a)(2)(c) at 47 U.S.C. § 541(a)(2)(A)-(C) (1995).

59. The unenacted sections stated:

(d) In prescribing methods under subsection (b)(1)(D) for determining just compensation, consideration shall be given to —
(1) the extent to which the cable system facilities occupy the premises;
(2) the actual long-term damage which the cable system facilities may cause to the premises;
(3) the extent to which the cable system facilities would interfere with the normal use and enjoyment of the premises; and
(4) the enhancement in value of the premises resulting from the availability of services provided over the cable system.
. . .

H.R. REP. No. 4103, 98th Cong., 2d Sess. § 633 (1984), *reprinted in* H.R. REP. No. 934, 98th Cong., 2d Sess. 13.

60. 130 CONG. REC. H10,444 (daily ed. Oct. 1, 1984) (statement of Rep. Fields).

61. H.R. REP. No. 934, 98th Cong., 2d Sess. 80-81 *reprinted in* 1984 U.S.C.C.A.N. 4655, 4717-18.

62. The court cited to Russello v. United States, 464 U.S. 16, 23-24 (1983) which holds "[W]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." It also cited to Thompson v. Kennickell, 797 F.2d 1015, 1024-25 (D.C. Cir. 1986) where the court found the deletion of a provision to evidence congressional intent.

*Russello* begs the question whether § 633(d) can truly be considered limiting language, as it clearly expanded the cable operators access under the analysis supplied by the *Wooley* court. Was the court correct in citing to this case? *Contra* Conroy v. Aniskoff, 113 S.Ct. 1562, 1567 (1993) where Justice Scalia stated, "Judge

of the House Energy and Commerce Committee, Congressman Wirth, was disappointed in the failure of § 633.[63] However, a reading of the statement indicates that Congressman Wirth was disappointed in the consumer's inability to request cable services because of the deletion of the multi-unit dwelling provision. He does not state that a taking is precluded because of the deletion. The court also noted that an opponent of the mandatory access provision, Congressman Fields, stated that he was pleased with the end result, for it removed a potential burden on property owners to allow an entire apartment building to be wired at the request of one tenant.[64] Congressman Fields stated that he agreed with the intent of the provision - to further expand the reach of cable systems - but disagreed with the modus operandi of this particular provision. Hopefully, the court did not find the intent of Congress existed in the statement of an opponent to § 633 who explicitly agreed with the desired goal of the unenacted provisions. Congressman Fields confirms that the intent was to provide as much cable services as possible. His statement does

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Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." Isn't this what the court is doing here?

63. Rep. Wirth stated:

> The purpose of [§ 633] was to ensure that all consumers including those who reside in apartments and mobile home parks, had the opportunity to receive cable service . . . . The provision prohibited landlords from interfering with a consumer's ability to receive cable service — an increasing troublesome problem whereby landlords become the ultimate electronic editors, deciding to what sources of electronic information, if any, a consumer shall have access.
>
> A number of states have enacted laws to provide for citizen access so that consumers would not be denied access to the increasing wealth of programming and services available over cable television. I applaud these efforts and, of course, the fact that a similar provision is no longer part of [the bill] in no way effects the application of those state laws. I hope my colleagues will join with me in the future to see to it that a similar Federal provision is enacted.

16 CONG. REC. H10435 (daily ed. Oct. 1, 1984) (statement of Rep. Wirth).

64. Rep. Fields stated:

> I am particularly pleased with the version of the legislation before us today which differs slightly from the bill reported from the Committee in June . . . . Under [the mandatory access] provision, if one tenant in an apartment building requested cable, a property owner would have been forced to wire the entire building. Although I concur with the intent of this provision, to make cable service available to the greatest number of individuals, I believe this goal can be achieved in a better, more orderly manner through a negotiated agreement between the cable operator and the property owner, and not by legislative fiat . . . .

16 CONG. REC. H10444 (daily ed. Oct. 1, 1984) (statement of Rep. Fields).

not categorically deny access to any private easement, just those in multi-unit dwellings. Section 633 would not have been applicable where the private easement sought is one in a subdivision that branches off of a public easement into an individual dwelling. In such a case, Congressman Fields' statement would not be of any significance, whatsoever.

The *Wooley* court stated that these floor statements constitute "[F]urther evidence . . . that the Cable Act as ultimately passed encompasses some of the protections for property owners that the deleted § 633 provided, but not those requiring just compensation for takings."[65] However, due to the political manueverings of lobbyists and lawyers to persuade committee staff members and congressional members, it is necessary to be suspicious of the both of these floor statements.[66] Still, the court surmised that:

> Congress recognized that once it deleted the provision for mandatory access to multiple unit dwellings, it need no longer be concerned with the "taking" issue . . . . [W]e read the requirement in section 621(a)(2)(C) that the owner be 'justly compensated' by the cable operator for any damages to be unrelated to any takings issue.[67]

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65. Cable Invs., Inc. v. Wooley, 867 F.2d 151, 157 (3d Cir. 1989).

66. As duly noted by Justice Scalia:

> [O]nly a small proportion of the Members of Congress read either one of the Committee Reports [in question], even if the Reports happened to have been published before the vote; that very few of those who did read them set off for the nearest law library to check out what was actually said in the [four] cases at issue . . . . As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purposes of those references was not primarily to inform Members of Congress what the bill meant . . . but rather to influence judicial construction. What a heady feeling it must be for a young staffer, to know that his or her citation . . . can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.

Blanchard v. Bergeron, 489 U.S. 87 (1989).

67. 867 F.2d at 158. *But cf.* Greater Worcester Cablevision v. Carabetta Enter., 682 F.Supp. 1244, 1259 (D. Mass. 1985) (The court felt that the final version of the Act did, in fact, provide just compensation. It found that "the legislative history [of the Act] explicitly refers to the Supreme Court's decision in *Loretto.*" The courted further noted that "§ 633 was drafted to comply with the constitutional requirement set forth in that decision. Except for the provision detailing a method for determining what constitutes just compensation, § 621(a)(2) fully incorporates the compensation provisions of the unenacted § 633."); *see also*, Media General Cable of Fairfax, Inc. v. Sequoyah Condo. Council of Co-Owners, 991 F.2d 1169, 1180 (3d Cir. 1993) (Kaufman, J. dissenting) (Judge Kaufman adopted this interpretation of the

Based on the legislative history as outlined above, the *Wooley* court determined that it has construed the Act "to avoid the constitutional issue that would be created were access mandated without providing for just compensation to be made to the owner."[68] Here, it is clear that a proper reading of *Loretto* and the Just Compensation Clause would severely diminish the weight placed on legislative history by the *Wooley* court. In fact, a correct reading of *Loretto* and subsequent application of the Just Compensation Clause, despite Congress' beliefs regarding § 633, its surrounding legislative history and the *Wooley* court's reliance on these tools to avoid the takings issue, requires a court to apply the law in conformance with Constitutional precedent and leave it to Congress to amend the Act.

Furthermore, three and maybe four members of the Court adhere, in some form, to Justice Scalia's New Textualism and thus it would be error to discuss § 633 without indicating inherent weaknesses in the use of legislative history in statutory interpretation. This is especially true in a cases interpreting the Cable Act where congressional misunderstanding of the Constitution and Supreme Court precedent lends to drafting which does not accomplish, necessarily, what Congress' stated purpose would suggest.

Scalia and company would look only to the literal meaning of § 621(a)(2), as enacted, and any applicable Supreme Court precedent to as their tools of statutory interpretation. This is not to say, without exception, that the use of the legislative history is without some merit in statutory interpretation.[69] However, it can not be denied that:

> [T]he fact of the matter is that legislative history can be cited to support almost any proposition, and frequently is. The propensity for judges to look past statutory language is well known to legislators. It creates strong incentives for manipulating legislative history to achieve through the courts results not achievable during the enactment process. The potential for abuse is great.[70]

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legislative history. His position comports with the fact that Congress did not understand *Loretto*).

68. 867 F.2d at 159.

69. *See* Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991), where the entire Court, absent Scalia, found varied degrees of relevance from legislative history in statutory interpretation.

70. Wallace v. Christensen, 802 F.2d 1539, 1559 (9th Cir. 1986) (Kozinski, J., concurring in the judgment.)

As previously discussed, the self-executing nature of the clause means that the absence of a just compensation provision within a statute or ordinance does not mean that takings are not authorized by the statute or that just compensation cannot be provided, i.e. that the statute is unconstitutional. Quite conversely, just compensation is automatic once the taking has occurred and if not provided by the legislature or the executive, the statute is invalidated as unconstitutional.[71] Based on the predicate that the Third Circuit misunderstood *Loretto*, it is easy to see that the use of the unenacted § 633 accomplished the court's desire to limit access provided by the Cable Act and avoid the constitutional takings issue. While *Wooley* clearly demonstrates that a provision expressly providing access into apartment complexes was dropped, the legislative history of the Act can never preclude or preempt a correct application of the Constitution. Because Congress clearly did not grasp takings law when drafting or enacting the Act, *Wooley*'s reliance on legislative history is misplaced. Therefore, it is next necessary to look to the Court of Appeals for the Eleventh Circuit, which avoids the takings issue as a matter of jurisprudence, to further explain the deficiency in the circuits' application of the Fifth Amendment. Notice that in all cases to follow, the initial and most crucial flaw is the failure to understand *Loretto* and the self-executing nature of the clause.

### *The Eleventh Circuit and the Canon to Avoid a Constitutional Issue*

While the Third Circuit's extensive analysis of the legislative history has been a primary source for other courts' conclusion that Congress did not intend to provide access to private easements, the Eleventh Circuit has provided the most interesting interpretation of takings law. Primarily, from three lines of cases, this circuit has left its takings jurisprudence in disarray.[72] These case will be analyzed chronologically so the misunderstandings of takings law can be traced more easily.

The issue of the scope of access provided by the Cable Act was first addressed by the United States District Court in the Northern District of Georgia. This was the beginning of the *Cable Hold-*

71. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601 (1935).

72. The three lines of cases are Cable Holdings of Ga., Inc. v. McNeil Real Estate Fund VI Ltd., 678 F.Supp. 871 (N.D. Ga. 1986), *rev'd* 953 F.2d 600 (11th Cir. 1992) *reh'g denied en banc* 988 F.2d 1071 (11th Cir. 1993); Centel Cable Television Co. v. Admiral's Cove Assoc. Ltd., 835 F.2d 1359 (11th Cir. 1988); Centel Cable Television Co. v. Thos. J. White Dev. Corp., 902 F.2d 905 (11th Cir. 1990).

*ings* trilogy.[73] The district court, after examining the legislative history of the Act, concluded that "[C]ongress intended § 621(a)(2) to create the right of access; § 633 merely contained the standards governing the exercise of that right."[74] The court also stated that if Congress did not provide for just compensation for the taking of property that occurs when the CATV franchisee exercises its right of access then § 621(a)(2) would be: (1) unconstitutional or (2) cannot be found to grant access to private easements.[75] Here, the court determined that just compensation is provided by the Act and that only the standards of what equals just compensation were not transferred from § 633 to § 621; therefore, the Act was deemed constitutional.

Next, the Eleventh Circuit heard *Admiral's Cove* on appeal. The district court had found that Centel was not provided a private right of action to install its cables in easements that had been platted for telephone and electric utilities. Writing for the court, Judge Fay held that (1) the cable operator was authorized to access easements dedicated for compatible uses, not limited to "public" easements[76], and (2) that a cause of action for CATV operators was created by the Act.[77] Most importantly, the court noted that "Congress intended the Cable Act to provide uniformity . . . . We do not believe that Congress intended that the cable industry

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73. In that case, the cable operator claimed that the Act provided a right of access to serve tenants in two apartment complexes through compatible utility easements. The landowner stated that the right of access was limited and could not be exercised over a landowner's objection. The landowner asserted that the operators were limited to public rights of way and publicly-dedicated easements and that access to private easements would violate the owner's constitutional rights.

74. 678 F.Supp. at 873. *But cf. Wooley*, 867 F.2d at 158 where the court held:

> [T]he deletion of § 633 in the final version of the Cable Act, the transfer of some of its provisions to § 541 but not those provisions detailing the factors to be considered in arriving at just compensation for a taking, the deletion of any reference to multi-unit buildings, and the statements of the congressmen approving and decrying the deletion of § 633 lead ineluctably to the conclusion that Congress made a considered decision that the Cable Act should not give cable operators the right to impose their service on owners of multi-unit dwellings who choose not to use them.

75. 678 F.Supp. at 873. Unfortunately, this indicates that the district court did not properly address the takings issue.

76. Based on the legislative history of the Act, Judge Fay held that the language "[easements] which have been dedicated for compatible uses . . ." indicated Congressional authorization for cable operators to "piggyback" on easements "dedicated for electric, gas or utility transmission . . . ." 835 F.2d at 1361 n.5.

77. The issue of a CATV operator's right of access to courts is not being treated in this comment, however, Judge Fay's determination that Congress would more likely place the right to sue property owners with the CATV operators is logical.

insure its growth by relying on state access laws when the majority of states had not passed such laws."[78] The case was subsequently remanded for further proceedings. *Admiral's Cove*'s holding primarily addressed the issue of a right of action for cable operators under the Act and hence, the footnote that stated cable operators were allowed to "piggyback" private easements was ignored as dicta in the next case before the circuit.

Thus, in *White,* where the court was faced with the issue of a landowner denying access to a CATV operator to easements which had been granted to Florida Power and Light and Southern Bell, the court found that prohibition of such access is a private agreement in violation of the Act.[79] The developer argued that the Act, as interpreted by the *Admiral's Cove* court, violated the Takings Clause by providing access to "private" easements.[80] The panel rejected this argument based on *Admiral's Cove*.[81] In a concurring opinion Judge Henley, sitting by designation from the Eighth Circuit, expressed concern over *Admiral's Cove* handling of the constitutional issue. While Judge Henley agreed that the Act provided CATV operators an implied right of action against developers who restricted their access to "easements dedicated for compatible uses" he noted "that enforcement of this right does not violate the Fifth Amendment."[82]

Judge Henley's concern regarding the circuit's treatment of the takings issue is well-founded. *Admiral's Cove* relied on *FCC v. Florida Power Corp.*[83] The *Admiral's Cove* court relied on *Florida*

78. 835 F.2d at 1362 *citing* 130 CONG. REC. S14,283 (daily ed. Oct. 11 1984) (statement of Sen. Goldwater); 130 CONG. REC. H10,435 (daily ed. Oct. 1, 1984) (statement of Rep. Wirth).

79. Centel Cable Television Co. v. Thos. J. White Dev. Corp., 902 F.2d 905, 908 (11th Cir. 1990). Under United States v. Machado, 804 F.2d 1537, 1543 (11th Cir. 1986) the circuit is bound by the decisions of prior panels until they are modified en banc. Thus, the *White* court was also bound by the determinations of the *Admiral's Cove* court when it addressed the constitutionality of the Act.

80. The *Admiral's Cove* panel stated that Congress may force the developer to allow a cable operator to use utility easements without offending the Fifth Amendment when the developers voluntarily grants easements for utility use. The court noted that "once an easement is established for utilities it is well within the authority of Congress to include cable television as a user." 835 F.2d at 1362 n.7.

81. 902 F.2d at 909.

82. *Id.* at 910.

83. 480 U.S. 245, 250-51 (1987) where the Supreme Court, reversing the Eleventh Circuit, held that the Pole Attachments Act, 47 U.S.C. § 224 (1988), did not create a taking under the Fifth Amendment because "[n]othing in the Pole Attachments Act . . . gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators. . . . This element of required acquiescence is at the heart of the concept of occupation."

*Power* to hold that since developers made voluntary easement grants for "compatible uses", Congress could force the developer to allow CATV access to those easements without a constitutional violation. Judge Henley properly noted that reliance on this case is incorrect because in *Florida Power* the Supreme Court determined that the Pole Attachments Act did not require pole owners, such as utilities, to allow installation of TV cables on the poles and thus no takings issue developed.[84] Instead, the Court found that since the pole owners had voluntarily permitted physical occupation, the regulation was not the kind of taking as in *Loretto*.[85] Here, the landowners are not voluntarily permitting access to the CATV operators so *Florida Power* is inapplicable.

*Cable Holdings* came on appeal to the circuit two years after *White* had been decided. The circuit court reversed the district court's finding that the Act provided access to the interior of an apartment house's wall through the use of private easements granted to the telephone company, electric company and competing video programming operator.[86] First, the court stated it would not accept the district court's interpretation of § 621(a) because the district court erred by not applying the canon of statutory construction that requires courts to avoid constitutional issues.[87] The court stated that "Congress does not have the constitutional power to authorize a physical occupation of an owner's property . . . even

84. 480 U.S. at 251.

85. *Id.* at 252-53.

Next, Judge Henley made the distinction between the factual scenario of whether the easements in *White* had been granted before or after the enactment of the Cable Act. He stated that if they were prior to enactment, the facts are analogous to *Loretto* and if subsequent, then the Act really works as a condition on future development. The latter situation, Judge Henley urged, would be analogous to Nollan v. California Coastal Commission, 483 U.S. 825 (1987), where a state land use commission conditioned the building permit for a beach bungalow on the granting of a public easement to pass along beachfront property. 902 F.2d at 911.

In *Nollan*, the Court found that the commission could not place such a condition on development within any legitimate exercise of their power and that if they desired the public easement they were required to engage in eminent domain proceedings and pay just compensation. I do not find that situation factually analogous to the situations which arise under the Cable Act. Clearly, Congress does have regulatory authority over the cable industry. That is why the decisions address the issue of congressional intent. *Nollan* was an unconstitutional taking because of the manner in which the easement was obtained — as a condition on development by an agency which lacked such authority. Even an easement created subsequent to the Act would still amount to a permanent physical taking and thus *Loretto* would continue to control.

86. Cable Holdings of Ga., Inc. v. McNeil Real Estate Fund VI Ltd., 953 F.2d 600, 601 (11th Cir. 1992).

87. *Id.* at 602.

when a property owner has privately allowed other occupations which are 'compatible' with a government sanctioned invasion."[88] In an attempt to avoid a constitutional issue, the court fathomed the rule that "§ 621(a)(2) authorizes a franchised cable company's access to easements on private property only when the private property owner has dedicated those easements for the general use of any utilities."[89] Finally, the court stated that the Act does not afford the operator the right to access and occupy the developer's private apartment buildings.[90] Critical errors are committed in the court's discussion of *Loretto*. In a span of one page, the court both correctly and incorrectly states the rule from *Loretto*.[91]

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88. *Id.*

89. *Id.*

90. *Id.*

The district court, in fact, had not stated that the CATV operator could occupy any area of the owner's building. The court stated, "[T]o the extent that [Cable Holding's] system does not completely follow [does not 'piggyback'] rights-of-way or easements, [they] are not properly exercising [their] rights of access. The court will allow [Cable Holdings] 90 days to remove those sections of its system . . . that do not piggyback compatible easements." 678 F.Supp. at 874.

This begs the question of whether the Eleventh Circuit limited access to "public" easements in a reaction to what it thought was the lower court decision providing access to and allowing occupation of "private apartment buildings."

91. The court acknowledged that the New York law amounted to a permanent physical occupation authorized by government and that such a taking required just compensation. It even acknowledged that the Court remanded the case for a determination on the amount of compensation due. Then it stated, in declining to address the takings issue, that if § 621(a) authorizes an occupation of compatible easements the court "would have substantial reservations regarding the constitutionality of the Cable Act . . . . [T]he district court's construction of § 621(a)(2) effectively permits exactly the same occupation found impermissible in Loretto . . . ." 953 F.2d at 604.

Another major argument the court made was that providing access to private easements violates an owner's right to exclude. The court correctly noted that "when the government appropriates an owner's right to exclude another's physical presence without paying the owner just compensation, the government violates the Takings Clause." *Id.* The court surmised that the takings issue thus created is whether the government may appropriate the right to exclude whenever the owner "selectively relinquishes that right by permitting a compatible occupation." *Id.* However, in *Kaiser Aetna*, the marina selectively relinquished its right to exclusion at the charge of $72 per individual who desired to purchase a membership to the marina. There, the Court held that the government had the power to turn the marina public, so long as compensation was provided to the marina owners despite the fact that in so doing, the government was intruding on the landowners right to exclude. Kaiser Aetna v. United States 444 U.S. 164, 179-80 (1979).

Thus, the House Report providing that "[a]ny private arrangements which seek to restrict a cable system's use of such easements or rights-of-way which have been granted to other utilities are in violation of this section and not enforceable . . . ." is further illustration that the Act contemplates a taking, even in the sense of a *Kaiser Aetna* government intrusion on the right to exclude. H.R. REP. No. 934, 98th Cong., 2d Sess. 80-81 *reprinted in* 1984 U.S.C.C.A.N. 4655, 4696.

Just over a year later, the circuit denied rehearing *Cable Holdings* en banc. In a scorching dissent, Chief Judge Tjoflat addressed many of the issues discussed above and emphasized that the Fifth Amendment is self-executing. As stated by Chief Judge Tjoflat:

> The panel, by proceeding as if the clause is not self-executing, has established a rule with far-reaching implications. According to the panel — and apparently now a settled matter in this circuit — state and federal statutes that operate to take private property but which do not explicitly provide for just compensation are unconstitutional. This approach abrogates in this circuit Supreme Court precedent holding that the Just Compensation Clause is self-executing and, therefore, legislation need not explicitly provide for just compensation in order to be constitutional.[92]

Chief Judge Tjoflat exhibits a thorough understanding of takings law and properly notes that the Act need not expressly provide for just compensation. His urging to rehear the takings issue should be followed by the circuit because, currently, its takings law is in disarray.

*Back to the Fourth Circuit: the Courts' Interdependence*

In addition to its plain meaning interpretation, the Fourth Circuit, in *Media General,* relied almost exclusively on the opinions of the Third and Eleventh Circuits in determining that the Act does not permit a CATV operator to compel access to private

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Finally, the court looked to *Nollan* when asking the hypothetical "[C]ould the government [instead] legislate that if the beachfront owner allowed his neighbors to cross his beach, he must allow the public at large to cross?" Again, in *Nollan*, the Court held that the lack of a nexus between the condition imposed and the original purpose in the building restriction converts the purpose into the obtaining of an easement to serve a governmental purpose but without just compensation paid. Therefore, the Court found that if the state wanted an easement across the property, it could exercise its eminent domain power and pay for it. Nollan v. California Coastal Commission, 483 U.S. 825, 844 (1987). Clearly, Congress need not authorize the kind of taking proposed in the hypothetical. Congress may simply authorize a taking, and any taking will require just compensation or invalidation.

92. 988 F.2d at 1071. *Supra* pp. 11-16 for an in-depth discussion of the self-executing nature of the Takings Clause.

Chief Judge Tjoflat's second reason for requesting a hearing en banc was to address "erroneous interpretations" of the facts in *Admiral's Cove* and *White*. Chief Judge Tjoflat suggests that a proper reading of the circuit's precedent would have compelled a different result in *Cable Holdings*. Although breifly alluded to previously, a detailed discussion of this issue is not necessary for the purpose of this comment. Still, the request of Chief Judge Tjoflat for a hearing en banc is obviously encouraged.

utility easements in order to reach individual unit owners, authorize a taking of private property, or provide just compensation for such a taking. Again, the court stated that Media's access was limited solely to "easements and rights-of-way dedicated for public use."[93] What is more troubling, however, is the Fourth Circuit's reliance on *Cable Holdings*. The Fourth Circuit specifically stated that it wished to reserve the takings question "for another day and another set of facts."[94] It accomplished this goal by citing with approval to a section in *Cable Holdings* which stated:

> If § 621(a)(2) authorized [the cable franchisee] to construct its cable system on McNeil's private property regardless of the presence of any compatible easements, we would have little difficulty in finding the provision in violation of the Fifth Amendment. After all, under such facts § 621(a)(2) would be indistinguishable from the New York statute analyzed [and declared unconstitutional] in *Loretto*. . . .[95]

Clearly, the reliance on this passage indicates that the majority does not properly understand *Loretto*. In dissent, however, Judge Kaufman skillfully illustrates the correct holding of *Loretto* and its application to the Act. Judge Kaufman is of the view that the Act does in fact provide CATV operators with access to private easements.[96] Judge Kaufman noted that *Loretto* is factually distinguishable from any case arising under the Cable Act because the statute in *Loretto* did not limit a CATV operator's access to easements, but gave the right to occupy any part of the property. However, Judge Kaufman correctly notes that for the purposes of taking law, this difference is inconsequential.[97] The fact that the *Loretto* statute provided for access to any of the property reasonably required for use adds even more credence to the view that the majority is misreading the clause. This is because the Act limits access to easements and public rights-of-way, an area far more limited than that of the *Loretto* statute. Judge Kaufman correctly stated that construing the Act as enacted so as to require just

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93. The legislative history argument will not be discussed again. However, it is important to note that the same misreading of *Loretto* helps affirm the use of such history. Clearly, the history would be valuable if Congress and the courts were not misapplying the Constitution, but as previously stated, legislative history cannot provide a conclusive basis for an opinion in these cases because the Constitution is being misread.

94. Media General Cable of Fairfax, Inc. v. Sequoyah Condo. Council of Co-Owners, 991 F.2d 1169, 1175 (4th Cir. 1993).

95. *Id.* at 1175 (quoting *Cable Holdings*, 953 F.2d at 604) (alteration in original).

96. *Supra* pp. 16-22 for a discussion on a textual interpretation of the Act.

97. 991 F.2d at 1180.

compensation for a taking allows CATV operators to provide services via private easements and that such a reading of the Act avoids any constitutional problem.[98] Again, as did the majority in *Wooley*, the court here addressed a takings issue it sought to avoid and resolved it improperly.

## CONCLUSION

It is important that we came full circle back to *Media General* because this case illustrates the tendency of the circuits to rely on the decisions of other circuits when cases of first impression arise.[99] Still, there are circuits which have not addressed the issue discussed above and, hopefully, they will pause to read this comment which encourages a proper reading of *Loretto* and the Just Compensation Clause. Failure to do so will surely convolute the purpose of the Telecommunications Act of 1996, just as it has frustrated competition in the cable television industry. Courts considering the scope of access issue presented by the Act should find the Act unconstitutional after addressing the takings issue rather than blindly follow the obstacle course that has haphazardly been laid before them. This would at least entitle Congress another bite at the apple and at worst prevent additional confusion of the issue. The use of the canon to avoid constitutional issues should be employed with caution. As the Supreme Court stated, "[T]he fact that courts should not decide constitutional issues unnecessarily does not permit a court to press statutory construction 'to the point of disingenuous evasion' to avoid a constitutional question."[100] Instead of invoking the canon, I urge courts to recognize the self-executing nature of the clause, allow for invalidation as a remedy, give each provision in § 621(a)(2) equal weight and then rule. The correct ruling would seem to allow the operators access to private easements of "compatible uses." However, if a court does not find the same, invalidation - after addressing the constitutional issue - would at least provide Congress another chance to get it right.

98. *Id.* at 1181.

99. *See* Century Southwest Cable TV, Inc. v. CIIF Assocs., 33 F.3d 1068 (9th Cir. 1994); TCI of N. D., Inc. v. Schriock Holding Co., 11 F.3d 812 (8th Cir. 1993). Both of these cases rely on the techniques of the cases discussed in this comment and cite to the cases approvingly.

100. Jean v. Nelson, 472 U.S. 846, 854 (1985) (quoting United States v. Locke, 471 U.S. 84, 96 (1985)).