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# *FCC v. Florida Power Corp.*: Limiting the Utility of the *Loretto* Rule

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## I. INTRODUCTION

Since the advent of cable television in the 1950's, utilities have commonly permitted cable television operators to set up cable distribution systems by attaching their cables and equipment to the utilities' pole systems.[1] Use of the preexisting pole networks is the most feasible way of establishing a cable system due to financial, aesthetic and franchise considerations.[2] The arrangements between the utilities and the cable companies are referred to as pole attachment agreements and typically involve the leasing of a portion of the unused space on the pole for an annual fee. These agreements also entitle the utilities to reimbursement for all costs incident to preparing the pole for the attachment of cable equipment.[3] Florida Power Corp. (Florida Power) entered into such agreements with Cox Cablevision Corp. (Cox), Teleprompter Corp. and Teleprompter Southeast (Teleprompter), and Acton CATV, Inc. (Acton).[4]

As the cable television industry expanded, the cable companies became dissatisfied with their contracts with the telephone and electric power utilities. The cable operators complained that the utilities often determined rates arbitrarily and drafted terms and conditions into the contract on a "take it or leave it" basis. The utilities were

1. FCC v. Florida Power Corp., 772 F.2d 1537, 1539 (11th Cir. 1985), *rev'd*, 107 S. Ct. 1107 (1987).
2. *Id.* at 1540.
3. *Id.* at 1539.
4. *Id.* at 1539-40.

able to dictate the terms of the agreement by virtue of their superior bargaining position resulting from their monopoly on the ownership and control of the poles. At the urging of the cable television industry, Congress passed the Pole Attachments Act.[5] "The Act authorizes the FCC, subject to preemption by state regulation, to 'regulate the rates, terms, and conditions of pole attachment agreements and to ensure that all of such are just and reasonable.' "[6] The Act sets a formula by which the FCC is to determine the range of what would constitute a "just and reasonable" rate for each particular pole attachment agreement.[7] The Pole Attachments Act also empowers the FCC to "adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms and conditions."[8]

Teleprompter and Acton filed complaints with the FCC alleging that Florida Power was overcharging them under their existing pole attachment agreements.[9] Florida Power responded that relief would effect a taking of private property without just compensation, and thus would violate the fifth amendment.[10] The FCC found for Teleprompter and Acton and ordered rentals to be set at $1.79 per pole.[11] Florida Power then filed an application for review by the FCC.[12] While this application was pending, Cox filed a complaint against

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5. *Id.* at 1540; *see* 47 U.S.C. § 224 (1982).

6. *Florida Power*, 772 F.2d at 1540. The Pole Attachments Act provides in part:

> Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions.

47 U.S.C. § 224(b)(1).

7. 47 U.S.C. § 224(d)(1). The court found this provision unconstitutional. *Florida Power*, 772 F.2d at 1546.

8. 47 U.S.C. § 224(b)(1); *see supra* note 6.

9. *Florida Power*, 772 F.2d at 1540-41. Florida Power was charging Teleprompter an annual rental rate of $6.24 per pole. The parties had agreed to this rate in a contract dated July 1977. That contract further provided for rates of $6.51 for 1981, and $6.79 for 1982. Acton was paying an annual rental rate of $7.15 per pole pursuant to two contracts that the parties signed in 1980. *Id.* at 1541.

In its complaint, Teleprompter requested the FCC to order a maximum annual rate of $2.23 per pole, to insert that rate into the contract, and to require Florida Power to refund to Teleprompter all monies paid in excess of that rate, with interest, from the date of filing of the complaint. Acton's request was identical, except that it requested the FCC to order a maximum annual rate of $2.21. *Id.*

10. *Id.* In regard to Teleprompter's complaint, Florida Power argued that the lower rate would violate the due process clause of the fifth amendment because it would retroactively nullify a contract predating the effective date of the Act. *Id.* at 1541. The Eleventh Circuit did not reach this specific contention because it found that the Act as a *whole* violated the takings clause. *Id.* at 1546 n.6.

11. *Id.* at 1541.

12. *Id.*

Florida Power.[13] Again, the FCC found in favor of the cable company and granted Cox's request that the FCC set a rate of $1.79 per pole.[14] Florida Power filed an application for review of the Cox order with the FCC.[15] On September 28, 1984 the FCC, in one order, denied both applications for review.[16] Subsequently, Florida Power petitioned the Court of Appeals for the Eleventh Circuit for review on October 5, 1984.[17] The Eleventh Circuit vacated the FCC order and held that the order authorizing cable operators to occupy space on Florida Power poles effected a taking of property for which just compensation was due,[18] because the court assumed that the FCC would prevent Florida Power from excluding cable operators from its poles. The Eleventh Circuit also deemed the Pole Attachment Act unconstitutional insofar as it did not permit a judicial determination of just compensation.[19] The FCC appealed the Eleventh Circuit's decision to the Supreme Court.[20] The Supreme Court reversed the Court of Appeals for the Eleventh Circuit and held, that the Pole Attachments Act, as interpreted by the FCC, did not effect a taking under traditional fifth amendment analysis.[21] The Supreme Court did not address the Eleventh Circuit's determination that the Act unconstitutionally usurped judicial power to assess just compensation, because no taking had been found.[22]

This Note will examine the forces and policies that have shaped

13. *Id.* Cox's initial agreement with Florida Power dated back to 1963 and provided an annual rental rate of $5.50 per pole. In 1978, Florida Power proposed a rate of $6.86. Because the parties were unable to reach an agreement, Cox continued to pay only $5.50.

14. *Id.*

15. *Id.* at 1542.

16. *Id.* The FCC rejected Florida Power's constitutional arguments under the takings and due process clauses and, in general language, upheld all of the agency's decisions regarding rate regulation.

17. *Id.*

18. *Id.* at 1546-47.

19. *Id.* The Eleventh Circuit interpreted section (d) of the Pole Attachments Act as prescribing a binding rule for the final ascertainment of just compensation. It viewed this provision as a legislative usurpation of what has long been held to be an exclusively *judicial* function. *Id.* at 1546. The court cited Monongahela Navigation Co. v. United States for the proposition that "the determination of just compensation under the fifth amendment is exclusively a judicial function" and that it "does not rest with Congress to say what compensation shall be paid, or even what shall be the rule of compensation." 148 U.S. 312, 327 (1893). The court also cited Miller v. United States, 620 F.2d 812 (Ct. Cl. 1980), and American Hawaiian Steamship Co. v. United States, 124 F. Supp. 378 (Ct. Cl. 1954), as examples of cases where the courts have struck down legislatively imposed standards for just compensation. The Eleventh Circuit concluded that the Pole Attachments Act was unconstitutional because it did not allow for judicial determination of just compensation.

20. *FCC v. Florida Power*, 107 S. Ct. 1107 (1987).

21. *Id.* at 1113.

22. *Id.*

the jurisprudence of the fifth amendment takings clause. Second, it will analyze and question the reasoning by which the Eleventh Circuit found a taking through the application of the *Loretto* per se rule. Third, this Note will argue that although the Supreme Court correctly reversed the Eleventh Circuit, the Court's cursory analysis leaves a most troublesome issue unresolved: whether a property owner who voluntarily participates in a regulated activity may legitimately invoke the takings clause through the *Loretto* rule solely to avoid the economic regulatory burdens of the activity while retaining its benefits.

## II. REGULATION OR TAKING: A FINE LINE

The fifth amendment to the Constitution provides in part, that "private property [shall not] be taken for public use, without just compensation."[23] The archetypical "taking" occurs when a government entity formally condemns a landowner's property and obtains a fee simple pursuant to its sovereign power of eminent domain.[24] The government then must indemnify the individual for the government act which, in effect, has redistributed the landowner's property rights to others.[25] Frequently, the indemnification principles of the fifth amendment conflict with the federal or state exercise of police power.[26]

Through their police power, federal and state governments may infringe upon property rights of individuals if necessary to further the

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23. U.S. CONST. amend. V. The fifth amendment is applicable to the states through the fourteenth amendment. Chicago Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226 (1897). The constitutions of all states except North Carolina contain similar explicit "takings clauses." *Zoning*, 91 HARV. L. REV. 1427, 1463 n.3 (1978). The framers included this provision in the fifth amendment to bar the government from placing the full expense of public projects on certain private individuals because fairness and justice dictate that the public itself bear this burden. Armstrong v. United States, 364 U.S. 40, 49 (1960). For a detailed history of the takings clause, see Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

24. San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 651 (1981). Constitutional protection of property developed at a time when the principal type of property right recognized was that of physical occupation and possession. In this context, constitutional protection of property generally extended only to its title and possession until around 1877. As a result, government action affecting property was not considered a taking unless the government action amounted to an acquisition of the fee simple or an ouster of possession. *See* Siegel, *Understanding the Lochner Era: Lessons from the Controversy Over Railroad and Utility Regulation*, 70 VA. L. REV. 187, 211 (1984); *see also* Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465, 465-576 (1983) (During the nineteenth century, courts were concerned with property as a physical thing; not as a relationship between an owner and a resource.).

25. Costonis, *supra* note 24, at 478.

26. *Id.*

"health, safety, morals, or general welfare"[27] of the public. When the government exercises its police power, it need not compensate injured individuals.[28] These intrusions do not vest the government with a fee simple, but rather, are in the nature of regulations. Although at first glance regulations may appear less intrusive than outright appropriation of legal title, their effect may be so intrusive or restrictive as to amount to the same thing. The Supreme Court has desperately tried to fashion a comprehensive approach for determining when an otherwise valid state exercise of its police power is so deleterious to an individual's property interest as to effect a taking, and thus, to entitle that individual to just compensation.[29] The Court has used two lines of analysis to resolve the takings issue. The first line of cases considers the use of the police power to interfere with an individual's rights to control,[30] and make free economic use[31] of his property. The other line of cases involves the state's exercise of the police power to regu-

27. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (Zoning ordinance excluding buildings devoted to business and trade is legitimate on ground that it bears a rational relation to the health and safety of the community.); Block v. Hirsh, 256 U.S. 135 (1921) (Proper use of the police power may modify tangible rights and, to that extent, rights can be cut down without pay.). One may trace the definition of "police power" to Munn v. Illinois, 94 U.S. 113, 125 (1877) (The government may regulate the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation is necessary for the public good.). For a description of the scope of the police power, see Berman v. Parker, 348 U.S. 26, 32 (1954) ("An attempt to define [the police power's] reach or trace its outer limits is fruitless, for each case must turn on its own facts."); Hadacheck v. C.E. Sebastian, 239 U.S. 394, 411 (1915) (defining police power as one of the most essential powers of the government, permissible as long as its use is neither arbitrary nor discriminatory).

28. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 55 U.S.L.W. 4326 (U.S. Mar. 19, 1987); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); Miller v. Schoene, 276 U.S. 272 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

29. *See, e.g.*, Furman, *Constitutional Law—Fifth Amendment—A Clarification of the Analysis for Takings*—Loretto v. Teleprompter Manhattan CATV Corp., 28 N.Y.U. L. REV. 1137, 1145 (1984). *See generally* Costonis, *supra* note 24; Dunhan, Griggs v. Allegheny County *In Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63; Michelman, *supra* note 23; Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); *see also infra* note 37 and accompanying text.

30. Costonis, *supra* note 24, at 477, 513. In his article, Professor Costonis distinguishes between a *dominion* interest and an *economic* interest in property. He claims that historically, there has always been a bias to extend greater protection to possessory interests in property. He points out that Justice Holmes made this distinction in Block v. Hirsch. *Id.* at 514 (quoting 256 U.S. 135, 155 (1921) ("Tangible property . . . tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed.")).

31. Restrictions on economic rights to property have appeared in various forms. *See* Miller v. Schoene, 276 U.S. 272 (1928) (orders totally prohibiting the beneficial use—growing red cedars trees—to which a landowner had previously devoted land); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (zoning ordinances restricting the most beneficial use of property); Hadacheck v. C.E. Sebastian, 239 U.S. 394 (1915) (nuisance law). Mugler v. Kansas, 123 U.S. 623 (1889) (nuisance law). For a detailed discussion of restrictions on economic rights to property, see *infra* notes 33-49, 64-93 and accompanying text.

late prices and rates of business commodities.[32]

## A. *Property Regulation*

Prior to the decision in *Penn Central Transportation Co. v. City of New York*,[33] the Supreme Court had enunciated several different tests for determining whether a regulation effected a taking. These tests included the "physical invasion" or "appropriation" test,[34] the "nuisance" test,[35] and the "severity of economic impact" test.[36] The

32. *See infra* notes 64-93 and accompanying text.

33. 438 U.S. 104 (1978).

34. The Court presented the first test to determine whether an exercise of police power effected a taking in Pumpelly v. Greenbay, 80 U.S. 166 (1871). In *Pumpelly*, the state authorized the building of a dam that caused Lake Winnebago to permanently overflow onto parts of Pumpelly's land. *Id.* at 167. The Court held that when anything *actually physically invades* real estate, whether the invading material is water, earth, sand, or an artificial structure placed on it, if it effectually destroys or impairs the usefulness of the property, then it is a taking. *Id.* at 181. This decision by the Court established the "physical invasion" or "appropriation" test in the taking analysis. *See* Furman, *supra* note 29, at 1145. The physical invasion test, however, has received wide criticism. *See* Michelman, *supra* note 23, at 1227 (As a rule for a takings analysis, the physical invasion test's "capacity to distinguish, even crudely, between significant and insignificant losses is too puny to be taken seriously."); Sax, *supra* note 29, at 48 (contending that the physical invasion test is an exercise in form over substance and recommending that it "be rejected once and for all"); *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 447 (1982) (Blackmun, J., dissenting) ("[T]he extent to which the government may injure private interests now depends so little on whether or not it has authorized a 'physical contact' . . . ."). Despite these criticisms, the courts have consistently used this test in their takings analysis. *See* Michelman, *supra* note 23, at 1184 ("The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, *never* deny compensation for a physical takeover."); *see also* Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 540 (1904) (telegraph lines that run over a railroad right-of-way held to be a compensable taking); St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893) (telegraph company had to pay compensation in the nature of rent for placing its poles in city streets).

The test rests primarily on the notion that a physical invasion destroys the rights to "possess, use and dispose" of property. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-36 (1982) (citing United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945)); Andrus v. Allard, 444 U.S. 51, 65-66 (1979) (A physical invasion by the government does not simply take a single "strand" from the "bundle" of property rights; it chops through the bundle, taking a slice out of every strand.). Courts consider the right to exclude others from private property as one of the most crucial rights, if not, the *most* crucial right, that arises from the ownership of property. If the government takes this particular property right away, be it by a physically compelled occupation or less intrusive actions, a court generally will find that a taking has occurred. *See* Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) (holding that deprivation of the right to exclude vessels from a marina amounted to a taking); United States v. Causby, 328 U.S. 256, 266-67 (1946) (holding that inability to exclude overhead flights by government aircrafts amounted to a taking).

35. In Mugler v. Kansas, the Court established the "nuisance test." 123 U.S. 623 (1887). This test does not deal with the physical invasion of or interference with an individual's *physical* dominion of his property. Instead, this test is concerned with government action that interferes with and/or restricts an individual's *economic* use of his property. In *Mugler*, the Court held that prohibiting a property use that may harm the general public welfare is a lawful

Court sometimes used these tests independently of one another, and

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exercise of police power, and the state need not compensate the property owner for any diminution in value resulting from abating the nuisance. *Id.* at 669.

The nuisance test is simple to apply. If the government exercises the police power to restrain or punish crime, or to preserve public peace, health, morals, or safety, then the exercise of the power is valid and it does not amount to a taking. *Id.* at 664-69. A court will deem the government to have effected a taking only upon an invalid exercise of the police power, that is, an exercise that has no real or substantial relation to proper legislative ends. *See* Stoebuck, *Police Power Takings and Due Process*, 37 WASH. & LEE L. REV. 1057, 1062 (1980) (arguing that the "nuisance test" under *Mugler* is really a substantive due process test).

The nuisance test has played a major role in upholding nuisance and zoning laws against fifth amendment challenges. *See* Miller v. Schoene, 276 U.S. 272, 279 (1928) (upholding the validity of an ordinance ordering the total destruction of property on grounds that the legislative objectives were proper); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (upholding ordinance on its face as a measure reasonably calculated to promote the safety and health of the city); Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915) (ordinance banning brickyard operation, which posed a health hazard, was not a taking although brickyard owner suffered a 90% loss of his property); Mugler v. Kansas, 123 U.S. 623, 624 (1887) (upholding a statute prohibiting the manufacture and sale of intoxicating liquors as a legitimate exercise of the police power in protecting public health, safety, and morals).

Professor Freund has characterized the "nuisance test" as follows:

> If the government is trying to prevent a harm, then its action is under the police power and does not require compensation. If on the other hand, the government is trying to attain a benefit for the public, then it is acting under its eminent domain power and compensation is required.

FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHT § 511 (1904). The Court significantly eradicated the distinction Professor Freund made in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). In *Penn Central*, the Court held that "harm" could be anything that frustrated articulated legislative policy. The Court refused to implement Freund's definition of harm, which limited harm to traditional "noxious uses of land," such as brickyard operations. The Court suggested that decisions restricting "noxious uses" did not rest on notions of blameworthiness or moral wrongdoing. *Id.* at 133 n.30. Rather, these decisions would be better understood as restrictions necessary for the implementation of a legislative policy expected to produce a widespread benefit. *Id.* Arguably then, the legislature can restrict an owner's use of his property as long as the action is part of an implementation of some articulated beneficial social policy.

Recently, in Keystone Bituminous Coal Association v. DeBenedictis, the Supreme Court retreated from the expanded definition of "noxious uses" it had articulated in *Penn Central*. 55 U.S.L.W. 4326 (U.S. Mar. 19, 1987). For a recitation of the facts of this case, see *infra* note 36. In *Keystone*, the Court reinstated the narrow definition of "noxious uses" that it had enunciated in *Mugler*. The Court specifically defined noxious uses of property as "uses injurious to the health, morals or safety of the community," "uses inflicting injuries upon the community," and "uses impending danger." 55 U.S.L.W. at 4331-32. This is precisely the harm/benefit distinction drawn by Professor Freund.

The Court in *Keystone* noted that where a state exercises its police power merely to *restrain* uses of property that constitute public nuisances, courts, in most instances, will "hesitate to find a taking." *Id.* at 4332. The rationale for hesitating under these circumstances is the notion of "reciprocity of advantage." *Id.* This notion stems from the theory that "while each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." *Id.* That is, as a member of the public, even the restricted owner benefits from the elimination of the nuisance. The Court concluded that because the benefits arising from the termination of a nuisance are commensurate with the resulting burdens, no compensation is due.

The opinion sets out the traditional criteria for determining when a land use regulation

other times, concurrently in various combinations. No general agree-

becomes a taking. A land use regulation effects a taking when the regulation "does not substantially advance a legitimate state interest" or where it "denies an owner economically viable use of his land." *Id.* at 4330 (citing Agins v. Tiburon, 447 U.S. 255, 260 (1980)). The first criterion requires a weighing of private and public interest. *Id.* at 4332. If the regulation advances a public interest that outweighs the private interest harmed, then the regulation does not effect a taking. The *Keystone* decision appears to support the presumption that, in most instances, the public interest advanced by a regulation falling under "the nuisance exception" will outweigh any private interest harmed. To buttress its position, the Court cites numerous opinions where courts have held that compensation is not required when the state acts to stop illegal activity or to abate a public nuisance although, in so doing, it diminishes or destroys the value of property. *Id.* at 4332 n.22.

Unfortunately, although the Court appeared to view the satisfaction of the first criterion alone as sufficient to preclude the finding of a taking in the nuisance context, it failed to delineate clearly the relevance of the second criterion in the takings calculus. Specifically, the opinion was ambiguous as to whether the two criteria were disjunctive or conjunctive. The opinion seems to suggest, however, that once a court determines that a regulation falls within the "nuisance exception," it should not deem the regulation to be a taking insofar as it actually restrains noxious uses of property. Arguably, even if a property owner's sole economic use of his property is a noxious one, a court should not find a taking. This interpretation of *Keystone* does not contradict the holding in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). *See infra* note 36. Notwithstanding the fact that the *Mahon* decision stands for the proposition that a regulation becomes a taking whenever it goes so far as to destroy all property value, the decision was not made in the context of a "nuisance" type regulation. Accordingly, using traditional analysis, Justice Holmes in *Mahon* weighed the public interest advanced by the regulation against the private interest it harmed. Justice Holmes concluded that the public interest advanced by the regulation did not warrant the total destruction of private rights, and consequently, held that the regulation effected a taking.

36. In its decision in Pennsylvania Coal Co. v. Mahon, the Court took a new approach to the takings issue. 260 U.S. 393 (1922). In both the "physical invasion" test and the "nuisance" test, the *character* of the government action was the determinant factor as to whether a compensable taking had occurred. In *Mahon*, the Court focused its analysis on the *economic effect* of the governmental action. In particular, the Court focused on the diminution in value of the property resulting from the regulation and the degree to which the regulation frustrated the owner's investment-backed expectations. *Id.* at 413.

In *Mahon*, the Court considered Pennsylvania's Kohler Act which, among other things, prohibited any mining that might cause the collapse of any structure used as a human habitation, except in certain circumstances. *Id.* at 412. The trial court granted an injunction preventing the coal company from mining a vein of coal running near Mahon's house. *Id.* at 413. The Supreme Court held that the Kohler Act prevented the coal company from mining, and in effect, it had made the right to mine worthless. Moreover, the Court's holding stands for the proposition that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. The Kohler Act was held to to be an invalid exercise of the police power insofar as it did not advance a sufficient public interest to warrant so extensive a destruction of the coal company's rights. *Id.* at 414. This balancing analysis, involving the public interest underlying a regulation measured against the destruction of property rights, came to be known as the "diminution of value" test. The major problem with this test is its application. The Court did not give a workable indication as to how much of a diminution of value was needed to implicate the takings clause. *See* Costonis, *supra* note 24, at 537; Furman, *supra* note 29, at 1149, 1151 nn.75 & 81; Michelman, *supra* note 23, at 1192; Stoebuck, *supra* note 35, at 60.

Subsequent to its decision in *Mahon*, the Supreme Court veered from the test it had set forth in that case. In subsequent decisions, the Supreme Court declined to use the *Mahon* test, despite a substantial diminution in value of the property in question. *See* Andrus v. Allard,

ment existed, however, as to the appropriate test for a given set of facts.[37] This inconsistency ultimately forced the Court to recognize

444 U.S. 51, 66 (1979) ("When we review regulation, a reduction in the value of property is not necessarily equated with a taking."); Goldblatt v. Town of Hempstead, 369 U.S. 590, 595-96 (1962) (safety measure resulting in the total shut-down of a sand and gravel operation did not effect a taking despite total diminution of value); Miller v. Schoene, 276 U.S. 272, 279 (1928) (upholding statute that provided for total destruction of a cedar plantation without providing for just compensation); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926) (upholding a zoning ordinance despite a 75% diminution in value).

In Keystone Bituminous Coal Association v. DeBenedictis, the Court recently revisited its decision in *Mahon*. 55 U.S.L.W. 4326 (U.S. Mar. 19, 1987). The regulation at issue in *Keystone* was similar to that in *Mahon*. In *Keystone*, Pennsylvania enacted the Bituminous Mine Subsidence and Land Conservation Act prohibiting coal mining that causes subsidence damage to preexisting public buildings, dwellings, or cemeteries. *Id.* at 4327. Pursuant to the Act, the Pennsylvania Department of Environmental Resources issued regulations requiring, among other things, that 50% of the coal under designated structures remain in place to provide surface support. *Id.* at 4328. The regulations also called for the revocation of mining permits where removal of coal caused damage to a protected structure and the operator did not make repairs, or provisions for such repairs, within six months. *Id.* Relying on *Mahon*, Keystone contended that these regulations effected a taking of its property under the fifth amendment without just compensation. *Id.* at 4329.

The Court did not find the two determinative factors of the *Mahon* decision compelling in *Keystone* and held that the Subsidence Act did not effect a taking. *Id.* at 4329. The Court clarified these two factors as being (1) the nature of the state's action (interest in enacting the law) and (2) the extent to which the regulation denied the owner the viable economical use of his land. *Id.* at 4330.

In the first half of the *Keystone* opinion, the Court reiterated the important role of the "nuisance test" in the takings area. The Court could not have been more clear: a state must be able to restrain property uses tantamount to nuisances without having to pay compensation. *Id.* at 4332. If the regulation is deemed to be an exercise of the police power for the health, safety, and general welfare, the public interest, in most instances, will outweigh any private interest involved, and a court will not find a taking. *Id.*; *see supra* note 35. The Court identified the Subsidence Act as falling within the "nuisance exeption" but did not rely solely on the nuisance characterization to validate the Act. The decision also analyzed the economic impact of the Act on Keystone.

The Court held that a regulation generally effected a taking under the "diminution of value" test upon a showing that it "denies an owner economically viable use of his land." *Id.* at 4333 (citing Agins v. Tiburon, 447 U.S. 255, 260 (1980)); *see supra* note 36. The opinion also made clear that, in applying the "diminution of value" test, a court must measure the degree of interference with property rights as compared with rights in the parcel as a whole. *Id.* at 4333 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978)). Upon review of the economic effect of the Subsidence Act on Keystone, the Court failed to find a taking. Despite the regulations of the Act, Keystone still could mine profitably 75% of its underground coal. *Id.* at 4334. The Court distinguished this situation from that of *Mahon* in which the regulation went so far as to render the business of mining unprofitable.

37. "[The Supreme Court], quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government . . . ." Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); *see* Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962) ("There is no set formula to determine where regulation ends and takings begins."); United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) (Whether a particular restriction will be found to be a taking depends largely "upon the particular circumstances [in that] case."). Not only has the Supreme Court struggled for a coherent rationale, but it also has been the aim of many legal scholars "to find a rationalizing principle or set of principles which will 'explain' in the

that whether governmental action amounted to a taking had been an ad hoc inquiry involving several significant factors.[38] In *Penn Central*,[39] the Court gleaned all the factors from the previous tests and incorporated them into a single multifactor approach. These factors include the character of the governmental intrusion,[40] the economic impact of the regulation,[41] and the extent to which the regulation interfered with investment-backed expectations.[42]

In *Penn Central*, a terminal owner filed suit against New York City claiming that the application of the Landmarks Preservation Law constituted a "taking" of property without just compensation and arbitrarily deprived him of his property without due process.[43] The Landmarks Preservation Commission[44] had denied approval for Penn Central's plan to construct a fifty-story office building above the terminal.[45] The Court analyzed Penn Central's claim under its multifactor approach and concluded that no taking had occurred.[46] The

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sense of imposing an intelligible order upon judicial decisions in compensability cases, or otherwise to suggest a principle to govern judicial decisions of such cases." Michelman, *supra* note 23, at 1171. *See* Costonis, *supra* note 24, at 524 (recognizing the need for a coherent framework that will identify and categorize competing values, preferred values, etc.); Dunhan, *supra* note 29, at 63 (describing the judgments of the Supreme Court in the area of expropriation as a crazy-quilt pattern).

38. *Penn Central*, 438 U.S. at 124.

39. The *Penn Central* multifactor approach essentially incorporated the "physical invasion" test of *Pumpelly*, the "value diminution" test of *Mahon*, and the "nuisance" test of *Mugler*. *See supra* notes 34-36.

40. *See supra* notes 34 & 35.

41. *See supra* note 36.

42. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

43. *Penn Central*, 438 U.S. at 119.

44. The Commission, created pursuant to the New York City Landmark Preservation Law statute, was responsible for designating sites as "landmarks." *Id.* at 108-10. Final designation as a landmark restricted the landowner's possible uses of the property. First, the law compelled the owner to keep the exterior features of the building in good repair. Second, it prohibited the owner from altering the exterior architectural features of the landmark or constructing any exterior improvement on the landmark site without the Commission's approval in advance. *Id.* at 111-12. Despite these restrictions on the use of the property, the law ensured such property owners both a "reasonable return" on their investments and "maximum latitude" to use their parcels for purposes not inconsistent with the preservation goals. *Id.* at 110.

45. *Id.* at 117-18.

46. Penn Central first claimed that the statute deprived them of any gainful use of their "air" rights. A landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. United States v. Causby, 328 U.S. 256, 264 (1946). The Court dismissed this claim on grounds that a denial of the ability to exploit a property interest that was believed to be available does not always constitute a taking. More importantly, the Court pointed out that in deciding whether a governmental action effected a taking, it would measure the interference and character of the action against the rights in the parcel as a whole. *Penn Central*, 438 U.S. at 130. Penn Central's second contention was that the landmark law was arbitrary and discriminatory and thus not a valid exercise of the police power. The Court disagreed. *Id.* at 132-35. Lastly, Penn Central argued that the regulation

Court stressed that, in deciding whether a particular governmental action effected a taking, a court's focus should be on both the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.[47] A key factor in the decision was that the statute did not frustrate Penn Central's primary expectation concerning the use of the parcel, but rather, allowed it a "reasonable return" on its investment.[48] The Court also reaffirmed its commitment to the "physical invasion" test as an element of the multifactor approach by stating that "[a] taking may more readily be found when the interference with the property can be characterized as a physical invasion by government."[49]

Upon application of the *Penn Central* multifactor approach, it becomes clear that the test amounts to no more than an ad hoc factual inquiry by the Court. The Court did not give any indication as to which factors should be weighed more heavily or which should prove determinative.[50] Thus, in the wake of *Penn Central*, there still existed great uncertainty in the takings area. The Court had not articulated a determinative factor that would indicate whether a taking had occurred. This was the state of the law until the decision in *Loretto v. Teleprompter Manhattan CATV Corp.*[51]

In *Loretto*, the Court modified the *Penn Central* multifactor approach by making the "physical invasion" factor determinative on the takings issue. In *Loretto*, the dispute arose when New York

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significantly diminished the value of the terminal. The Court applied the *Mahon* test and measured the economic impact of the regulation on the property. The Court found that the law permitted Penn Central "not only to profit from the Terminal but also to obtain a 'reasonable rate of return' on its investment." *Id.* at 136.

47. *Id.* at 130-31.

48. *Id.* at 136. The Court determined that the terminal's designation as a landmark permitted the property owner to continue to use its property precisely as it had been using the terminal for the previous 65 years.

49. *Id.* at 124; *see supra* note 34. *But see* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 77 (1980) (upholding a restriction on a shopping center owner's right to exclude students wishing to circulate a petition on the shopping center's grounds). In its analysis, the Court found that whether the students had "physically invaded" the shopping center was not determinative of the takings issue. The Court viewed the physical invasion as limited in nature because the owner of the property could restrict the time, place, and manner of the activity. *Id.* at 83. The Court stressed that such a physical invasion did not "unreasonably impair the value or use of the property as a shopping center." *Id. But cf.* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (owner's inability to exclude others from his marina proved to be the decisive factor in establishing a taking).

50. The *Penn Central* multifactor approach involves several factors that courts apply with varying weights in different cases. The doctrine has left so much uncertainty in its application to a given problem that commentators have criticized it as permitting a court "to reach whatever result it wants in any particular case." Epstein, *Not Deference, But Doctrine: The Eminent Domain Clause*, 1982 SUP. CT. REV. 351, 354-55.

51. 458 U.S. 419 (1982).

passed an ordinance[52] requiring all landlords to permit cable television companies to install cable television facilities on their property. Loretto, a rental property owner, brought a class action on behalf of all New York owners of real property on which Teleprompter had placed cable components. She alleged that the installation of the equipment constituted a physical invasion of private property and, insofar as the statute authorized such invasions, they effected a taking under the fifth amendment for which the plaintiffs were entitled to just compensation.[53] The Court agreed and held that a "permanent physical invasion" authorized by the government is a taking without regard to the public interest it may serve.[54] In its analysis, the Court distinguished between a permanent physical occupation and a temporary one, noting that the former necessarily amounted to a taking.[55]

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52. NEW YORK EXEC. LAW § 828 (McKinney Supp. 1981-82) provides in part:

> 1. No landlord shall
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> a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require:
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> i. that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises and the convenience and well-being of other tenants. . . .
>
> . . . .
>
> b. demand or accept payment from any tenant, in any form . . . in excess of any amount which the commission shall, by regulation, determine to be reasonable.

*Id.*, *cited in Loretto*, 458 U.S. at 423.

53. *Loretto*, 458 U.S. at 424. The lower court upheld the statute as constitutional. On review, the Court of Appeals for the Second Circuit rejected the argument that a physical occupation authorized by the government necessarily effects a taking. The Second Circuit applied the multifactor approach and concluded that the law served a legitimate police power purpose, that the regulation did not have an excessive economic impact upon Loretto's property when measured against her aggregate property rights, and that it did not interfere with any reasonable investment-backed expectations. *Id.* at 425.

54. *Id.* at 426. The Court stated:

> [W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the takings clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is determinative.

*Id.* For a description of the evolution of the physical invasion test, see *supra* note 34.

55. The dissent noted that the majority made an undefined distinction as to what contitutes a *permanent* as opposed to a *temporary* physical invasion. It found the new distinction less substantial than the distinction between a *physical* as opposed to a *nonphysical* intrusion. *Loretto*, 458 U.S. at 447-48.

The *Loretto* Court cited analogous cases to advance its proposition that the invasion was definitely permanent. *Id.* at 428-29 (citing Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 540 (1904) (construction of telegraph lines over a railroad's right of way constituted a compensable taking); St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893) (placement of a utilty's poles on the city's public streets was a "permanent and exclusive physical

Because the cable equipment would have to remain on Loretto's property as long as she wished to continue to lease the apartments, the Court viewed the invasion as significant enough to be considered permanent.[56] The Court distinguished *PruneYard Shopping Center v. Robins*[57] by recognizing that the physical invasion in that case was temporary and limited in nature.

The underlying rationale for the *Loretto* decision was the notion that, to the extent the government occupies physical property, it

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occupation")). The Supreme Court concluded that historically courts have treated permanent occupations of land by utility installations such as telegraph and telephone poles as takings. The fact that such installations generally occupy only a relatively insubstantial amount of space and do not interfere with the landowner's use of the rest of his land has been irrelevant. *Loretto*, 458 U.S. at 430.

The Court also noted that certain kinds of servitudes are "constructive permanent invasions" and, thus, takings. *Id.* at 433. *See* Kaiser Aetna v. United States, 444 U.S. 164 (1979) (The imposition of a navigational servitude destroying the owner's right to exclude results in an actual physical invasion of the privately-owned marina.); United States v. Causby, 328 U.S. 256 (1946) (holding that frequent low level flights by government aircrafts is a constructive intrusion upon the landowner's air space).

56. *Loretto*, 458 U.S. at 438. The Court stated: "[A] landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Id.* at 439 n.17.

57. PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). In *PruneYard*, a group of students were soliciting in a privately owned shopping center for signatures for petitions in opposition to a United Nations resolution. *Id.* at 77. The Court upheld their constitutional right to free speech and held that distributing the petitions on the shopping center property did not amount to a taking. *Id.* at 83. The Court stressed that the owner of the shopping center could restrict the expressive activity by limiting the time, place, and manner of the petitioner's activities so as to minimize any interference with its commercial functions. *Id.* The *Loretto* Court characterized the invasion in *PruneYard* as temporary and limited because the shopping center owner retained the right to restrict the students' activities. *Loretto*, 458 U.S. at 434. The Court also found it persuasive that by opening the shopping center to the general public, the owner had exhibited a desire not to exercise his right to exclude.

It is extremely important to note that the *Loretto* Court considered the owner's right to exclude as a decisive factor in determining whether it would characterize an invasion as permanent or temporary. If the owner's right to exclude is absolutely lost, then the physical invasion is permanent in nature. If, on the other hand, the owner only loses the right to exclude temporarily, then the physical invasion is not a permanent one. If the invasion is only temporary, the court then must subject the restriction to a more complex balancing process to determine whether it effects a taking. *Loretto*, 458 U.S. at 435 n.12. The Court's language seems to indicate that the permanency issue should not be determined by reference to the exact temporal duration of the invasion. In *PruneYard*, the Court did not give the students any deadline as to when they had to stop visiting the shopping center. All the Court required the students to do was subject themselves to the specific regulations of the shopping center. *PruneYard*, 447 U.S. at 83. The Court seemed to be saying that if the students wanted to visit the shopping center for the rest of their lives at the regulated times, their occupation would nevertheless be only temporary. Arguably then, it is the *quality* of the invasion that determines whether the occupation is permanent or not, and not the exact temporal duration. As long as the owner is free to regulate the terms of the occupancy, then the occupancy does not absolutely destroy his right to use, possess, and dispose of his property. This occupancy then qualifies as only temporary.

destroys the owner's rights to "possess, use and dispose of it."[58] In particular, the Court stressed that the owner loses the power to exclude others from his property permanently.[59] Furthermore, a physical invasion is qualitatively more severe than any other regulation on the use of property, because the owner may have no control over the timing, extent, or nature of the invasion.[60]

*Loretto* thus established a two tiered analysis to resolve the takings issue.[61] A court must first determine whether a permanent physical occupation has occurred.[62] If it has, then the government has effected a taking. On the other hand, if no permanent physical invasion is found, the court must apply the multifactor approach of *Penn Central*.[63]

### B. *Rate and Price Regulation*

Rate and price regulation are a vital part of the American economic system.[64] Federal, state, and local governments regulate prices

58. *Loretto*, 458 U.S. at 435 (citing United States v. General Motors Corp., 323 U.S. 373, 378 (1945)). For a discussion of the rationale underlying the "physical invasion" test, see *supra* note 34. The *Loretto* Court summarized the destruction of these property rights as follows. First, the owner has no right to possess the space himself and has no power to exclude the occupant from possessing or using the space. Second, permanent occupation absolutely denies the owner any power to use or control the property. The Court noted that although a deprivation of the right to use property for profit is not in itself sufficient to establish a taking, it is nevertheless a relevant factor. *Loretto*, 458 U.S. at 435 (citing Andrus v. Allard, 444 U.S. 51, 66 (1979)). Third, a physical invasion is qualitatively more severe than a regulatory invasion insofar as the owner may have no control over the timing, extent, or nature of the invasion. *Id.* at 436.

Professor Costonis has suggested that the *Loretto* per se rule reflected the Court's preferential protection of *dominion* interests as opposed to *economic* interests. Costonis, *supra* note 24, at 513. He contends that the Court's opinion undoubtedly demonstrates that the Court was more concerned with the statute's exclusion-denying consequences than with its rate regulation subsection and its limitations on use and disposition. *Id.* He notes that the Court did not show any objection to the rent control aspect of the statute prohibiting landlords from charging their tenants for access to cable television. *Id.* at 513 n.196. Moreover, the Court would have found the statute less objectionable had it required landlords, at their own expense, to provide cable television hook-ups to their tenants. *Id.* at 513. The Court conceded that the landlord would be worse off economically under this alternative, but stated that the state had always had broad power to regulate housing conditions in the landlord-tenant relationship, without paying compensation for all economic injuries that such regulation entails. *Id.* at 513-14 n.197.

59. *Loretto*, 458 U.S. at 436.

60. *Id.*; *see supra* note 57.

61. Furman, *supra* note 29, at 1157-58.

62. The dissent voiced strong concerns as to the "strained and untenable" distinction that the majority established between permanent and temporary invasions. *Loretto*, 458 U.S. at 447-48.

63. Furman, *supra* note 29, at 1157-58.

64. Drobak, *Constitutional Limits on Price and Rent Control: The Lesson of Utility Regulation*, 64 WASH. U.L.Q. 107, 107 (1986).

for businesses such as utilities, apartment leasing, nursing homes, and insurance.[65] Prior to 1934, courts restricted price regulation to businesses affecting the public interest[66] unless emergency conditions existed.[67] Today price regulation is an accepted part of the government's normal control over the economy.[68]

It has been the task of the Supreme Court to set constitutional limits on the exercise of the government's regulatory power.[69] In

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65. *Id.*

66. Munn v. Illinois, 94 U.S. 113 (1876). In *Munn*, the Illinois legislature imposed a schedule of maximum prices on grain warehouses and elevators located in Chicago. The Court upheld the validity of the legislation against a constitutional challenge.

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

*Id.* at 126. The Supreme Court rejected the "clothed with a public interest" doctrine in Nebbia v. New York, 291 U.S. 502 (1934). In *Nebbia*, the Court stated:

> So far as the requirement of due process is concerned, and in the absence of other constitutional restrictions, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it.

*Id.* at 537.

67. Prior to *Nebbia*, the Supreme Court upheld price regulations against constitutional challenges under the takings clause as justified by the existence of a state of "temporary emergency." *See* United States v. Commodities Trading Corp., 339 U.S. 121 (1950) (upholding the validity of the Emergency Price Control Act as a constitutional measure of just compensation during wartime); Bowles v. Willingham, 321 U.S. 503 (1944) (justifying regulation by the economic demands of war); Block v. Hirsh, 256 U.S. 135 (1921) (upholding rent control in the District of Columbia due to the war emergency).

68. Drobak, *supra* note 64, at 108. Most modern courts interpret the Supreme Court's language in *Nebbia* to mean that the existence of an emergency is no longer a constitutional prerequisite for price regulation. Drobak, *supra* note 64, at 107 n.4. For a discussion of *Nebbia*, see *supra* notes 66-67.

69. *See* Regan v. Farmers' Loan & Trust Co., 154 U.S. 362 (1894) (holding that judicial inquiry as to the reasonableness and justice of rates so as to prevent confiscation is part of the judicial function of upholding the constitutional protection of property); Chicago, Milwaukee & St. Paul Ry. v. Minnesota, 134 U.S. 418 (1890) (holding that the Constitution requires judicial review of the reasonableness of legislative regulatory rates); *cf.* Dow v. Beidelman, 125 U.S. 680 (1888) ("[T]he power to regulate is not the power to destroy.").

The judicial scope of review of administrative ratemaking decisions is limited. In reviewing the reasonableness of a particular rate, the reviewing court should only set aside a rate where it is "found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (1982). This standard of review is extremely lenient to the administrative agency. The principle is that a court should not substitute its judgment or own inference of fact from that of the agency as long as it finds a rational basis for the agency's decision. Gray v. Powell, 314 U.S. 402 (1941). This principle does not apply where the constitutionality of rates, as opposed to their reasonableness, is challenged. In this instance, the court should exercise an independent determination of the constitutionality of the rates,

determining the constitutional limits of this power, the takings clause of the fifth amendment has shaped most of the Supreme Court's analysis.[70] The takings clause serves as a constraint on all types of economic regulation by requiring the payment of "just compensation" whenever a regulation causes sufficient injury to constitute a "taking."[71] Two distinct lines of cases have emerged from the Court's application of the "takings clause" to the government's ratemaking power.[72] Cases dealing with utility rate regulation comprise one line of cases. The other line of cases deals with federal price controls.

In the utility regulation area, the Supreme Court set the constitutional limits of the government's rate fixing power in *Federal Power Commission v. Hope Natural Gas.*[73] In *Hope*, the Court held that the constitutionality of rates must be determined through a balancing of investors and consumer (public) interests.[74] The investors' interest requires that governmental rates on utilities be "just and reasonable" in order to be constitutional.[75] A "just and reasonable" rate is one that allows enough revenue not only for operating expenses, but also for the capital costs of the business.[76] If the governmental rates fail to satisfy the investors' interest, the countervailing public interest may nevertheless justify the rates.[77] If the court determined that the total effect of the rate order could not be said to be unjust and unreasonable, then judicial inquiry would be at an end.[78]

In its opinion, the Court delineated certain factors for determin-

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without being limited to the agency's findings of fact. In essence, this is a reiteration of the principle that legislatures cannot preclude courts from hearing constitutional claims. It embodies the constitutional protection of checks and balances that the Supreme Court recognized in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

70. Drobak, *supra* note 64, at 109. "As both the ratemaking doctrine and the jurisprudence of the taking clause evolved, the Court recognized that the principles of the takings clause that constrain government regulation or partial takings are the foundation of the constitutional ratemaking doctine, rather than the eminent domain principles." *Id.* at 109 n.12. According to Professor Drobak, the Supreme Court has ruled over the last hundred years that utility ratemaking *is* a governmental taking, which requires just compensation. *Id.* at 109.

71. *Id.* at 109.

72. *Id.*

73. 320 U.S. 591 (1944); *see also* Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575 (1942). The majority in *Natural Gas Pipeline* held that judicial review of rates legitimately extends only to the determination of whether the agency order, when "viewed in its entirety, produce[d] no arbitrary result." 315 U.S. at 586.

74. *Hope*, 320 U.S. at 603.

75. *Id.*

76. *Id.*; *see* American Trucking Ass'ns v. United States, 344 U.S. 298 (1953).

77. Drobak, *supra* note 64, at 139. For a discussion of the meaning of the public interest in the ratemaking cases, see Drobak, *From Turnpike to Nuclear Power: The Constitutional Limits on Utility Rate Regulation*, 65 B.U.L. REV. 65, 88-93 (1985).

78. *Hope*, 320 U.S. at 602.

ing a "just and reasonable rate."[79] Most courts interpret this constitutional constraint to require utility rates high enough to maintain moderate profits for investors.[80] Utility companies may challenge rates allowing an insufficient profit margin under the fifth amendment, either under the "just compensation" provision or on substantive due process grounds.[81] In sum, in order for rate regulation of utilities to be constitutional, the rates imposed must satisfy the *Hope* standard.[82]

In the general price regulation area, the Court has not set a constitutional limit on price fixing analogous to the one it established in *Hope*.[83] Instead, the Court has traditionally examined the constitutionality of price controls in light of other factors, different from those *Hope* established.[84] For example, these factors include the justification for the regulation,[85] the duration of the controls,[86] and the ability

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79. The *Hope* Court provided the following guidelines:

> From the investor or company point of view, it is important that there be enough revenue not only for operating expenses but also for the capital cost of the business. These include service on the debt and dividends on the stock. . . . By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

*Id.* at 603 (citation omitted). The judicial scope of review for rates is very limited. A court will deem a rate to be confiscatory only if unjust, unreasonable or arbitrarily applied. The focus of the court in conducting the review should be the impact of the rate, not its underlying rationale. "If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not important." *Id.*

80. Drobak, *supra* note 64, at 108.

81. *Id.* at 109.

82. *Id.* at 109 n.12. Professor Drobak suggested that courts use the *Hope* standard as a measure of just compensation under the fifth amendment. He argued that during the initial development of the utility ratemaking doctrine after the Civil War, the Court analogized railroad rate regulation to the eminent domain power. The Court concluded that the regulation was a taking of the use of the railroad's property which entitled the railroad to just compensation in the form of reasonable rates. Therefore, the Court has always regarded utility ratemaking as a "taking" that requires reasonable rates to be constitutional. Courts do not view *Hope* as determinative of whether a "taking" has occurred, but rather, as determinative of whether the "taking," once effected, is constitutional. Utility regulation is constitutional as long as the government provides just compensation, and compensation is "just" if it satisfies the *Hope* requirement. Conversely, courts do not necessarily equate price regulation with an exercise of the eminent domain power, and thus, do not require the government to satisfy the *Hope* standard.

83. *Id.* at 110; *see supra* note 82. In order to trigger the *Hope* standard, the court must find that a regulation has effected a "taking."

84. Drobak, *supra* note 64, at 110.

85. *See supra* notes 66-67.

86. *See supra* note 67. *But cf.* note 68 (Although the Court has justified the imposition of price controls as a necessary measure in emergency situations, the Court, in Nebbia v. New

of the regulated firm to avoid the regulation by withdrawing from the regulated business.[87] The first two factors are often used by the court in the traditional takings analysis.[88] As in the traditional takings analysis, confiscation of property is the constitutional limit of any regulation.[89] But because no definite consensus exists as to the extent of deterioration that is constitutionally permissible, property rights may be greatly diminished before a taking will be found.[90]

The ability of a regulated firm to be able to withdraw from the regulated business has been an important determinant of whether a court will find that rate or price regulation amounts to a taking.[91] It has been suggested that if a firm is unable to withdraw from the regulated market, either for legal or practical reasons,[92] then it is not unlike a utility, and thus it should be entitled to the *Hope* constitutional protection.[93]

## III. *FCC v. Florida Power Corp.*

### A. *The Eleventh Circuit's Broad Reading of* Loretto

In *FCC v. Florida Power Corp.*,[94] the Court of Appeals for the

York, 291 U.S. 502, 537 (1934), implied that an emergency was not a prerequisite to their imposition.).

87. Drobak, *supra* note 64, at 110. Professor Drobak concluded that utility and price control cases illustrate that all firms subject to legal price control are entitled to the protection of the *Hope* doctrine, even if the firm cannot be classified as a utility. *Id.* at 123. Drobak stated: "Legal barriers to exit from a regulated business are a major reason for the constitutional ratemaking doctrine." *Id.* at 120.

88. *Id.* at 110. For a discussion of the traditional takings analysis utilized by the Court, see *supra* notes 34-36, 39, 51-63 and accompanying text.

89. Drobak, *From Turnpike to Nuclear Power: The Constitutional Limits on Utility Rate Regulation*, 65 B.U.L. REV. 65, 98 (1985). Professor Drobak suggested that at some point, price regulation may result in loss of market value or profits that is so severe as to constitute an unconstitutional confiscation.

90. *Id.* at 98-108.

91. Some courts have recently classified the ability to withdraw from a price-controlled business as a reason for not finding a taking under the utility ratemaking doctrine. *See* Minnesota Ass'n of Health Care Facilities, Inc. v. Department of Pub. Welfare, 742 F.2d 442 (8th Cir. 1984) (holding that the constitutional utility ratemaking doctrine did not apply to price regulation of nursing homes, which were free to either go out of business or stop admitting Medicaid recipients); Worker's Comp. Insurer Rating Ass'n v. State, No. 452,706 (Dist. Ct. Minn. Sept. 24, 1981) (holding that the *Hope* standard did not apply to insurance companies because the companies were free not to write insurance policies).

92. Professor Drobak suggests that a court should determine whether a firm can feasibly withdraw from a price-controlled business despite the nonexistence of legal barriers. For example, firms that own many specialized assets could only withdraw from the business at an inordinate financial loss. Drobak, *supra* note 64, at 123-24.

93. *Id.* at 120, 124-25.

94. 772 F.2d 1537 (11th Cir. 1985), *rev'd*, 107 S. Ct. 1107 (1987). For a recitation of the facts of this case, see *supra* notes 1-22 and accompanying text.

Eleventh Circuit held that the FCC order authorizing cable television companies to occupy space on Florida Power's poles at rates lower than those specified in preexisting contracts between the parties effected a taking of Florida Power's private property.[95] Moreover, the court found the Pole Attachment Act[96] unconstitutional insofar as it prescribed a binding rule for determining just compensation under the fifth amendment, thus usurping Florida Power's right to a judicial determination of the compensation issue.[97]

The Eleventh Circuit relied entirely on the per se rule that the Supreme Court established in *Loretto v. Teleprompter Manhanttan CATV Corp.*[98] The *Loretto* rule states that any permanent physical invasion is a fifth amendment taking, which entitles the property owner to just compensation.[99] In its analysis, the appellate court viewed the FCC order as requiring Florida Power to permit the cable companies to occupy its property permanently.[100] By such a characterization, the court implicated the *Loretto* per se rule. The FCC contended that the facts of this controversy did not warrant the application of the *Loretto* rule[101] and that before a court may apply the *Loretto* rule, there must be an *uninvited* and *permanent* physical occupation.[102]

The FCC argued that its regulation of Florida Power differed significantly from the regulation in *Loretto*.[103] First, the FCC contended, because Florida Power voluntarily granted access to its poles,[104] it was not entitled to the protection that the *Loretto* rule afforded a landlord from an *uninvited* intrusion. Second, the FCC argued that even if the court viewed the cable companies' presence as uninvited, it was not *permanent* in nature because the occupation

95. *Id.* at 1539. The court concluded that on the facts, "*Loretto* . . . controls, and based on that decision, we hold that the FCC's Order effected a taking of Florida Power's property." *Id.* at 1544.

96. 47 U.S.C. § 224 (1982).

97. 772 F.2d at 1546.

98. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), *cited in Florida Power*, 772 F.2d at 1544; *see supra* notes 51-61 and accompanying text.

99. *Loretto*, 458 U.S. at 441.

100. 772 F.2d at 1544.

101. *Id.*

102. *Id.*

103. *Id.* at 1542.

104. The FCC contended that Florida Power "knowingly and *voluntarily* contracted with the cable companies for the installation of the cable network." *Id.* at 1543 (emphasis added). Consequently, the FCC contended that Florida Power could not claim that the cable companies' access to its poles was "uninvited." *Loretto* involved such an uninvited access because the applicable government regulation explicitly granted the cable companies access to occupy Loretto's property. Loretto neither invited nor agreed to the cable companies' presence.

would last only until expiration of the contracts. Permanence, the FCC argued, is the second prerequisite for invoking the *Loretto* rule.[105]

The court, however, rejected the FCC's contentions. As to the first, the court conceded that although one could construe Florida Power's actions as an invitation to the cable companies to occupy its poles, the invitation was subject to and based on certain conditions, namely, the negotiated annual rate.[106] By insisting on different conditions, the cable companies transformed their status from that of "invitee" to that of "trespasser."[107]

The Eleventh Circuit equated Florida Power's situation with that of the landlord in *Loretto*, where the regulation forced the landlord *both* to rent space to cable operators *and* to do so for a specified one time fee. Although the critical coercive aspect of *Loretto* was clearly absent from the FCC regulation,[108] the court nonetheless held that the FCC regulation operated in the same manner as the *Loretto* regulation and thus effected a taking.[109] In essence, the Eleventh Circuit found the FCC regulation to be "constructively coercive" by *assuming* that if Florida Power decided to terminate the occupation of the cable companies, the FCC would grant a stay preventing Florida Power from evicting them.[110] The court assumed that the FCC would

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105. *Id.* at 1543. The FCC contended that Florida Power had to endure the cable companies' presence only for the term of the contracts.

106. *Id.* The court stated, "In our opinion, the cable companies' occupation of Florida Power's poles at the rate specified by the FCC is anything but invited."

107. *Id.*

108. *See infra* notes 122-124.

109. *Florida Power*, 772 F.2d at 1544.

110. The FCC felt that issuance of temporary stays would further the intent of Congress in enacting the Pole Attachments Act because Congress intended to give the FCC power to protect cable operators from irreparable injury pending resolution of facially supportable complaints. The Act provided the FCC with broad discretion in promulgating rules to carry out the Pole Attachments Act. In the Matter of Adoption of Rules For the Regulation of Cable Television Pole Attachments, 68 F.C.C.2d 1585 (1978).

> Moreover, Section 4(i) of the Act, 47 U.S.C. 154(i), defining the duties and powers of the Commission, states that "The Commission (FCC) may perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions." The adoption of complaint procedures is in no way constrained by the Act. To the contrary, the intent of the pole attachment regulation is that the Commission develop "a flexible program . . ." that includes such rules as it "deems appropriate to the conduct of the complaint procedure."

*Id.* at 1587.

The FCC may issue temporary stays only in limited circumstances. The FCC will allow a cable operator to petition for a temporary stay "(1) prior to removal of the CATV facilities from poles or termination of service or maintenance, etc., and (2) prior to an increase in pole attachment rates." *Id.* at 1588. In order to allow the cable operator time to file a petition, the FCC has required utility companies to give cable operators notice 60 days prior to taking such

grant the stay whether Florida Power decided to terminate existing contracts or merely refused to renew them at expiration.[111] If the FCC actually prevented Florida Power from evicting the cable companies, then Florida Power could justifiably claim that the regulation *coerced* it to provide a third party with access to its property. This scenario undoubtedly would warrant the application of the *Loretto* rule. Yet, significantly, it is only upon the happening of this contingency that the cable companies' occupation of Florida Power's poles would qualify as the type of occupation triggering the *Loretto* rule.

Even if the FCC were to issue a temporary stay, the occupation would have to be permanent in nature before the *Loretto* rule inhered. The court found that the occupation was permanent because Florida Power would have to wait at least until its contracts expired before excluding the cable companies.[112] Even upon expiration, it is plausible that the FCC would prohibit Florida Power from excluding the companies at all, and effectively force the companies to renew their contracts.[113] The court emphasized that the *Loretto* permanency requirement does not necessarily demand that the physical occupation last *forever*.[114] According to the Eleventh Circuit, the fact that the FCC *could* prevent Florida Power from excluding the cable companies rendered the duration of the invasion indefinite. The court

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action. The cable operator must file its petition at least 45 days in advance of the proposed change. The utility then has seven days to respond. No further filings are permitted unless requested or authorized by the FCC, nor will extensions of time be granted unless justified by 47 C.F.R. § 1.46 (1986). The FCC had considered granting automatic stays under these circumstances but rejected that proposal. 68 F.C.C.2d at 1587-88.

The FCC has stated that it will not grant a stay absent a preliminary indication of the unlawful nature of the complaint and a clear demonstration by the cable operator that it is likely to suffer irreparable harm and cessation of service. "[The FCC] will adhere to a strict threshold showing where such a claim is asserted, and [it] will not hesitate to dismiss where inadequate support is provided." *Id.* at 1588.

111. In support of its position, the court cited previous cases in which utilities ordered cable companies to disconnect their equipment and the FCC routinely intervened and issued temporary stays preventing the exclusions. *See Florida Power*, 772 F.2d at 1543 (citing Whitney Cablevision v. Southern Ind. Gas & Elec. Co., Mimeo 841 (Nov. 16, 1984); TeleCommunications, Inc. v. South Carolina Elec. & Gas Co., Mimeo 5957 (Aug. 16, 1983)). At present, it is not clear how the FCC would react should Florida Power attempt to exclude the cable operators. Presumable, if Florida Power should do so purely to avoid the regulatory rate ceilings, logic and analogous precedent strongly suggest that the FCC would stay such an action. *See infra* notes 138 & 58-59; *cf.* Robinson v. Diamond Hous. Corp., 463 F.2d 853 (D.C. Cir. 1972); Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1968).

112. *Florida Power*, 772 F.2d at 1544.

113. *Id.*; *see supra* notes 111-12.

114. *Florida Power*, 772 F.2d at 1544. In *Loretto*, the Court noted that as long as the landowner wanted to lease her property, she had to abide by the regulation and grant access to the cable companies. *Loretto*, 458 U.S. at 439. Arguably, the Court must have believed that this condition on her right to rent her property would probably force her to acquiesce to the

concluded that the cable companies' physical occupation satisfied *Loretto*'s permanency requirement[115] and constituted a compensable taking.[116]

### B. *The Supreme Court's Shortsighted Reversal of the Eleventh Circuit*

The validity of the Eleventh Circuit's analysis necessarily depended on the assumption that the FCC would prevent Florida Power from excluding the cable companies from its poles.[117] A facial constitutional challenge to the Pole Attachments Act was not at issue

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cable operator's occupation for an amount of time sufficient to satisfy *Loretto*'s permanency requirement. The Eleventh Circuit analogized the *Loretto* situation to that of Florida Power.

This analogy, however, is flawed. In *Loretto*, the government required a landlord to allow a cable company to physically invade her property until she chose to remove her property from the rental market. It would have been economically irrational for Loretto to take such an extreme step to avoid a minimal physical invasion having no real economic impact on her property. The Court therefore concluded that the cable operator's occupation was permanent in nature.

Florida Power, on the other hand, may have to endure the cable operators' presence on its poles only until the expiration of its contracts. This is quite different from the situation of the landlord in *Loretto*. The physical occupation of Florida Power's poles is finite in nature and the utilities need endure the occupation only for the term to which they themselves originally agreed. If, however, the FCC were to go so far as to prevent Florida Power from excluding the cable operators at the end of the contract term, then such a stay would amount to a forced renewal. Although the occurrence of a forced renewal would implicate the concerns embodied in *Loretto*, it would be fundamentally incorrect to equate the coerciveness of the government's actions in the two cases. If the FCC had perceived Florida Power's motive for not renewing its contracts to be retaliatory, it probably would have prohibited Florida Power from discontinuing pole attachment rights; *but only if* Florida Power *voluntarily* continued to designate rental space on its poles for other cable operators. The Pole Attachments Act's legislative history clearly states that a utility company that owns and controls poles is not subject to FCC jurisdiction if no telecommunication space has been designated on its poles. S. REP. NO. 580, 95th Cong., 2d Sess. 15-16, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 100, 123-24. Section 1.1406(a) of the Pole Attachments Complaint Procedures requires the FCC to dismiss a complaint against a utility if the utility does not use or control poles, ducts, or conduits used or designated, in whole or in part, for wire communication. 47 C.F.R. § 1.1406(a) (1978). Therefore, if Florida Power wanted to exclude cable operators from its poles, it only need cease designating space for wire communication.

It would be illogical and inaccurate to characterize the FCC stay under these circumstances as a coercive regulatory action analogous to that of *Loretto*. The *Loretto* regulation was coercive partly because it left the landlord no reasonable alternative method by which to avoid the physical invasion of the cable operators, but rather, required the landlord to subject a portion of her property to a physical intrusion. Florida Power cannot legitimately make this claim. An FCC stay clearly would not coerce Florida Power to subject its property to the occupation of cable companies. If Florida Power chooses not to rent its pole space to the cable companies, it may simply remove its pole space from the rental market.

115. *Florida Power*, 772 F.2d at 1544.

116. *Id.*

117. If the FCC did not impede Florida Power's right to exclude cable companies from its poles, then the Pole Attachments Act does not impose a physical occupation. *See infra* notes 123-24.

before the Eleventh Circuit. The real issue decided was, had the FCC issued a stay, would it have amounted to an unconstitutional taking of Florida Power's property by virtue of the *Loretto* rule. The Eleventh Circuit's decision invalidated the Act *as applied* to Florida Power on the assumption that the FCC would grant the cable operators a stay preventing Florida Power from excluding them. On appeal, therefore, the Supreme Court should have reviewed the validity of the Eleventh Circuit's analysis in light of this assumption. The Court, however, explicitly chose not to address the the Eleventh Circuit's assumption.[118] Consequently, the Court's decision offered no insight as to the validity of the appellate court's analysis. Instead, the Supreme Court chose to analyze the constitutionality of the Pole Attachments Act only facially, and on that basis alone, reversed the Eleventh Circuit.[119]

The Supreme Court found that the Eleventh Circuit had "broadened that narrow holding [of *Loretto*] beyond the scope to which it legitimately applie[d]."[120] According to the Supreme Court, the Eleventh Circuit failed to distinguish between the *character* of the government regulation before the Court in *Loretto* and that of the FCC regulation involved in this dispute.[121] The government regulation involved in Florida Power differed radically from that which the Court invalidated in *Loretto.* The *Loretto* Court focused on *uninvited* intrusions resulting from government regulations that coerce a property owner to subject some portion of his property to a physical occupation by a third party.[122] The Pole Attachments Act, on the other hand, does not vest a CATV system operator with a *right* of access to

118. FCC v. Florida Power Corp., 107 S. Ct. 1107 (1987).

119. *Id.* at 1111.

120. *Id.* at 1112.

121. *Id.* The Court's holding in *Loretto* rested entirely on the character of the government regulation involved. *See supra* notes 54-55, 58 and accompanying text. The *Loretto* Court made clear that its holding was very narrow. *Loretto,* 458 U.S. at 441. *Loretto* is to apply only where the *character* of the government action is in the form of a permanent physical occupation, whether the occupant is the government, or an authorized third party. *Id.* at 432 n.9. The *Loretto* Court distinguished between a government action that requires a physical occupation and a government action that seeks only to restrict the *use* of property. It made clear that when the government only restricts the use of property, a court should analyze the government action under the multifactor approach of *Penn Central. Id.* at 440-41. The Court then reaffirmed that the government has *substantial* authority to impose appropriate restrictions upon *use* of private property. *Id.*

122. The *Loretto* Court noted that "as long as these regulations do not require the landlord to suffer the physical occupation of a portion of his [property] by a third party," the *Loretto* rule is inapposite. 458 U.S. at 440. In *Loretto,* the New York regulation required the property owner to allow the cable companies *access* to her property. The regulation specifically prevented the landlord from interfering with the installation of the cable facilities on her property. *Loretto,* 458 U.S. at 423.

utility poles.[123] The FCC is not empowered to authorize cable operators to physically occupy any of the utilities' property. The FCC's regulatory power only inheres when a utility *voluntarily* engages in the business of renting out pole space and *solicits* the presence of cable operators onto its poles. Congress empowered the FCC to exercise regulatory restraints on private agreements between utilities and CATV systems when the parties themselves are unable to reach a mutually satisfactory arrangement[124] so as to prevent monopolistic strong arm tactics on the part of the utilities.[125] The Supreme Court found the FCC regulation to be a *restriction*[126] on the use of property, not a government compelled physical *occupation*. The regulation merely restricts a utility's economic use of its property.[127] The distinction between these two regulatory schemes is obvious. The regu-

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123. In the instant case, the FCC regulation did not require Florida Power to provide access to its poles to the cable companies. To the contrary, the legislative history of the Pole Attachments Act expressly provides that the Act *does not* "vest within a CATV system operator *a right to access* to a utility pole . . . [nor does it] require a power company to dedicate a portion of its pole plant to communication use." S. REP. NO. 580, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 100, 124 (emphasis added).

124. The legislative history of the Act clearly states that the:

> [B]asic design of [the act was] to empower the [FCC] to exercise regulatory oversight over the arrangements between utilities and CATV systems in any case where the parties themselves are unable to reach a mutually satisfactory arrangement. . . . The underlying [aim of the act] is to assure that communications space on utility poles, created as the result of private agreement between nontelephone companies and telephone companies, or between nontelephone companies and cable television companies, be made available, at just and reasonable rates, and under just and reasonable terms and conditions. . . . FCC regulation will only occur when a utility or CATV system invokes its powers . . . to hear and resolve complaints relating to the rates, terms, and conditions for CATV pole attachments. The Commission is not empowered to prescribe rates, terms, and conditions for CATV pole attachments generally.

S. REP. NO. 580, 95th Cong., 2d Sess. 15, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 109, 123.

125. Cable operators complained that utilities were exploiting their monopolistic position and demanding unreasonable rates. *Florida Power*, 772 F.2d at 1540.

> Due to the local monopoly in ownership or control of poles to which cable system operators, out of necessity or business convenience, must attach their distribution facilities, it is contended that the utilities enjoy a superior bargaining position over CATV systems in negotiating the rates, terms, and conditions for pole attachments. It has been alleged by representatives of the cable television industry that some utilities have abused their superior bargaining position by demanding exorbitant rental fees and other unfair terms in return for the right to lease pole space. Cable operators, it is claimed, are compelled to concede to these demands under duress.

S. REP. NO. 580, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 109, 121.

126. *Florida Power*, 107 S. Ct. at 1112.

127. *See supra* note 124. The FCC regulations prevent the utilities from imposing unreasonable rates, terms, or conditions on the cable companies. The FCC became involved in

lation in *Loretto* was purely coercive inasmuch as property owners had no choice but to allow cable companies to occupy their property at specified compensatory rates. The Florida Power regulation, in contrast, is *conditional* in nature. Although rates are subject to a regulatory maximum, the regulatory "burden" only applies after an owner affirmatively and voluntarily elects to accept the concomitant benefit of the occupation. The Supreme Court emphatically stated that the distinction between the cable companies in Florida Power and *Loretto* "is the unambiguous distinction between a commercial lessee and an interloper with a government license."[128] It was the coercive and intrusive nature of the *Loretto* regulation that led the Court to hold that the regulation per se effected a taking.[129]

### C. *What the Supreme Court Ought to Have Addressed*

The decision of the Supreme Court in *FCC v Florida Power Corp.* firmly establishes the Court's intention to apply the *Loretto* per se rule in an extremely narrow manner.[130] On its face, a regulation will trigger the application of the *Loretto* rule only when its language unambiguously compels a physical occupation of private property, and, like the regulation in *Loretto*, leaves the owner no reasonable alternative by which to avoid the intrusion. Yet, critically, the Supreme Court failed to address the statute in light of the FCC's power to issue stays of exclusion. As the appellate court suggested, it was this power alone that rendered the regulation under the Pole Attachments Act analogous to the coercive regulation in *Loretto*.[131] The regulation was clearly valid on its face. The real issue was whether a regulatory agency may, through the issuance of a stay, prevent a property owner from exercising his right to exclude solely to avoid rate regulation after having elected to benefit from the regulated activity or whether under such circumstances, the issuance of a stay would constitute a taking under *Loretto*. By validating this regulation in a vacuum, the Court offered a holding of limited import and failed to pass upon the difficult and pressing problem: may an owner invoke the takings clause to make an end run around a valid regulatory scheme? Because the Supreme Court failed to address the propriety of the Eleventh Circuit's analysis, a property owner still has the option to

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the regulation of pole attachment agreements following complaints by cable operators that the utilities were overcharging them.

128. *Florida Power*, 107 S. Ct. at 1112.

129. *See supra* notes 121-22 and accompanying text.

130. *Florida Power*, 107 S. Ct. at 1112.

131. *Florida Power*, 772 F.2d at 1513-14; *see supra* notes 108-10 and accompanying text.

resort to such tactics to flout regulations necessary for the public welfare.

Florida Power objected to the regulation of rates by the FCC, not to the presence of the cable companies. Florida Power was aware that the Pole Attachments Act was in effect when it entered into contracts with some of the cable operators.[132] Therefore, when Florida Power entered into contracts with the cable operators, it assumed the risk of regulation. Florida Power had no right to complain when that risk materialized. Florida Power sought to avoid regulation while continuing to rent out telecommunication space at a premium.

Because Florida Power based its objections solely on the imposition of the FCC's prescribed rates, it follows that it would not want to rent out its space to any other cable company because it would subject itself again to the risk of regulation at the same rate.[133] A decision by Florida Power to take its rental space out of the telecommunications market would eliminate the FCC's jurisdiction over the utility poles.[134] If Florida Power's motive for terminating or refusing to renew pole attachment agreements stemmed from its desire to leave the rental market, then it would be free to exclude any cable operator from its poles. The difficult question arose solely because Florida Power had no intention of foregoing the lucrative rental of otherwise

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132. Florida Power entered into the Acton contract two years after the enactment of the Pole Attachments Act. The contract with Teleprompter was finalized while the Act was under consideration. The contract with Cox, although initially made prior to the Act, provided for a term of one year and thereafter was terminable at will by either party on six months notice. Florida Power was on notice of the Act when it failed to terminate each of these contracts. Brief for Appellant at 17-18, FCC *v.* Florida Power Corp., 107 S. Ct. 1107 (1987) (No. 85-1660).

133. The FCC determines reasonable rates for a utility company based on a formula prescribed by the Pole Attachments Act.

> For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than the additional cost of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment, by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

47 U.S.C. § 224(d)(1) (1982). The FCC has interpreted the statute to require the maximum rate allowed under the Act whenever it reduces an existing pole attachment rate. *Florida Power*, 107 S. Ct. at 1113. Therefore, the rates a utility may charge a cable operator will not vary substantially.

134. The FCC will dismiss any complaint by a cable operator where "the utility does not use or control poles, ducts, or conduits used in whole or in part, for wire communication." *See supra* note 114. The FCC will not dismiss a complaint if there is communications space designated on the poles and the utility has discontinued cable operator attachments in order to avoid FCC jurisdiction. As long as the utility does not designate communication space on its poles, it is free from FCC jurisdiction. 68 F.C.C.2d at 1589.

useless space. Because Florida Power did not want to remove the telecommunication space from the rental market, and because it offered no other motivation for excluding the cable operators, it necessarily follows that Florida Power wanted to exclude the operators solely so it could seek other cable operators that would be willing to pay higher rentals than those allowed by the FCC.[135] As long as these replacement tenants refrained from complaining to the FCC about such rentals (as they would to avoid the fate of their predecessors), the transaction would remain beyond the reach of the FCC's regulatory jurisdiction and scrutiny. Through such disingenuous posturing, Florida Power would have cornered the government and cable companies into a checkmate position. If the FCC allowed Florida Power to exclude cable companies because the utility objected to the rate regulation, cable operators would be dissuaded from invoking FCC jurisdiction.[136] The utility companies could thus coerce the operators

135. Florida Power could do this because the FCC is not empowered to interfere in a pole attachment agreement unless the cable operator first complains. *See supra* note 124.

136. The situation between Florida Power and the FCC is analogous to the situation which other courts have addressed in the landlord/tenant relationship. In that context, courts have upheld laws restricting a landlord's ability to evict a tenant for retaliatory reasons. *See, e.g.*, Robinson v. Diamond Hous. Corp., 463 F.2d 853 (D.C. Cir. 1972). The rationale for this approach is that unless a tenant is given protection of this sort, he would be hesitant and fearful of reporting housing code violations to the authorities with the result that the legislative goals of the code would never materialize. Housing conditions would improve negligibly, if at all.

Justice Rehnquist, in dissent to the summary disposition of Fresh Pond Shopping Center v. Acheson Callahan, addressed the implications of the *Loretto* decision in the landlord/tenant context. 464 U.S. 875 (1983) (Rehnquist, J., dissenting). In *Fresh Pond*, the city of Cambridge enacted an ordinance preventing landlords from removing their rental units from the market save at the discretion of a rent control board. *Id.* at 876. In deciding whether to grant the removal permit, the Cambridge Rent Control Board was to consider factors such as the hardship imposed on the tenants of the units sought to be removed, the benefits of denying removal to the tenants protected by rent control, and the effect of removal on the proclaimed housing shortage in Cambridge. *Id.* at 876. The Board was empowered to deny removal permits under almost any situation. *Id.* The city of Cambridge also enacted the Cambridge rent control statute. *Id.* The rent control statute prohibited landlords from evicting tenants without first obtaining an eviction permit. A landlord must first obtain a removal permit, however, before he is permitted to obtain an eviction permit. *Id.* Eviction permits are only issued when tenants commit certain improper acts. *Id.* In conjunction, both regulations severely restrict a landlord's use of his property.

Justice Rehnquist viewed these restrictions on the landlord's ability to evict tenants as amounting to a taking of property. "In my view this deprives appellant of the use of its property in a manner closely analogous to a permanent physical invasion, like that involved in *Loretto*." *Id.* A landlord is only allowed to evict a tenant if he is permitted to take his property out of the rental market. Even then, it is doubtful whether he would in fact be allowed to do that.

The situation in *Fresh Pond* is distinguishable from that in *Florida Power*. In *Fresh Pond*, the regulation not only prevented the landlord from excluding tenants for retaliatory reasons, but also restricted the landlord in his ability to remove his rental unit from the market irrespective of motive. According to Justice Rehnquist, the regulation effectively compelled

into silently submitting to rates above FCC limits. To countenance such strong arm tactics would deny the public the benefits underlying the Pole Attachments Act.[137]

On the other hand, if the FCC tried to avoid this situation by granting stays to prevent retaliatory and regulatory evasive evictions of cable companies,[138] the *Loretto* rule technically would compel a court to deem such an action a taking. A court would then have to invalidate the regulatory scheme or order the FCC to compensate Florida Power at "market value"[139] for the taking of its pole space. A court could easily construe market value to entitle Florida Power to compensation at the monopolistic rates it had charged prior to the

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the landlord to participate in the rental market. Arguably, the facts of *Fresh Pond* implicate the price control issue of whether "inability to leave a regulated market" amounts to a taking. *See supra* notes 91-93 and accompanying text. Therefore, it is possible that Justice Rehnquist might not apply the *Loretto* rule where the restriction on eviction would only be imposed in the case of retaliation and where the property owner would be free to exit the market otherwise.

137. *See infra* note 158.

138. The legislative history of the Act shows that the committee recognized instances where a nontelephone utility that provided cable pole attachment space might discontinue such provision to a particular cable operator simply in order to avoid FCC regulation. S. REP. NO. 580, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 109, 124. The committee believed that under the Act, the FCC could determine that such conduct would constitute an unjust or unreasonable practice and take appropriate action upon finding that cable pole attachment rights were discontinued solely to avoid jurisdiction. *Id.* Appropriate action under these circumstances would include the issuance of a temporary stay pending resolution of the charge. The authority of the FCC to issue temporary stays in cases of retaliatory action has not been questioned in this litigation. Arguably, if the FCC has broad discretion to implement the policies underlying the Act, granting a stay would constitute a valid means by which to prevent this unfair practice by the utility companies.

139. The fifth amendment requires the payment of "just compensation," normally measured by fair market value, whenever the government takes private property for public use. United States v. 50 Acres of Land, 469 U.S. 24 (1948). Courts have commonly interpreted the standard of "fair market value" to mean "what a willing buyer would pay in cash to a willing seller at the time of the taking." United States v. Miller, 317 U.S. 369, 374 (1943). Fair market value entitles an owner to be put in as good a pecuniarily position as if the government had not taken his property. He must be made whole although he is entitled to no more. Olson v. United States, 292 U.S. 246 (1934). The Court in *Miller* stated that "the term *fair* hardly added anything to the phrase 'market value', which denotes what 'it fairly may be believed that a purchaser in fair market conditions would have given, or more concisely, market value fairly given'." *Miller*, 317 U.S. at 374 (emphasis added).

Although courts have commonly used "fair market value" as the measure of just compensation, courts have acknowledged situations where market value is inappropriate because it is either not ascertainable or where its application would result in manifest injustice to the owner or the public. *See* United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950). For example, market value is not readily ascertainable when the property, or the type of property at issue, has not been sold in the market for a long time. The application of the "fair market value" would result in injustice to the public "when property has special value to the owner because of its adaptability to his needs, or where it has a special value to the taker because of its peculiar fitness for the taker's project." *Miller*, 317 U.S. at 375; *see* United States v. Cors, 337 U.S. 325 (1949).

existence of the regulatory ceiling.[140] Again, the cable companies would be at the mercy of the utility companies. The end result is that whether or not Florida Power escaped regulation, it would still receive a premium for its pole space by virtue of its monopolistic status.

Florida Power is legitimately entitled to avoid FCC regulation if it withdraws its telecommunication space from the rental market.[141] Florida Power does not have to overcome any legal or practical barrier that could prevent it from doing so. Its situation, therefore, is not analogous to that of the landlord in *Loretto*. In *Loretto*, the landlord's primary economic use of her property, apartment rental, was conditioned on her submission to a government intrusion unrelated to the primary use.[142] In *Florida Power*, the regulation conditions a *secondary* economic use of property, the rental of otherwise superfluous space, upon submission to a valid economic regulation directly related to this secondary use alone. The regulation in no way impedes the primary use of the property—transmission of electricity. Loretto was not engaged in the business of renting space on her property to cable operators. The effect of the regulation, however, left Loretto no real choice: she had to either rent the space or forfeit the primary economic use of her property. In contrast, Florida Power had a choice. It could avoid the FCC regulation while still engaging in the primary economic use of its its poles—the transmission of electricity.

Because the Supreme Court failed to either condone or condemn

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140. *See supra* note 149. The market value of Florida Power's rental space is readily ascertainable. Arguably, if the definition of market value is "what a willing seller will pay a willing buyer," then the rates Florida Power charged the cable companies before the FCC intervened could be seen as representative of market value. Clearly Florida Power would have sought compensation in that amount. When the FCC intervened to prevent Florida Power from continuing to charge monopolistic rates, it determined what would be a "just and reasonable" rate. *See supra* text accompanying notes 11 & 14. Arguably, the FCC's formula attempts to arrive at a "fair" market rate for Florida Power rental space, one corresponding to competitive market forces. Florida Power's objective in this takings claim must be to obtain compensation at monopolistic, uncompetitive rates. The Supreme Court, in deciding *Florida Power*, noted that one could not seriously argue that the maximum rates prescribed under the Pole Attachments Act were confiscatory. *Florida Power*, 107 S. Ct. at 1113; *see supra* note 69. Implicit in this holding is that FCC regulation of Florida Power's rental space, under a rate regulation takings analysis, did not amount to a taking under the fifth amendment. Perplexingly, if Florida Power is allowed to establish a taking under *Loretto*, then arguably it should be entitled to some amount of just compensation in excess of FCC rates. It would be senseless for the Court to entertain Florida Power's takings claim, if at the end, it would grant as just compensation the originally-prescribed FCC rates.

141. As far back as Munn v. Illinois, the Court noted that price controls are fair because the owner of the business can withdraw from the regulated business. The Court also specified, however, that "so long as he maintains the use, he must submit to the control." 94 U.S. 113, 126 (1877); *see supra* note 66.

142. *See supra* note 56.

the reasoning that the Eleventh Circuit considered fundamental to its holding, the appellate decision may well be viable precedent should the FCC ever actually stay a retaliatory eviction. As the Eleventh Circuit's decision demonstrates, a court could easily view such a fact pattern as falling within *Loretto*, and might feel compelled to allow the owner to use the takings clause as an end run around the regulatory scheme. Thus, the continued viability of the Eleventh Circuit's reasoning poses a subtle but real threat to the success of future regulatory schemes. The Supreme Court should have eagerly seized the opportunity to address and resolve the issue.

### D. *A Principled Application of the* Loretto *Per Se Rule*

> Per se rules are designed to encourage efficiency, but they are not invoked until the underlying conduct, examined in light of the guiding principle of law which governs it, is found to be so egregious as to render future consideration of particular instances of that conduct unnecessary to a determination that these principles have been violated.[143]

The *Loretto* Court established a per se rule in the takings context. In the Court's view, a permanent physical invasion of property necessarily deprives a property owner of his "bundle of property rights."[144] This "bundle" encompasses the right to "possess, use, and dispose" of one's property.[145] One of the most precious strands in this bundle is the right to exclude.[146] The Court also stressed that occupation by a stranger was a particularly severe form of invasion because it added insult to the owner's injury.[147]

Assuming that the FCC would prevent Florida Power from excluding the cable companies in retaliation, such action would "technically" trigger the *Loretto* rule. An analysis of the circumstances underlying this dispute, however, demonstrates that most of the concerns underlying the *Loretto* decision are inapposite. The utility companies have the right to "possess" the space occupied by the cable operators if they need it.[148] The utility does not relinquish all property

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143. Costonis, *supra* note 24, at 535.

144. *Loretto*, 458 U.S. at 435-36; *see supra* note 58.

145. *Loretto*, 458 U.S. at 435 (citing United States v. General Motors Corp., 323 U.S. 373, 378 (1945)).

146. *Id.* at 436; *see supra* note 34.

147. *Loretto*, 458 U.S. at 436.

148. Florida Power's agreement with each cable operator made clear that it granted the operator access only to surplus space on each pole, and that if Florida Power needed the space for its own operations, it might reclaim it. The agreement required Florida Power to give notice before removing cable facilities. *See* 47 C.F.R. 1.1403(a) (1986) (requires utilities to give notice to cable operators prior to removal or termination of service). Such pole-by-pole

rights in the space occupied by the cable operators.[149] The companies may also "use" the space inasmuch as they may receive a reasonable rate of return for the rental of space for which they have no other use.[150] Moreover, the utilities have the right to remove their poles from the telecommunications market and thereby retain power to free themselves from regulation.[151] More importantly, the severity of the type of invasion in *Loretto*, that of a *stranger* occupying the space, did not occur in Florida Power. *Loretto* stressed that the severity of an occupation by a stranger stemmed from the owner's lack of control over the timing, extent, and nature of the invasion.[152] In the instant case, Florida Power had contracted with the cable operators for the occupation of the space on its poles subject to negotiated conditions and terms. The only limitation FCC placed on the utility's use of its property is that the utility may not impose unreasonable terms or conditions upon its tenant. In substance, all Florida Power is giving up is the right to obtain monopolistic profits as a result of its superior bargaining position.

Nevertheless, a court applying the *Loretto* per se rule cannot consider these factors. As this case illustrates, despite the administrative convenience of per se rules, upon application, they often yield unsound results.[153] Justice Blackmun's dissent in *Loretto* correctly

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displacements are less likely to be retaliatory than decisions to terminate economically beneficial agreements in their entirety. If Florida Power needed to use the surplus space on its poles, its motivation for excluding the cable operator is less likely to be characterized as retaliatory. Brief for Appellants at 19 n.24, FCC v. Florida Power Corp., 107 S. Ct. 1107 (1987) (No. 85-1660).

149. The property owner in *Loretto* did not have any kind of property right in the space occupied by the installation. Loretto could reclaim the space occupied by the cable company only if she withdrew her unit from the rental market.

150. The FCC permits the utility companies to charge a reasonable rate for their rental space. *See supra* note 13 and accompanying text. The regulation in *Loretto* limited the landlord to a one time, one dollar fee for the use of her space.

151. The FCC only has jurisdiction over the utilities as long as they assign communication space on their poles. *See supra* note 134.

152. *Loretto*, 458 U.S. at 437.

153. This would be the practical effect of applying the per se rule of *Loretto*. *See* text accompanying notes 144-52. Despite the fact that the FCC substantially lowered the rental fee the utility was charging, Florida Power would have a difficult time arguing that the rate finally imposed was confiscatory. *See Florida Power*, 107 S. Ct. at 1113 (rate allowed by the Pole Attachments Act permitted recovery of allocated and capital costs); Permian Basin Area Rate Cases, 390 U.S. 747 (1968). In the *Permian Basin Area Rate Cases*, the Court held that regulation may, "consistently with the Constitution, limit stringently the return recovered on investment, for investors' interests provide only one of the variables in the constitutional calculus of reasonableness." *Id.* at 769. Moreover, under the *Penn Central* test, Florida Power would not be able to assert successfully a takings claim. In *Penn Central*, the Court suggested that as long as the property owner could get a "reasonable rate of return" on his investment, and the regulation did not interfere with his primary expectations, the regulation did not effect a taking. In *Florida Power*, the utility company did not allege that the regulation was

pointed out that by "directing that all 'permanent physical occupations' automatically are compensable, 'without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner' . . . the Court does not further equity so much as it encourages litigants to manipulate their factual allegations to gain the benefit of the *per se* rule."[154]

To apply the *Loretto* per se rule to these facts is to ignore the main purpose of the takings clause—to bar the government from forcing individuals alone to bear public burdens which, in all fairness and justice, the public as a whole should bear.[155] The clause prohibits the state from exercising the police power in an arbitrary manner[156] or in a way so deleterious to an individual's property right as to amount to an appropriation or confiscation.[157] The framers could not have intended for the takings clause to provide a property owner with a bad faith defense to a valid and necessary regulation.

### E. *The Prevention of Retaliatory Exclusions Should Not Trigger the* Loretto *Per Se Rule*

In order for the Pole Attachments Act to operate effectively, the FCC must be empowered to issue stays preventing a utility from excluding the cable companies when the actions of the utility are aimed at undermining the success of the regulatory scheme.[158] Although an FCC order enjoining the utility companies from excluding the cable operators could technically trigger the *Loretto* per se rule, a court should nevertheless dismiss a takings claim where it makes a preliminary finding that the party asserting the claim is acting in bad faith. A utility would be acting in bad faith when its decision to exclude a cable operator is directly related to the cable operator's invocation of the FCC's jurisdiction and protection.

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depriving it of a reasonable rate of return. Moreover, the regulation did not interfere with Florida Power's primary expectation as to the use of its surplus pole space, namely the ability to rent pole space. Therefore, the regulation could amount to a taking only if applied "arbitrarily or unreasonably." *See supra* note 35.

154. *Loretto*, 458 U.S. at 451.

155. Armstrong v. United States, 364 U.S. 40, 49 (1960).

156. *See supra* note 35.

157. *See supra* notes 34-93 and accompanying text.

158. Effective implementation and enforcement of the Pole Attachments Act is totally dependent on the private initiative of cable operators who object to oppressive rates. Permitting the utility companies to evict cable operators in retaliation would have a chilling effect on the assertion of rights protected by the Act. *Cf.* Robinson v. Diamond Hous. Corp., 463 F.2d 853 (D.C. Cir. 1972) (An eviction grounded on a desire to punish a tenant's exercise of his right to assert substantial violations of the housing code is impermissible.); Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1968) (same).

Courts should not permit such retaliatory action by a utility company.

A court should presume an eviction to be retaliatory[159] when it follows a cable operator's successful invocation of the FCC's jurisdiction. The utility company would then have to show that the underlying motive for the exclusion was not retaliatory. This burden, whether of proof or of production, ought to fall on the utility company because they alone have access to information regarding the reasons for the exclusion. The court should hear the takings claim only after the utility company proves the absence of retaliatory motivation or the existence of a legitimate reason for excluding the cable operators.

## IV. CONCLUSION

The Supreme Court in *FCC v. Florida Power* had an excellent opportunity to place the *Loretto* rule in its proper perspective and to provide guidelines as to its proper application. The case presented a highly complicated and very real question: if the FCC stays a utility's attempt to exclude a cable operator who invoked FCC economic regulation of their pole attachment agreement, does the issuance of such a stay constitute an unconstitutional taking of the utility's property under the *Loretto* rule? The Supreme Court specifically chose not to address this issue and instead, held that, on its face, the Pole Attachments Act did not constitute an unconstitutional taking of Florida Power's property. The Court thus resolved the issue by answering a question that no one had asked.

Although the Supreme Court did not answer the real question posed in Florida Power, it ought to have done so in the negative. In *Loretto*, the Supreme Court stated that the rule of that case should be applied only in a very narrow manner. In theory, the rule should only inhere when the government authorizes an uninvited permanent physical invasion onto private property. The critical and obvious dis-

159. The Court should attach the same presumption of retaliatory eviction employed by courts in the landlord/tenant context. *See* Robinson v. Diamond Hous. Corp., 463 F.2d 853, 865 (D.C. Cir. 1972). According to *Robinson*, the fact finder must first determine the landlord's motivation for evicting the tenant. That motivation may be inferred from the landlord's objective manifestations. If the landlord's actions are motivated by a desire to punish the tenant for exercising his rights, or a desire to chill the exercise of similar rights by other tenants, then his actions are impermissible. An unexplained eviction following successful assertion of a tenant's rights is presumed to be retaliatory. Once the court determines the existence of this presumption, the landlord may rebut the presumption by showing some legitimate business purpose. If the landlord is unable to rebut this presumption, then the court will assume that his motives for eviction are illicit and deny him the right to evict.

tinction between *Loretto* and *Florida Power* is that in the former, the owner had in no way invited the physical invasion of the cable operator. It was the invasion of a property owner's *dominion* interest that was critical to the genesis of the *Loretto* rule. *Florida Power*, on the other hand, poses an entirely different scenario. Once Florida Power willingly solicited the cable operators' occupation of its poles, it could no longer validly claim that the subsequent FCC economic regulation infringed upon its *dominion* interests. Because the distinction between the two cases is so critical, the Supreme Court should have limited the *Loretto* rule as inhering *only* when the permanent physical invasion is *unsolicited*.

Moreover, Florida Power should not be permitted to invoke the *Loretto* rule in order to protect its *economic* interest from FCC imposition of confiscatory rates. The Supreme Court has established traditional takings analyses to determine the constitutionality of price and rate regulation. Those are the proper channels by which Florida Power should have asserted its takings claim. Florida Power was not legitimately entitled to assert a *Loretto* physical invasion claim when it is clear that only its *economic* interests, as opposed to its *dominion* interests, were the basis for the claim.

There is another equally compelling reason for not permitting a utility to invoke the *Loretto* rule in the event that the FCC issues a stay in response to a retaliatory exclusion. Unless the FCC is able to issue retaliatory stays preventing utility companies from excluding cable operators after successful invocations of FCC regulation, the resulting exclusions would not only serve as a wrongful punishment to cable operators for exercising valid rights, but they would also serve as a warning to other cable operators not to exercise the same rights. Because the effective implementation of the Pole Attachments Act depends entirely on the cable operators' assertion of their own rights, retaliatory action by the utilities would have a chilling effect on the assertion of such rights and consequently would frustrate the public objectives of the Act. If the Court had determined that under these circumstances, an FCC stay would nevertheless trigger the application of the *Loretto* rule, the Court, in essence, would have sanctioned the utilities' use of strong arm tactics to blackmail cable operators into silence and submission.

A court has a duty to effect the will of Congress just as it has the responsibility to consider the social context upon which its decisions will impact. A court should not allow a per se rule to legitimize unfair and illegitimate business practices aimed at undermining the intent of Congress in enacting valid remedial legislation.

In a very real sense, Florida Power's monopolistic overcharging smacks of blackmail. The utility companies received public land upon which to build their poles, and thus arrived at their present monopolistic status, under the assumption that the companies existed to serve the public. Congress saw fit to limit the degree to which the utilities could take advantage of their lucrative position by holding the cable operators hostage for exorbitant ransoms ultimately to be borne by the public. By asserting the takings clause as an end run to a legitimate and necessary legislative goal, the utilities once again attempt to make the public bear the cost of their monopolistic greed. The issue was and remains: will the Court make the *Loretto* rule the vehicle for the satisfaction of the utilities' own greed?

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