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Taking Clause v. Technology: *Loretto v. TelePrompter Manhattan CATV, A Victory for Tradition*

Robert D. Rubin

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I. INTRODUCTION

The fifth amendment of the United States Constitution prohibits the taking of private property for public use without just compensation.\(^1\) Courts have frequently struggled over the scope of this taking clause.\(^2\) Consequently, "[t]he judicial history reveals a pattern of confusing and incompatible results."\(^3\)

Ambiguity over the scope of the taking clause has resulted in the merging of the concepts of eminent domain and land-use regulation into an expanded theory of compensable takings.\(^4\) Traditionally, the taking concept referred only to the state's actual appropriation of land in eminent domain actions.\(^5\) Land-use regulations, by contrast, imposed restrictions on the use of land but did not affect the landowner's right to exclusive possession.\(^6\) The taking

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1. In Chicago, B. & W.R.R. v. Chicago, 116 U.S. 226 (1899), the United States Supreme Court held the fifth amendment applicable to the states through the due process clause of the fourteenth amendment.
2. For a comprehensive historical analysis of the taking issue, see generally F. Bosselman, D. Collins & J. Banta, *The Taking Issue* (1973).\(^7\)
4. Commentators have attributed the expansion of compensable takings to Justice Holmes's opinion in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). In dicta, Justice Holmes stated that the taking clause includes excessive exercises of a state's regulatory police power. *Id.* at 413.
6. The term "land-use regulation" is used by the courts to identify state and local governmental restrictions and prohibitions on the use of land to protect the health, safety and welfare of the community. See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (zoning ordinance); Gardner v. Michigan, 199 U.S. 325 (1906) (restrictions upon gar-
concept was never used as a restraint on the state's police power, no matter how onerous the land regulation.\(^7\) By merging these concepts, the courts have blurred the demarcation between takings and regulations of land.\(^8\) The expanded theory of compensable takings appears to be the source of the uncertainty over what constitutes a taking for purposes of the fifth amendment.

Under the expanded takings theory, courts balanced the degree of government intrusion against the public benefit to be derived from the use restriction.\(^9\) By finding that the public benefit outweighed the degree of intrusion, courts could disguise a traditional taking as a valid exercise of the police power. Until *Loretto v. TelePrompter Manhattan CATV Co.*\(^10\), this expanded theory was inadequate to protect property owners from invasions that, under the historically rooted interpretation of the taking clause, constituted a taking.\(^11\) In *Loretto*, the Supreme Court of the United States departed from this expanded takings concept and revived the historical interpretation. The Court held that government action constituting a “permanent physical occupation” of privately owned real property is, to the extent of the occupation, a taking entitling the owner to just compensation under the fifth amendment.\(^12\) By rejecting the balancing test, the *Loretto* decision clarifies the ambiguities associated with the takings concept.

*Loretto* involved a challenge to the constitutionality of section 828 of the New York Executive Law.\(^13\) Section 828 required land-

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8. See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1977); Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962). Many courts have discussed the possibility that a taking may result from mere regulation of land. At this writing, however, no federal court has ordered a state or local government to pay for a diminution in value of property caused by a zoning regulation.
12. 458 U.S. at 441. The Court emphasized that such an appropriation was an “intrusion of an unusually serious character,” id. at 433, and “perhaps the most serious form of invasion of an owner's property interests,” id. at 435.
13. N.Y. EXEC. LAW § 828 (McKinney Supp. 1982). The statute provided in part:
1. No landlord shall
   a. interfere with the installation of cable television facilities upon his prop-
lords to permit the installation of cable television ("CATV") facilities on their property and prohibited them from demanding payment from the CATV company in excess of an amount determined to be reasonable by the State Commission on Cable Television. 14

Relying on this statute, TelePrompter Manhattan CATV Co. ("TelePrompter") installed CATV facilities on New York City apartment buildings. 15 Jean Loretto, an apartment building owner, objected to TelePrompter's installation of CATV facilities on her building. 16 In a class action against TelePrompter, 17 Loretto challenged the installation on the ground that it was a trespass and asserted that section 828 constituted a taking of private property for public use without just compensation. 18

Id. The legislature enacted this statute to promote the rapid development of the cable television industry "with optimum technology and maximum penetration ... as rapidly as economically and technically feasible," so that "the state would benefit from valuable educational and public services through cable television systems." Id. at § 811.

14. Pursuant to the statute, the Commission ruled that a one-time, one dollar payment was a reasonable fee. Loretto, 458 U.S. at 423-24.

15. The City of New York granted TelePrompter an exclusive franchise to install cable facilities in certain areas of the city, which included the area of appellant's building. Id.

16. The New York Court of Appeals described the installation as follows:

On June 1, 1970 TelePrompter installed a cable slightly less than one-half inch in diameter and of approximately 30 feet in length along the length of the building about 18 inches above the roof top, and directional taps, approximately 4 inches by 4 inches, on the front and rear of the roof. By June 8, 1970 the cable had been extended another 4 to 6 feet and cable had been run from the directional taps to the adjoining building at 305 West 105th Street.


17. The class consisted of all owners of real property on which TelePrompter had placed any CATV component in the State of New York. Class-action status was granted in accordance with Jean Loretto's request. Owners of single-family dwellings were excluded. 458 U.S. at 424 n.4.

18. Appellants sought money damages and injunctive relief. New York City, which had granted TelePrompter an exclusive franchise, intervened. The New York Supreme Court granted TelePrompter's and the city's motion for summary judgment, upholding the consti-
This article analyzes the reasoning by which the Loretto Court derived a rule from the confusing and incompatible precedent. The Court attempted to provide coherence to prior decisions, but failed to denounce the expanded doctrine of takings or to reestablish the necessary distinction between due process violations and eminent domain actions. Instead, the Court created a narrow exception to the expanded doctrine of takings. This article resurrects the historical dichotomy between eminent domain and land-use regulation and proposes adoption of this distinction to clarify the taking issue in future decisions.

II. DEVELOPMENT OF THE TAKING CONCEPT

A. Historical Interpretation

The taking concept emerged during the transition from the feudal system to individual ownership of private property. Under the feudal system, an individual held land under a tenure granted by the sovereign. Government appropriations did not involve "takings" of property because the sovereign was already the landowner. With the decline of the feudal system and the rise of modern concepts of individual ownership and private property, the power of the sovereign to appropriate land was recognized.

Grotius, the seventeenth-century Dutch political philosopher, first articulated this concept of eminent domain. Grotius recognized the principle of sovereignty—the power of the state to use, alienate and destroy property for the benefit of society. He...
stated, however, that a moral obligation to compensate the property owner attached to the government's exercise of eminent domain. Blackstone also recognized the government's inherent right to take private property for the public good if the property owner received "full indemnification" for the loss sustained. Both Grotius and Blackstone indicated that exercises of eminent domain referred to the government's physical dominion and control over private property.

Similarly, the drafters of the fifth amendment implicitly acknowledged the power of federal sovereignty by requiring the government to compensate landowners when taking their property for public use. The scope of compensable takings contemplated by the drafters was consistent with Grotius's and Blackstone's interpretations of the power of eminent domain. The fifth amendment taking clause embodies this interpretation.

The United States Supreme Court's first significant interpretation of the taking clause was in *Pumpelly v. Green Bay Co.* There, the Court held that an invasion of land as an indirect result of government action constituted a taking within the purview of the fifth amendment. In *Pumpelly*, a state statute authorized the construction of a dam to control floods. The dam caused permanent flooding on the plaintiff's land. The Court indicated that the government had effectively taken control of the property to the exclusion of the owner, who, consequently, was entitled to compensation. Adhering to the traditional interpretation of the taking clause, the Court restricted its holding to actual physical

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25. Id.
26. 1 W. BLACKSTONE, COMMENTARIES *139.
27. Regulations of land were customary in early England. These regulations, even if they forbade landowners to develop their property, did not appear to have offended the medieval sense of justice, since they were designed to promote the public benefit. "There is no evidence that the founding fathers ever conceived that the taking clause could establish any sort of restrictions on the power to regulate the use of land." F. BOSSELMAN, D. COLLINS & J. BANTA, supra note 2, at 104.
28. Id. at 99-104.
29. See J. THAYER, 1 CASES ON CONSTITUTIONAL LAW 946-52 (1895).
30. See F. BOSSELMAN, D. COLLINS & J. BANTA, supra note 2, at 104-06.
32. "[W]here real estate is actually invaded by super-induced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution . . . ." 80 U.S. (13 Wall.) at 181.
33. Id. at 178.
invasions of property.\textsuperscript{34}

Sixteen years later, in \textit{Mugler v. Kansas},\textsuperscript{35} Justice Harlan expanded \textit{Pumpelly} by carefully distinguishing the power of eminent domain from the police power of the state.\textsuperscript{36} In \textit{Mugler}, a brewery owner argued that a state prohibition on the sale or manufacture of intoxicating liquors destroyed the value of his property and, therefore, could not constitutionally be enforced without payment of compensation. Justice Harlan noted that the prohibition attempted to protect the public health and safety, and thus was not a taking within the meaning of the fifth amendment.\textsuperscript{37} If the government had acquired a proprietary interest in the property, there would have been a compensable taking.\textsuperscript{38} The Court held that the regulation was not a taking, despite the impairment of the property's use, because there was no encroachment on private property.\textsuperscript{39} The Court thus perpetuated the historical interpretation of the taking clause. The \textit{Mugler} opinion remained the dispositive interpretation of the taking clause until Justice Holmes's opinion in \textit{Pennsylvania Coal Co. v. Mahon}.\textsuperscript{40}

\textbf{B. Pennsylvania Coal and Its Progeny}

Unlike Justice Harlan, Justice Holmes in \textit{Pennsylvania Coal} saw no qualitative difference between traditional takings and legislative exercises of the police power. He viewed the two concepts as differing only in degree.\textsuperscript{41} In \textit{Pennsylvania Coal}, an owner of land had conveyed the surface of his property but had reserved the right to remove the coal beneath. A statute enacted after this transaction forbade mining so "as to cause the caving-in, collapse, or subsidence" of any occupied land.\textsuperscript{42} The Court struck down the statute as a violation of the taking clause on the ground that the

\textsuperscript{34} \textit{Id.} at 180. \textit{Pumpelly} indicates that a formal appropriation of property by the government is not necessary for there to be a taking. Government authorized action is enough.

\textsuperscript{35} 123 U.S. 623 (1887).

\textsuperscript{36} \textit{See id.} at 667-69. "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." \textit{Id.} at 668-69.

\textsuperscript{37} \textit{Id.} at 668.

\textsuperscript{38} \textit{Id.} Compare \textit{id.} at 667-69 (regulation on the use of land not a taking) \textit{with Pumpelly}, 80 U.S. (13 Wall.) at 178-80 (encroachment constituted a taking).

\textsuperscript{39} 123 U.S. at 669.

\textsuperscript{40} 260 U.S. 393, 412-16 (1922) (Holmes, J.).

\textsuperscript{41} \textit{See id.} at 415. "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." \textit{Id.}

\textsuperscript{42} \textit{Id.} at 393 n.1.
prohibition exceeded the state's police power. "To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." Under this view, "[w]hen [regulation] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."

Justice Holmes's opinion in Pennsylvania Coal expanded the interpretation of a taking to include regulations of land use that have a substantial impact on the value of private property. He stated, however, that "Government hardly could go on if . . . property could not be diminished without paying for every such change in the general law." Nevertheless, he noted that a regulation causing substantial diminution in the value of land was tantamount to a taking even though the owner continued to have possession of and title to the land. The traditionally distinct concepts of eminent domain and land-use regulation were thus merged into a broad theory of compensable takings.

After Pennsylvania Coal, the Court struggled to develop a standard by which to apply Justice Holmes's theory and to determine where regulation ended and taking began. The Court did not have to confront this problem in cases where it held that no taking had occurred or where the government had physically invaded private property. By sidestepping this issue, the Court avoided drawing the line between takings and regulations. The Court reiterated, in dicta, the notion that when government regulation goes too far, the resulting diminution in the land's value is a taking. This dicta perpetuated the ambiguity caused by Pennsylvania Coal. Although the courts continued to quibble over the proper

43. See id. at 416.
44. Id. at 414.
45. Id. at 413.
46. See F. Bosselman, D. Collins & J. Banta, supra note 2, at 125-26; Stever, supra note 20, at 154.
47. 260 U.S. at 413.
48. Id. at 414.
49. Justice Holmes's theory placed the two concepts on a spectrum, each concept at a different end. Somewhere on the spectrum is a line separating compensable takings from mere regulations.
50. The Court held that no taking had occurred in Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962), and in United States v. Central Eureka Mining Co., 357 U.S. 155, 166 (1958). By contrast, a physical invasion was held to constitute a taking in United States v. Causby, 328 U.S. 256 (1946).
scope of the taking clause, no court actually held that an overzealous regulation of land constituted a compensable taking.

Recent decisions have continued to obfuscate the issue of where regulation ends and taking begins. In Penn Central Transportation Co. v. New York City,\(^5\) a statute enacted to preserve historic buildings imposed restrictions on construction at the Grand Central Terminal site. The owners of the land argued that the restrictions effected a taking of their property. The Court attempted to reconcile the inconsistencies of prior taking clause decisions by formulating a balancing test.\(^4\) Based on “essentially ad hoc, factual inquiries,” the test weighed the degree of intrusion against the public benefit from the government action.\(^5\) Although the historic preservation statute substantially impaired the owners’ rights to exploit the value of their property, it did not constitute a taking.\(^6\)

The Penn Central decision is significant because it attempted to derive a workable doctrine from the uncertainty that imbued the prior taking clause cases. The Penn Central balancing test is, however, inherently subjective, and courts have had difficulty defining its limits.\(^5\) Since Penn Central, the Court has avoided stating whether overzealous regulations on the use of land may be a compensable taking, and has adhered to the amorphous concept of takings developed by Justice Holmes in Pennsylvania Coal.\(^6\)

One year after Penn Central, in Kaiser Aetna v. United States,\(^6\) the Court reaffirmed the traditional interpretation of the taking clause. The Court held that a compensable taking had occurred when the government enforced a public right of access to a body of water made navigable by private enterprise.\(^6\) Property owners had developed a residential marina around a pond by dredging a passageway from the pond to a bay. Under state law, the pond was private property. The federal government argued that it had the right to regulate access to the new marina pursuant

54. See id. at 124.
55. Id. The Court identified several relevant factors from prior cases to weigh in the balancing test: (1) “The economic impact of the regulation on the claimant,” (2) “the extent to which the regulation has interfered with distinct investment-backed expectations,” and (3) “the character of the governmental action.” Id.
56. Id. at 138.
57. See infra notes 59-63 and accompanying text.
58. See infra note 63.
60. Id. at 178-80.
to the federal navigational servitude. The Court disagreed, however, stating, "This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina." In Kaiser Aetna, the Court reaffirmed "one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others."

C. Setting the Stage for Loretto

In Agins v. City of Tiburon and San Diego Gas & Electric Co. v. City of San Diego, the Court again declined to decide whether regulation of land amounted to a compensable taking. In Agins, landowners challenged a zoning ordinance passed after they acquired their property, contending that it completely destroyed the value of their property for any purpose. The Court affirmed the California Supreme Court's dismissal, holding that the zoning ordinance, which restricted land use to single-family residences, did not on its face effect a taking of the landowners' property without just compensation. Consequently, the Court did not pass on the state court's ruling that, even if the zoning ordinance did effect a taking, the landowners' only remedies were declaratory judgment and mandamus. In San Diego Gas, a utility company sued to recover the value of property allegedly taken as a result of downzoning from industrial use to an open space plan for a public park, making it impossible for the owner to use the land. The Court dis-

61. See id. at 170.
62. Id. at 180.
63. 444 U.S. at 176. Despite this reaffirmation, the Court restricted the landowner's right of exclusive possession in Prune Yard Shopping Center v. Robins, 447 U.S. 74 (1980). There, the Court applied the balancing test from Penn Central to find no taking had occurred. In Prune Yard, a shopping center owner challenged a state statute that authorized individuals to exercise free speech and petition rights on the premises. Even though the statute authorized physical occupation of solicitors on private property, "the fact that [the solicitors] may have 'physically invaded' appellants' property cannot be viewed as determinative." Id. at 84, quoted in Loretto, 458 U.S. at 434. The Court concluded that because shopping center owners hold the property open to the public, the right to exclusive possession was no longer "so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking'." Id.
64. 447 U.S. 255 (1980).
66. 447 U.S. at 263.
missed the appeal on procedural grounds.\textsuperscript{67} Thus, the majority avoided addressing the problem of the scope of the taking clause.

Although the case was dismissed on procedural grounds, the difference of opinion between the majority and the dissent in \textit{San Diego Gas} regarding the holding of the California Supreme Court in \textit{Agins} is particularly significant and indicates the Court's uncertainty as to the scope of the semantically ambiguous term "taking."\textsuperscript{68} Justice Brennan, in dissent, proposed a rule that would reaffirm Justice Holmes's decision in \textit{Pennsylvania Coal}.

Under Justice Brennan's suggested rule, "once a court finds that a police power regulation has effected a 'taking,' the government entity must pay just compensation."\textsuperscript{70} This rule attempts to resolve the dispute over the scope of the taking clause. A majority of Justices agreed in principle with the rule suggested by Justice Brennan.\textsuperscript{71} It appeared that Justice Brennan's approach would prevail in the Court's next taking clause case.

Justice O'Connor, who had never rendered an opinion on this subject, replaced Justice Stewart, a member of the \textit{San Diego Gas} dissent. Because it was not known whether Justice O'Connor would share Justice Brennan's view, how the Court would resolve the taking controversy again became unpredictable. It was unclear whether the Court would adopt the expanded interpretation that Justice Brennan espoused, or would return to the traditional interpretation of the taking clause.

\textsuperscript{67} See 450 U.S. at 633. The majority held that the appeal was not from a final judgment because the court of appeals failed to decide the question of whether a taking occurred at all. \textit{Id}.

\textsuperscript{68} Justice Blackmun for the majority stated: "Contrary to the dissent's argument, the California Supreme Court's \textit{Agins} decision did not hold that a zoning ordinance never could be a 'taking' and thus never could violate the Just Compensation Clause. It simply limited the remedy available for any such violation to nonmonetary relief." \textit{Id}. at 628 n.8. In contrast, Justice Brennan wrote in dissent:

[...]

\textsuperscript{69} \textit{Id}. at 658. Justice Brennan, however, has gone one step further in asserting that the remedy for a regulatory taking is just compensation.

\textsuperscript{70} \textit{Id}.  

\textsuperscript{71} Joining Justice Brennan's dissent were Justices Stewart, Marshall and Powell. Though concurring in the majority's result, Justice Rehnquist "would have little difficulty in agreeing with" Justice Brennan's proposed rule. \textit{Id}. at 633.
San Diego Gas and Agins represent conflicting interpretations of the scope of the taking clause. Subsequent lower court decisions have either argued the traditional interpretation of the taking clause or cited Justice Brennan's approach as the dispositive test for compensable takings. The resulting confusion necessitated a reconciliation of these inconsistencies. The timeliness of the Loretto factual circumstances, the presence of Justice O'Connor on the Court, and the potential difficulty of facilitating public access to CATV provided the necessary impetus for the Court to challenge the taking clause precedent.

III. The Reasoning of Loretto

In Loretto, the Court attempted to lend coherence to the inconsistent taking clause decisions. Although the decision dealt primarily with facilitating access to the modern technological wonder of CATV, the Loretto Court followed the reasoning of decisions in the late 1800's and early 1900's that dealt with analogous controversies. The Loretto decision is significant because the Court departed from the broad takings concept that emanated from Pennsylvania Coal and substantially revived the traditional interpretation of the taking clause.

Although the Loretto Court did not expressly adopt either Justice Holmes's or Justice Harlan's theory, the Court seemed implicitly to rearticulate Justice Harlan's historical interpretation of the taking clause. The Court ignored the ad hoc inquiry advocated in the Court's most recent land regulation cases. The Court also found the balancing test from Penn Central Transportation Co. inadequate to protect property owners' expectations of exclusive possession. Rather than balance the degree of intrusion against the public benefit, the Loretto majority maintained that the character of the government's action was the determinative factor. The


73. Beginning with Pumpelly, the Court identified the physical invasion decisions. Moreover, the Court analogized the telephone, telegraph, and other wire decisions to the circumstances in Loretto. See 458 U.S. at 426-35.

74. See San Diego Gas, 450 U.S. 621 (1980) (rezoning to open-space plan made property worthless for intended use as nuclear generating station); Agins, 447 U.S. 255 (1979) (zoning ordinance that placed density and other restrictions on appellant's property).

75. See 458 U.S. at 426.
Court stated a per se rule: "[W]hen the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred." 76

In support of its conclusion, the Court examined the pre-
Pennsylvania Coal cases. A critical factor in the Court's reasoning was its distinction between permanent and temporary occupations of land. 77 The Court emphasized the significance of this distinction by contrasting Pumpelly with the later case of Transportation Co. v. Chicago. 78

In Transportation Co. v. Chicago, construction of a tunnel prevented a landowner from having access to his property. The Court stated that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision." 79 Because there was no actual entry upon the owner's land, the temporary impairment was not an uncompensated taking. 80 The Court in Transportation Co. v. Chicago distinguished Pumpelly as a case involving a "practical ouster of possession," which constituted a taking. 81 The Loretto Court also distinguished other "flooding cases" involving permanent physical occupations from those involving only temporary invasions to demonstrate that occupations of private property must be permanent to constitute a taking. 82

In Loretto, the Court suggested that the permanent intrusions in the "flooding cases" were similar to the permanent installation of TelePrompter's cables. 83 In United States v. Kansas City Life Insurance Co., 84 the Court treated an actual permanent invasion of

76. Id. 77. See id. at 427-30. 78. 99 U.S. 635 (1878). 79. Id. at 642. 80. See id. at 645. 81. Id. at 642. 82. See 458 U.S. at 428. Compare United States v. Lynah, 188 U.S. 445, 468-70 (1903) (flood involved permanent invasion, and thus constituted a taking), and United States v. Cress, 243 U.S. 316, 327-38 (1917) (flood involved a permanent invasion, and thus constituted a taking), with Bedford v. United States, 192 U.S. 217, 225 (1904) (no taking because only temporary invasion), and Sanguinetti v. United States, 246 U.S. 146, 149 (1917) (no taking because only temporary invasion).

83. After the Court explained the application of the traditional test by examining the "flooding cases," it held, "TelePrompter's cable installation on appellant's building constitutes a taking under the traditional test." 458 U.S. at 438. 84. 339 U.S. 799 (1950).
property as a divestment of the owner's rights in his land. There, severe flooding from percolating waters effectively destroyed private property. The permanency of the damage constituted a compensable taking. Like the landowner whose land was appropriated by flooding caused by government action, the New York apartment building owners in Loretto suffered a permanent loss of use of their property due to a physical intrusion.

The Loretto Court compared the decisions in United States v. Pewee Coal Co. and United States v. Eureka Mining Co. to demonstrate the demarcation between temporary and permanent invasions. In Eureka Mining, a government regulation had caused a gold mine to be closed during wartime in order to conserve equipment and manpower. The Court held that this was not a taking because "the Government did not occupy, use, or in any manner take physical possession of the gold mines or of the equipment connected with them." In Pewee Coal, the Court found a taking of private property based on an "actual taking of possession and control," where the government had taken permanent control. Similarly, in Loretto, the CATV installation was an appropriation of the apartment owners' rights in their land. The Loretto Court noted that the permanent physical occupation was an injury different in kind from a temporary invasion, and, therefore, the owner deserved the protection of the taking clause. The Loretto interpretation of the taking clause is analogous to the principles enunciated in St. Louis v. Western Union Telegraph Co. In Western Union Telegraph, a telegraph company

85. See id. at 810.
86. Id. at 810-12. "The percolation raised the water table and soaked the land sufficiently to destroy its agricultural value. The continuous presence of this raised water table also blocked the drainage of the surface and subsurface water in a manner which helped to destroy the productivity of the land." Id. at 810 (footnote omitted).
87. 341 U.S. 114 (1951).
89. Id. at 165-66. "All that the Government sought was the cessation of the consumption of mining equipment and manpower in the gold mines and the conservation of such equipment and manpower for more essential war uses." Id. at 166.
90. 341 U.S. at 116. By executive order, the Secretary of the Interior was to take immediate possession and operate or arrange to operate the coal mine. The government also: required mine officials to conduct their operation as agents for the government; required the American flag to be flown; posted signs that read "United States Property" on the premises; and appealed to the miners to dig coal as a public duty. Id.
91. 458 U.S. at 439. "A permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." Id. (footnote omitted).
92. 148 U.S. 92 (1893).
placed poles on public streets pursuant to a city ordinance. After
the poles were installed, the city levied a tax on the company's
permanent and exclusive appropriation of a part of the public
streets. The Court stated that it was a "misconception" to suppose
that the privilege to perform a service for the public carried with it
"the unrestricted right to appropriate the public property of a
State." Although that case involved an appropriation of public
property, the Court stated that the same principle applied to tak-
ings of private property: "No matter how broad and comprehensive
might be the terms in which the franchise was granted, it would be
confessedly subordinate to the right of the individual not to be de-
prived of his property without just compensation." Applying
these principles in Loretto, Teleprompter's franchise was subordi-
ate to the landlords' property rights. Therefore, the appropria-
tion by Teleprompter was a compensable taking.

The Loretto majority examined the taking clause controversies
that had resulted from earlier technological advances. Courts have
found appropriations to be compensable takings in cases involving
telegraph and telephone lines, train rails, and underground pipes
and wires. Consistently with these cases, the Loretto Court ar-

gued that "constitutional protection for the rights of private prop-
erty cannot be made to depend on the size of the area permanently
occupied." In United States v. Causby, the Court had indicated
that questions of constitutional dimension are matters of principle,
not necessarily of degree. In contrast, the dissenting Justices in

93. Id. at 100. "No one would suppose that a franchise from the Federal government to
a corporation, State or national, to construct interstate roads or lines of travel transporta-
tion or communication, would authorize it to enter upon the private property of an individ-
ual, and appropriate it without compensation." Id. at 100-01.
94. Id. at 101.
95. 458 U.S. at 438.
pipelines); cf. Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922)
(guns shot from fort); Western Union Tel. Co. v. Penn. R.R., 195 U.S. 540 (1904) (telegraph
lines).
97. 458 U.S. at 438 (footnote omitted).
98. 328 U.S. 256 (1946).
99. See id. at 262. The issue in Causby was whether frequent and regular flights of
army and navy aircraft over respondent's land constituted a fifth amendment taking. Since
"[t]he landowner owns at least as much of the space above the ground as he can occupy or
use in connection with the land," id. at 264, flights over the land if "so low and so frequent
as to be a direct and immediate interference with the enjoyment and use of the land," id. at
266, invoke the fifth amendment taking clause as a remedy.

[A]n owner is entitled to the absolute and undisturbed possession of every part
of his premises, including the space above, as much as a mine beneath. If the
wire had been a huge cable, several inches thick and but a foot above the
Loretto argued that the CATV installation was not of constitutional significance because its interference with a private property interest was *de minimis*. The Loretto majority tacitly disapproved of the dissent’s willingness to reduce the taking issue to a subjective measuring of the extent of the cable’s intrusion upon the buildings’ rooftops. The majority concluded that the critical factors in determining whether a taking had occurred were objective and that, therefore, the extent of the occupation would rarely be an issue.

Implicit in the taking concept is the idea that a property owner is entitled to exercise complete dominion over his property, subject to the limitations on use imposed by the state for the health, safety, and welfare of its citizens. The Loretto dissent argued that section 828 of New York’s CATV statute served a legitimate public purpose, analogous to other statutes regulating the use of rental property. The dissent proposed that the intrusion upon the landlords’ property by the CATV facility be balanced against the public benefit of widely distributed CATV.

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100. Justice Blackmun stated in dissent, “I would be prepared to hold that the incremental governmental intrusion caused by that four- to six-foot wire, which occupies the cubic volume of a child’s building block, is a *de minimis* deprivation entitled to no compensation.” 458 U.S. at 448-49 n.6.

101. The majority stated, “[F]ew would disagree that if the State required landlords to permit third parties to install swimming pools on the landlords’ rooftops for the convenience of the tenants, the requirement would be a taking.” Id. at 436.

102. The Court stated, “The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute.” Id. at 437.


104. 458 U.S. at 448-50 (Blackmun, J., dissenting).

105. Id. at 451 (Blackmun, J., dissenting). The dissent argued that “§ 828 merely defines one of the many statutory responsibilities that a New Yorker accepts when she enters the rental business.” Id. at 448. Thus, if appellant converted her property into other than rental property, she would no longer be subject to the regulation.

Not every physical attachment to rental property constitutes a taking. See id. at 447-51 (Blackmun, J., dissenting). Section 828, however, prohibits landlords from exacting any compensation for the intrusion either from their tenants or from the cable companies. The majority reasoned that the dissent’s analysis

would allow the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained
recognized the states’ need to have “broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.”106 A permanent physical occupation, however, is a qualitatively more severe intrusion than is a regulation on the use of land. Section 828, therefore, was beyond the scope of a police power regulation.107

Section 828, in effect, authorized a third party to enter and attach CATV facilities without regard to the property owner’s right to exclusive possession. None of the regulatory statutes cited in the Loretto dissent authorized a permanent physical occupation of a landlord’s property by a third party.108 Those regulatory statutes merely required the landlord to take affirmative action or to abstain from an activity. Property owners typically maintained some control over the timing, extent, or nature of the invasion even though the regulatory statute may have provided in detail the manner of the landlord’s compliance.109 Section 828, in contrast, denied landlords the right to exercise any control over the CATV installation.110 The Loretto Court indicated that, if Jean Loretto had been allowed to exercise control over the CATV installation or had been required to purchase the facility for the benefit of her tenants, the statute might have presented a different question.111 Because section 828 permitted a third party physically to invade private property, and because it gave the landlords no control over the manner of compliance with the statute, the Loretto majority concluded that the occupation of a portion of Jean Loretto’s rooftop constituted a taking within the purview of the fifth amendment.112

Loretto presents a narrowly defined per se rule for compensable takings. The rule applies only to government authorized per-

by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices. The right of a property owner to exclude a stranger’s physical occupation of his land cannot be so easily manipulated.

Id. at 439 n.17.
106. Id. at 439.
107. Id. at 435-36.
108. See id. at 449 n.7 (Blackmun, J., dissenting).
109. Many statutes, for example, required landlords to pursue the manner of compliance. See id.
111. See 458 U.S. at 440-41 n.19.
112. See id. at 441.
manent and physical occupations of private property by a third party. The Loretto holding prohibits the application of state statues that authorize uncompensated permanent physical occupations of land even where the public benefit outweighs the degree of intrusion: "[W]e conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."113 This rule protects property owners from government overreaching under the guise of land-use regulations that purport to promote the health, safety and welfare of the public. This narrow rule precludes courts from engaging in a subjective balancing test that weighs the degree of intrusion against the public benefit.

IV. THE IMPACT OF Loretto

The Loretto Court substantially revived the historically rooted interpretation of the fifth amendment taking clause, but it failed to articulate the distinction between takings in eminent domain and regulatory exercises of the police power. In ignoring this distinction, the Loretto Court has merely carved out an exception to the expanded theory of compensable takings. The Court did not clarify the scope of the semantically ambiguous term "taking," which has led courts to confusing and inconsistent decisions. Since, prior to Loretto, the term was used to denote overzealous regulation of the use of land, Loretto leaves open the question of whether land-use regulation can ever constitute a taking within the purview of the fifth amendment.114 The Loretto majority seems to have fallen into the trap set by Justice Holmes in Pennsylvania Coal, which subsequent decisions have perpetuated.

As a consequence of this "semantic trap,"115 future courts will encounter similar difficulty in ascertaining the scope of the taking clause. Distinguishing between takings in eminent domain and regulatory action under the police power is critical to understanding the scope of the taking clause. Property is "taken in the constitutional sense" when the government authorizes an intrusion upon an owner's use of his land to the extent that the state acquires a

113. Id. at 426.
114. Rather than focus on the ambiguous term "taking," the Loretto Court chose not to define the scope of the taking clause but accomplished a similar result by formulating an exception to the ambiguous rule. The Loretto holding leaves the dictum of prior decisions intact concerning whether or not a regulation could ever constitute a taking.
servitude over the land. A taking thus may occur even without physical appropriation if the owner's right to use and enjoy his land is destroyed by a governmental act. In these circumstances, the owner's loss is the same as if the government had entered upon and taken possession of the land. Land-use regulation does not disturb the owner's control or use of his property for lawful purposes. These regulations restrict the use of property for purposes that the legislature declares, by valid legislation, to be injurious to the health, morals or safety of the community. The owner is free to dispose of his land or to use it for any lawful purpose. Land-use regulations are declarations by the state that certain uses are prejudicial to the public interest. By adopting this distinction between eminent domain actions and land-use regulations, courts would revitalize the historical interpretation of the taking and due process clauses. This demarcation would provide an objective basis for ascertaining the scope of the taking clause and would clarify the ambiguity surrounding the taking clause decisions.

The pre-1922 constitutional land decisions provided distinct remedies for exercises of eminent domain and excessive regulations of land: exercises of eminent domain triggered the protections of the taking clause and the remedy of just compensation; excessive

117. See United States v. General Motors Corp., 323 U.S. 373 (1945), where the Court stated, "Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." Id. at 378. See also Richards v. Washington Terminal Co., 233 U.S. 546 (1914); United States v. Welch, 217 U.S. 333 (1910).
118. The most common example of land-use regulation is zoning, which prohibits landowners from using their property in a manner that the legislative body deems inappropriate.
119. Goldblatt v. Town of Hempstead, 369 U.S. 590, 593 (1962) (quoting Mugler v. Kansas, 123 U.S. 623, 668-69 (1887)). The due process clause requires that there be at least a rational relationship between the state's exertion of power and the social ends sought to be achieved. Thus, the courts will generally sustain regulation of land based on rational public policy. In Nectow v. City of Cambridge, 277 U.S. 183 (1928), a particular application of a zoning law was invalidated. There, the zoning ordinance was declared unconstitutional because it was shown to be "a mere arbitrary or irrational exercise of power, having no substantial relation to the public health, the public morals, or the public safety or the public welfare in the proper sense." Id. at 187-88 (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).
120. The use the landowner prefers may be deemed unlawful. This restriction, however, does not preclude the owner from using the land for other lawful purposes. A prohibition of certain uses is not equivalent to a physical intrusion on private property. In the former instance, the owner still can make profitable use of his property, but in the latter case, a portion of his property is no longer available for any use.
121. As early as 1853, in Commonwealth v. Alger, 61 Mass. (7 Cush.) (1853), Chief Justice Shaw carefully distinguished the police power from the power of eminent domain and other powers.
regulation of land invoked the due process clause and the remedy of injunctive or declaratory relief. Excessive land-use regulation that does not constitute a taking within the scope suggested by this article may, nonetheless, be a violation of the due process clause. The remedy for such onerous regulation is injunctive or declaratory relief against the regulation's enforcement. This is consistent with the traditional eminent domain-regulation dichotomy. The major problem in applying this distinction is determining whether a taking in fact has occurred. If there is a taking, the appropriate remedy is just compensation. If, however, the facts indicate a mere regulation on the use of land, the court should weigh the degree of the governmental intrusion against the public benefit before awarding injunctive or declaratory relief.

Just compensation is not the appropriate remedy for every governmental action that results in a deprivation of property or a diminution of property value. For this reason, actions in eminent domain historically have been subject to the protections of the taking clause, and other deprivations of property rights have been treated under a due process analysis.

A dichotomy between constitutional remedies for takings and excessive regulations of land underlies this analysis. Where the

We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. . . . Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

This is very different from the right of eminent domain, the right of the government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor.

Id. at 84-85.

122. R. Mott, DUE PROCESS OF LAW 314-19 (1926); see also State v. Noyes, 30 N.H. 279 (1855) (city could prohibit bowling alleys within a specified distance of dwellings).

123. The due process clause limits the government's exercise of its regulatory police power. Thus, if regulation is disproportionately onerous in light of its societal benefits, a property owner may invoke the protections of the due process clause.

124. See Freilich, supra note 115, at 347.

125. This is not to suggest that money damages may never be an appropriate remedy for excessive regulation of land. Just compensation, however, is the exclusive remedy for actions in eminent domain.

The author does not suggest that the government may, through land-use regulation, achieve the same objectives as through actions in eminent domain. If restrictions on land
government, as in Loretto, has indirectly exerted dominion and control over the property, this action triggers the remedy of just compensation. The express terms of the fifth amendment taking clause provide this remedy. Just compensation traditionally has served as a limitation on the caprice of government in the exercise of its sovereign powers. Implicit in the idea of just compensation was the notion of a unique remedy for physical appropriations by the government.

The suggested dichotomy between eminent domain and overzealous land-use regulation reaffirms the intent of the drafters of the taking and due process clauses. Property owners would have greater protection under this distinction, since legitimate claims of deprivation would no longer be lost because they are not within the amorphous taking clause. A return to this historically rooted dichotomy would preclude the judicial legislation inherent in the balancing test proposed in Pennsylvania Coal and its progeny.

V. Conclusion

Loretto restores vitality to the battered taking clause. In addition to announcing a per se rule, however, the Loretto Court should have rearticulated the historical distinction between eminent domain and land-use regulation. In failing to express this dichotomy, the Court resolved only some of the difficulties that emanated from the recent taking clause decisions. The question is left

use are such as to render the land worthless, then there may be a taking. Also, nonresparatory takings in eminent domain are still possible. In fact, United States v. Causby, 328 U.S. 256 (1946), and its progeny have generally been regarded as stretching the concepts of property and taking. The intrusions have been called airspace easements or aviation easements. It is the permanency of the easement that makes it a taking. Thus, these easements reflect broader notions of physical property and traditional takings.

126. B. Schwartz, A Commentary on the Constitution of the United States—The Rights of Property 235 (1965). The fifth amendment taking clause is "a tacit recognition of a pre-existing power to take private property for public use, rather than a grant of new property." Id. (quoting United States v. Carmack, 329 U.S. 230, 241-42 (1946)). One commentator has noted,

As the Supreme Court has phrased it, the organic guaranty "that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Id. at 256 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

127. See id. at 234-55; Freilich, supra note 115, at 347-49.

128. It is difficult to apply a balancing test involving subjective criteria and many varying factual circumstances. Legislating is not a proper function of the courts, and when courts do attempt to legislate, the case law soon develops into an unworkable pattern of inconsistent precedent.
open whether land-use regulation may ever constitute a taking within the broad theory of compensable takings. If future courts can avoid the "semantic trap" of the taking clause, then the Loretto decision will have made a significant contribution to unraveling the "crazy quilt pattern of Supreme Court doctrine" that is characteristic of the taking clause.

ROBERT D. RUBIN

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