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Presumptive and Per Se Takings: A Decisional Model for the Taking Issue

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PRESUMPTIVE AND PER SE TAKINGS: A DECISIONAL MODEL FOR THE TAKING ISSUE

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Professor Costonis presents a decisional model for the judicial management of compensation practice under the takings clause that comprehends both physical and regulatory incursions. The model contains four elements: a commitment to presumptions rather than per se rules to determine whether property has been taken; a due process-takings phase, in which conflicts between welfare and indemnification concerns are mediated through application of the just share principle; a pure takings phase, in which a measure's fairness in operation is assessed; and a sliding scale to key government's burden of proof in justifying a particular measure in light of the values implicated by the measure. Professor Costonis identifies major developments in modern takings jurisprudence that prefigure the model, and he argues that the per se test adopted by the Supreme Court in Loretto v. Teleprompter Manhattan CATV Corp. *fails to accord with these trends. He concludes that the decisional model should replace both* Loretto's *per se test and the multifactor balancing test used to decide regulatory takings cases.*

CONTENTS

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The author is indebted to Michael Lesch and Michael Durst, whose law firms also represented Teleprompter Manhattan CATV Corporation, for their many valuable suggestions respecting earlier drafts of this Article, and to Michael Durst, specifically, for the phrase "use-dependency." See text accompanying notes 91-95 infra. Appreciation is due as well to Professors Estreicher, Nelson, and Neuborne, colleagues at the New York University School of Law, for their comments on earlier drafts, and to my research assistant Jane Peebles and Articles Editor Beth Sher, New York University School of Law students.

Introduction

The takings jurisprudence of any period is shaped by that period's attitudes towards private property and the judiciary's fifth amendment-appointed role as custodian of that institution. In times of relative stability, the *tesserae* composing the jurisprudential mosaic re-

main securely inlaid, forming familiar patterns in their relations to one another. But in periods of transition the pieces tend to work loose, rearranging themselves in novel patterns reflective of emergent attitudes.

Ours is a period of transition in which a variety of the elements that have shaped the mosaic throughout this century have been or, it can be anticipated, will shortly be pried loose and refashioned. Principal among these elements is the premise that the takings clause states a rule that a compensable taking invariably occurs when "property" is "taken."[1] This premise is yielding to an alternative one under which the clause states not a per se rule, but a presumption that may be, and in fact usually is, rebuttable by the government. No longer venerated, moreover, is a set of distinctions—those between property as "thing" and as "relation," between "direct" and "consequential" damages, between "permanent" and "temporary" invasions, and between "destruction" and "appropriation"—that once served to delimit the terms "property" and "taken."[2] The distinctions remain useful as factors that properly bear on the takings determination, but they no longer enjoy their former status as self-sufficient predicates for that determination.

Also suspect is the paradigmatic takings status conventionally assigned to "physical invasions,"[3] as contrasted with "regulatory," *i.e.*, nontrespassory, incursions. An extreme variant of the per se rule demands that takings be found on the basis of their "physical" character alone. Despite the United States Supreme Court's endorsement of this position in its 1982 opinion, *Loretto v. Teleprompter Manhattan*

[1] See, e.g., United States v. Willow River Power Co., 324 U.S. 499, 510 (1945); United States v. General Motors Corp., 323 U.S. 373, 377 (1945). A more recent illustration of the rule-oriented construction of the takings clause appears in Justice Brennan's categorical statement that "[a]s soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation, and . . . [the just compensation requirement] is triggered." San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 654 (1981) (dissenting opinion) (emphasis in original). For commentary exemplifying this construction, see, e.g., F. Bosselman, D. Callies & J. Banta, The Taking Issue (1973); Humbach, A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use, 34 Rutgers L. Rev. 243 (1982); Stoebuck, Police Power, Takings and Due Process, 37 Wash. & Lee L. Rev. 1057 (1980) [hereinafter Police Power].

[2] See text accompanying notes 31-41, 249-372 infra.

[3] Representative of this interpretation of the United States Supreme Court's takings jurisprudence is Professor Michelman's summarization that "[t]he one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership." Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1184 (1967) (footnote omitted); see also F. Bosselman, D. Callies & J. Banta, supra note 1, at 246-47; Berger, A Policy Analysis of the Taking Problem, 49 N.Y.U. L. Rev. 165, 170-71 (1974); Humbach, supra note 1, at 252-53.

CATV Corp.,[4] this variant should prove no more durable than the antecedents from which it derives; namely, the broader version of the per se rule and the distinctions-based parsing of the takings clause's operative terms. Concededly, physical invasions are more likely to be deemed takings than are regulatory incursions. But this is true only because policy considerations governing both physical invasions and regulatory incursions are more likely to be infringed by the former than by the latter, not because different considerations apply to the two types of interventions.

The compartmentalization of the due process (or police power) and takings (or eminent domain power) inquiries in conventional analysis of fifth amendment controversies[5] must also be rethought. While the two inquiries should not be collapsed into one, their interaction is more pronounced than compartmentalization supposes. The question whether a measure "goes too far," or works an unacceptable diminution in economic value, cannot be divorced so sharply from the judiciary's assessment of, first, the competing substantive values served by property's protection and by the proposed welfare measure and, second, the fairness in principle of the legislature's selection of *this* class of property (and property owners) to bear *this* burden. The piece that links these two inquiries is missing from the present mosaic. Consequently, the mosaic does not reveal how factors conventionally associated with due process analysis influence the result of the takings inquiry and, in a related vein, does not provide a basis for choosing among the various takings standards enumerated in the case law and literature.[6]

Finally, the mosaic's property piece is monochromatic, while the trend of Burger Court opinions indicates that it should be multi-hued or perhaps split into several separate pieces. Because the post-1930 Court has classed the values safeguarded by property as economic, it has extended less protection to property rights than to interests protected by other provisions of the Bill of Rights and the fourteenth amendment.[7] But opinions of the Burger Court have increasingly recognized that the notion of property may encompass what will here be termed a "dominion interest" as well.[8] The logic of these decisions requires that the dual standard formerly applicable to "property" and to "civil" rights be reworked to insure that the protection afforded

[4] 102 S. Ct. 3164 (1982).

[5] See text accompanying notes 54-80, 91-123 infra.

[6] See text accompanying notes 238-40 infra.

[7] See text accompanying notes 42-47 infra.

[8] See text accompanying notes 48-53 infra.

property rights is upgraded, at least where the values those rights shelter are noneconomic.

Refashioning the jurisprudential mosaic in the foregoing respects leads to a four-element decisional model for the takings issue. The model's dominant element is the proposition that *a governmental incursion, physical or regulatory, under which property is taken is a presumptive, not a per se, taking.* The remaining three elements address how a reviewing court should evaluate government's efforts to overcome that presumption. The object of the model's second element, termed here the "due process-takings phase," is to determine whether government has established that the redistribution effected by the measure is fair in principle. Two questions are asked: What are the competing values advanced by the measure and by the property that it seeks to redistribute? Does the measure accommodate these values in a way that fairly mediates between the broader welfare and indemnity concerns embodied in these values? The central concern at this phase is whether government can establish a link between the use to which the affected property is devoted and the measure's purposes that qualifies the incursion as fair. If the link is not established, analysis ends because a taking will be found. Otherwise, reasoning moves to the model's third element, termed here its "pure takings phase," which considers the measure's fairness in operation: Does the measure infringe more severely upon the property taken than is required to achieve its intended goals? Shaping the analysis under both the due process-takings phase and the pure takings phase is the model's fourth element: the character of the showing that government must make to satisfy the inquiries posed in both these phases. The severity of this graduated burden depends principally upon the relative weight assigned to the specific welfare and indemnity values identified in the model's due process-takings phase.

In my judgment, the model constitutes a principled, coherent predicate for judicial management of compensation practice under the takings clause. I also believe that, despite occasional modern precedents to the contrary and evident differences in verbal packaging, the model is reasonably descriptive of the general direction in which the Supreme Court's takings jurisprudence is moving. This Article undertakes to support these contentions through elaboration, negative example, and prediction.

The function of Part I is elaboration; it reviews the model's antecedents in late nineteenth and twentieth century judicial history and fills in the foregoing sketches of the model's four elements. Part II takes up the negative example furnished by the Court's opinion in

Loretto v. Teleprompter Manhattan CATV Corp.[9] In that controversy, the plaintiff successfully challenged New York Executive Law section 828,[10] which authorizes cable television companies to locate their equipment on privately owned apartment buildings without compensating the owners. The litigation centered on Teleprompter's occupation of approximately one-eighth of a cubic foot on the roof of Mrs. Loretto's Manhattan apartment building; the space was required for the stringing of approximately 36 feet of one-half inch cable and the installation of two directional taps, each housed in a 4-inch by 4-inch by 4-inch metal box.[11]

Although the Court endorsed the presumption-oriented construction of the takings clause for other types of encroachments,[12] it flatly rejected this construction in evaluating "permanent physical occupations,"[13] the label it attached to the section 828 intrusion. "A permanent physical occupation authorized by government," the Court stated categorically, "is a taking without regard to the public interests it may serve."[14] The volume of space occupied (whether or not "bigger than a breadbox"[15]), the "type of property"[16] so occupied, the importance of the "public benefit"[17] served by the occupation, and the "minimal" character of the occupation's "economic impact on the

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[9] 102 S. Ct. 3164 (1982).

[10] N.Y. Exec. Law § 828 (McKinney 1982). Section 828 provides, in relevant 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:
>
> i. that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants;
>
> ii. that the cable television company or the tenant or a combination thereof bear the entire cost of the installation, operation or removal of such facilities; and
>
> iii. that the cable television company agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities.
>
> b. demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable . . . .

Id. § 828(1).

[11] *Loretto*, 102 S. Ct. at 3169.

[12] Id. at 3173-74.

[13] Id. at 3174 & n.9.

[14] Id. at 3171.

[15] Id. at 3177 n.16.

[16] Id. at 3178.

[17] Id. at 3176.

owner"[18] do not affect this conclusion, according to the *Loretto* Court. Moreover, whether the purposes of the challenged measure comport with the police power is a "separate question,"[19] bearing no relation whatever to resolution of the takings claim. The Court also ruled out any consideration of facts that would be germane to the "multifactor balancing test"[20] that the Court claimed it employs when a measure authorizes a "temporary physical invasion,"[21] compels the landowner himself to devote space on his land to fixtures that he neither owns nor installs,[22] or limits the use to which land may be devoted.[23]

In short, permanent physical occupations are takings simply because of their physical character, according to the *Loretto* Court. Stated conversely, considerations integral to the decisional model's due process-takings phase are immaterial because these intrusions are per se, not presumptive, takings. In an extraordinarily overstated, if not flatly erroneous, litany, the Court concluded that "[o]ur constitutional history confirms the [per se] rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention."[24]

Loretto is a splendid foil for this Article because the points of disagreement between the two are clearcut and fundamental. Among the points Part II addresses are *Loretto's* categorical endorsement of the narrow variant of the per se rule, its resuscitation in full nineteenth century dress of the four distinctions allied to that rule, its equally retrograde divorce of due process and takings reasoning, and its skewed conception of the purposes of the takings clause.

But *Loretto* is instructive affirmatively as well. It endorses the presumption-oriented construction for all governmental interventions

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[18] Id.

[19] Id. at 3171.

[20] The phrase is taken from Justice Blackmun's dissent in *Loretto*, id. at 3180 (Blackmun, J., dissenting). As described by the *Loretto* majority, the test is "an ad hoc inquiry in which several factors are particularly significant—the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action." Id. at 3174 (citation omitted). Some of the Court's recent decisions employing this test are cited in note 74 infra; the most elaborate expression of the test appears in Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124-25 (1978). The test and its deficiencies are discussed further in notes 238-40 and accompanying text infra.

[21] *Loretto*, 102 S. Ct. at 3175.

[22] Id. at 3176 (physical invasion "is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner").

[23] Id.

[24] Id. at 3171.

falling short of permanent physical occupations,[25] that is to say, most governmental interventions. The Court's embrace of a per se rule for permanent physical occupations may flow less from its enthusiasm for that rule than from its conclusion that, faced with the multifactor balancing test as the alternative yardstick for section 828, the per se rule was the less unsatisfactory.[26] The multifactor balancing test aligns principally with the *economic* interest in property.[27] But section 828, as perceived by the Court, impinged upon the plaintiff landlord's *dominion* interest in her property.[28] So interpreted, *Loretto* suggests that the changes in current takings jurisprudence urged in this Article might best be effectuated by bringing the multifactor balancing test into line with the proposed decisional model. This possibility is also examined in Part II, which contrasts the Court's analysis of section 828 with an analysis of that section as it would have proceeded under the model.

The task of the Conclusion is prediction. Changes in the character of the Court's takings jurisprudence that would likely follow upon a transition from the multifactor balancing approach to the decisional model are anticipated. An Appendix to the Article examines the distinctions allied to the rule-oriented construction of the takings clause. The Appendix reviews an 1872 New Hampshire decision, *Eaton v. B. C. & M. R. R.*,[29] which portrays the character and role of the distinctions in the post-Civil War period, surveys post-*Eaton* trends in the Supreme Court's takings jurisprudence, and critiques the Court's use of the distinctions in *Loretto* in light of the foregoing review and survey.

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[25] The Court recognized that its recent cases "state or imply that a physical invasion [other than a permanent physical occupation] is subject to a balancing process," id. at 3174, citing with approval Kaiser Aetna v. United States, 444 U.S. 164 (1979) (publicly imposed navigation servitude not a per se taking because not a "permanent occupation of land"), 102 S. Ct. at 3175; PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) (publicly imposed speech servitude not a per se taking because not a "permanent physical occupation"), 102 S. Ct. at 3175, and its labor opinions requiring employers to grant access to nonemployee union organizers, e.g., Hudgens v. NLRB, 424 U.S. 507 (1976); Central Hardware Co. v. NLRB, 407 U.S 539 (1972); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), 102 S. Ct. at 3175 n.11. The Court noted that this balancing process is also applicable to obligations assuming the form of affirmative covenants (measures obligating property owners to perform certain acts on their premises), 102 S. Ct. at 3178-79, and of negative easements (measures precluding property owners from performing acts on their premises that, but for the restriction, would otherwise be permissible), id. at 3179.

[26] See text accompanying notes 201-204 infra.

[27] See note 20 supra and text accompanying notes 44-47, 238-40 infra.

[28] See text accompanying notes 195-204 infra.

[29] 51 N.H. 504 (1872).

I

THE DECISIONAL MODEL

A. Antecedents: Impediments to the Model and Their Erosion

Emergence of a climate favorable to acceptance of the decisional model has been gradual, continuing to this day, in which a variety of impediments have stubbornly yielded ground. Chief among these impediments have been a nineteenth century development ethic that employed the distinctions allied to the rule-oriented construction to rationalize forced subsidization of the costs of public improvements by affected landowners; a formalistic legal mentality that sustained these distinctions long after that ethic had disappeared; the post-1930 Supreme Court's enunciation of a dual standard affording less protection to property than to civil rights; and functional and assumed theoretical differences in government's employment of the police and eminent domain powers that endured throughout at least the first third of this century. The model's evolution and the Court's acceptance of at least its rudiments had to await the waning of the development ethic; the ascendancy of legal realism; the Burger Court's recognition of a dominion interest in property entitled to no less and possibly greater protection than conventional civil liberties; and, most important of all, the evolution of the police and eminent domain powers into essentially interchangeable means for achieving government's ends. Exhaustive treatment of these trends is neither possible in this Article nor necessary for its purposes. But their brief description here provides indispensable background for the portrayal of the model's four elements in the following section.

1. Nineteenth Century Development Ethic, Rule-Oriented Construction, and Allied Distinctions

In the nineteenth century, there was widespread concern that equating the concept of property for takings purposes with the broad concept of property in real property law would impede the young Republic's development by increasing the cost of canal, navigation, railroad, and other works essential to its transportation infrastructure. "In an underdeveloped nation with little surplus capital," Professor Horwitz has written, "elimination or reduction of damage judgments created a new source of forced investment, as landowners whose property values were impaired without compensation in effect were

compelled to underwrite a portion of economic development."[30] Among the techniques used by early and mid-nineteenth century judges was the introduction of a number of otherwise puzzling distinctions into takings jurisprudence.[31]

The courts of the time, for example, often conceived of property as a physical thing, not as a relation between an owner and a resource. As a consequence, they denied "property" status to such recognized noncorporeal real property interests as easements[32] and treated physical invasions as inherently more suspect than other types of public encroachments.[33] In addition, they deemed injury to private land noncompensable if the injury was "consequential" rather than "direct." Compensation was therefore denied for losses occasioned by public projects occurring on neighboring land, while a more generous rule was used for projects conducted on the claimant's own parcel.[34] Similar results were recorded when government's intrusion was inter-

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[30] M. Horwitz, The Transformation of American Law, 1780-1860, at 70 (1977). See generally J.W. Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States (1956); Scheiber, Property Law, Expropriation, and Resource Allocation by Government: the United States, 1789-1910, 33 J. Econ. Hist. 232 (1973). Although other commentators have questioned whether eminent domain practice was as skewed in favor of development interests as suggested by the foregoing authors, see, e.g., Freyer, Reassessing the Impact of Eminent Domain in Early American Economic Development, 1981 Wis. L. Rev. 1263, they do not contest either that the decisional rules based on the distinctions discussed in text accompanying notes 31-41 infra contribute to that result or that the rules have undergone substantial erosion since the pre-Civil War period.

[31] The distinctions are detailed in the Appendix to this essay through an examination of Eaton v. B. C. & M. R. R., 51 N.H. 504 (1872), an opinion written 25 years after the period described by Professor Horwitz and critical of the trend identified in text accompanying notes 32-41 infra.

The regressive thought that these distinctions have engendered continues to the present not only in such aberrational Supreme Court takings opinions as *Loretto* but in the otherwise sophisticated and incisive commentary of takings scholars such as Professor Stoebuck, see Police Power, supra note 1; A General Theory of Eminent Domain, 47 Wash. L. Rev. 553 (1972) [hereinafter Eminent Domain]; and Professor Humbach, see Humbach, supra note 1. Although takings commentary generally and my own thinking specifically have benefited substantially from the work of these scholars, their work suffers the grave defect shared by all rule-oriented approaches to the takings clause of attempting to address the takings issue within the confines of the language of the clause alone. In consequence, Professor Stoebuck, whose principal concern is with the term "taken," is forced to credit the appropriation/destruction distinction in a manner that is both artificial and discordant with the actual evolution of the Court's takings jurisprudence in this century. See note 91 infra. Professor Humbach, who concentrates on the term "property," advances a view of the clause premised on a distinction between "rights" and "freedoms" which, while fruitful on a number of levels, is so exception-ridden as to forfeit its claim as the predicate for a "unifying theory" of takings jurisprudence.

[32] See text accompanying notes 260, 266-68 infra.

[33] See text accompanying note 260 infra.

[34] See text accompanying notes 261-63, 265-66 infra.

mittent, or "temporary," as opposed to continuing, or "permanent."[35] Likewise, courts invoked the distinction between "destruction" and "appropriation" to reduce the instances in which property could be said to have been taken. Destruction alone was insufficient; the claimant also had to establish that government had affirmatively appropriated the destroyed property to its own use.[36]

The cramped definitions of "property" and "taken" embodied in these distinctions were reinforced by the judiciary's rule-oriented construction of the takings clause and its sister clauses in state constitutions. Compensation practice would clearly have become exorbitant had the label "property" been assigned to public acts which would have merited that label if undertaken or required by another private property owner, and if the deprivations effected by these acts were viewed as instances in which that property was "taken." Regulations restricting the use of private land may be analogized to the negative easement of real property law; regulations obligating a landowner to perform some act on his land, to the affirmative covenant or servitude; and regulations licensing the entry of third persons or their "things" onto that land, to the affirmative easement.[37]

Had the courts adopted the presumption-oriented alternative, they could have avoided a debilitating compensation practice without doing violence to the accepted or logical connotations of the terms "property" and "taken." That is, they could have conceded that property was indeed taken, but, in appropriate cases, still have refused to declare that a compensable taking had occurred. This route, however, would have obligated them to move in a direction that they apparently wished to avoid; namely, to look beyond these terms and, indeed, beyond the takings clause itself to determine when the presumption of a taking was rebutted and when it was not. Having boxed themselves in by the rule-oriented construction, they dodged their self-created dilemma by artificially manipulating the definitions of the terms of the takings clause, principally through the same distinctions that accorded so well with the nineteenth century development ethic.

The erosion of this ethic prompted the courts to question the fairness of imposing the costs of public projects on those whose land

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[35] See text accompanying notes 278-82 infra.

[36] See text accompanying notes 271-77 infra.

[37] This classification of less-than-fee real property interests on the basis of the legal consequences for the holders of their benefits and burdens parallels that generally subscribed to in the real property field. See C. Berger, Land Ownership and Use 447-49, 470-73, 498-501 (2d ed. 1975). For similar use of the classification in the takings field, see Humbach, supra note 1, at 245-51; Michelman, supra note 3, at 1186-90 & n.45.

happened to lie in the projects' paths.[38] With these doubts came a perceptible unraveling of the distinctions that rationalized such impositions.[39] The emphasis of legal realism on instrumentalist concerns rather than on verbal formalism further eroded the credibility of the distinctions. Not surprisingly, these distinctions and the unsatisfactory compensation practice they sheltered have been a recurring target of twentieth century realist judges[40] and commentators.[41] Both developments are chronicled in the Appendix to this Article.

2. *The Dual Standard: "Property Rights" vs. "Civil Rights"*

Despite the inclusion of the takings clause in the Bill of Rights, the Court, as part of its reaction to Lochnerism,[42] has relegated property rights to second-class status by classifying measures affecting them as economic legislation entitled to a close to insuperable presumption of constitutional validity.[43] In the context of modern takings litigation, the weak protection accorded property rights appears in the multifactor balancing test, under which the Court will decline to declare a measure a taking unless it precludes "economically viable"[44] or "reasonable beneficial"[45] use of land, and perhaps even in the face of such preclusion.[46] That test, therefore, has denied property the potent network of safeguards extended to other values guaranteed by

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[38] See Horwitz, supra note 30, at 66. Among the most comprehensive expressions of this turnabout in judicial attitudes is Eaton v. B. C. & M. R. R., 51 N.H. 504 (1872), discussed in text accompanying notes 251-82 infra.

[39] See text accompanying notes 251-355 infra.

[40] Illustrative are Justice Smith's majority opinion in Eaton v. B. C. & M. R. R., 51 N.H. 504 (1872), anticipating the legal realist movement by a half-century, and Justice Harlan's dissenting opinion in United States v. Central Eureka Mining Co., 357 U.S. 155, 183-84 (1958) (Harlan, J., dissenting).

[41] See, e.g., Michelman, supra note 3, at 1183-1201; Sax, Takings and the Police Power, 74 Yale L.J. 36, 44-60 (1964).

[42] For a recent account of this oft-told tale including citations to pertinent Court decisions and literature, see Oakes, "Property Rights" in Constitutional Analysis Today, 56 Wash. L. Rev. 583, 591-96 (1981).

[43] Illustrative of this relaxed standard of review in the land use field is the Court's landmark zoning opinion, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926): "[B]efore [a zoning] ordinance can be declared unconstitutional . . . [it must be shown to be] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Id. at 395; cf. Ferguson v. Skrupa, 372 U.S. 726, 730-31 (1963) (similar treatment for straightforward economic legislation); United States v. Carolene Products Co., 304 U.S. 144, 152 (1938) (same); Nebbia v. New York, 291 U.S. 502, 537-38 (1934) (same). See generally L. Tribe, American Constitutional Law § 8-7, at 450-51 (1978).

[44] See Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

[45] See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 (1978).

[46] See text accompanying notes 125-26 and note 126 infra.

the Bill of Rights such as freedom of expression.[47] A shift to the proposed decisional model is unlikely as long as the Court posits that the sole values comprehended by property are economic in character. Prospects for the shift would improve markedly were the Court to decide that property also comprehends noneconomic values on a par with values protected by other provisions of the Bill of Rights. A growing number of Burger Court opinions have asserted precisely this conclusion. In *Lynch v. Household Finance Corp.*,[48] for example, the Court assailed the "false" dichotomy between "personal liberties" and "property rights," protesting that "[p]roperty does not have rights. People have rights. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized."[49]

A flood of decisions has followed *Lynch*, emphasizing the Court's solicitude for what I have termed the dominion interest—and others, the liberty interest—in property.[50] One commentator has described this trend as endorsing

> a different, tighter, more conservative view of liberty: liberty as security of private property; liberty as freedom of entrepreneurial skill; liberty from the impositions of government and of third parties from disposing of "one's own." Liberty, in brief, more in the mode of John Locke and of Adam Smith and somewhat less in the mode of John Mill (or of John Rawls).[51]

Loretto illustrates how this trend can stand conventional takings analysis on its head when a challenged measure impinges upon property's dominion interest. Reasoning that section 828 did impinge prin-

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[47] L. Tribe, supra note 43, §§ 12-1 to 15-21, at 576-990 (discussing the rights of expression, political autonomy, religious freedom, and privacy); Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482 (1975).

[48] 405 U.S. 538 (1972).

[49] Id. at 552.

[50] See cases discussed in Dorsen & Gora, Free Speech, Property, and the Burger Court: Old Values, New Balances, 1982 Sup. Ct. Rev. 195; Nowak, Foreword: Evaluating the Work of the New Libertarian Supreme Court, 7 Hastings Const. L.Q. 263 (1980); Oakes, supra note 42, at 596-98.

[51] Van Alstyne, The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court, 43 Law & Contemp. Probs., Summer 1980, at 66, 70 (footnotes omitted). This assessment accurately describes the Burger Court's concern for the dominion interest in property, see discussion of *Loretto* in text accompanying notes 52-53, 195-204 infra, but overstates the Court's concern for the property owner's economic interest, which, the Court's land use opinions emphasize, remains vulnerable to extensive governmental restriction. See cases cited in notes 44-45 supra.

cipally upon that interest,[52] the Court invoked the per se rule to immunize landlords from interferences by cable companies in the form of permanent physical occupations. The Court thereby extended to landlords' dominion interest a degree of protection greater than that which it extends to speech and other civil liberties under its "strict scrutiny" or related standards.[53] While government's burden of satisfying these standards is demanding, it is not insuperable. The per se rule, on the other hand, denies government any opportunity to rebut the takings claim.

3. *The Police and Eminent Domain Powers: From Separation to Convergence*

The police and eminent domain powers are anchored in value premises, termed here the welfare and indemnity principles, that frequently function at cross purposes. Through the welfare principle, the police power deliberately envisages the redistribution of utility, often in the form of recognized interests in real property, as a means of furthering the community's "health, safety, morals, or general welfare."[54] Substantively open-ended and therefore uncabinable by preset standards, the power sweeps as widely as government's inherent legislative power.[55] The eminent domain power, through its indemnity principle, cuts the other way: its charge is protection of the individual, not the community, by making the individual whole in the wake of governmental acts that redistribute his or her property rights to others.[56]

These two powers condemn government to a permanent state of tension regarding their employment since, as Justice Holmes commented in one takings opinion, "[a]ll rights tend to declare themselves absolute to their logical extreme."[57] What is called the "taking issue" is, in fact, simply another label for that tension. Each age must find its own solution to this problem, but it is striking that the nineteenth

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[52] See text accompanying notes 195-204 infra.

[53] See commentary cited at note 47 supra.

[54] This phrase is most typically employed to define the scope of the police power. See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

[55] See, e.g., Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) (the police power is "one of the most essential . . . [and] least limitable" powers of government); Mugler v. Kansas, 123 U.S. 623, 659 (1887) (the police power "reaches everything within the territory of a state not surrendered to the national government"); see also Block v. Hirsh, 256 U.S. 135, 167 (1921) (McKenna, J., dissenting) (police power "embraces power over everything under the sun").

[56] See, e.g., Cormack, Legal Concepts in Cases of Eminent Domain, 41 Yale L.J. 221, 224-25 (1931); Stoebuck, Eminent Domain, supra note 31, at 583-88.

[57] Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908).

century experienced far less difficulty in doing so than has the twentieth.[58] The reason, I believe, is clear. In the nineteenth century, the two powers were *instrumentally* and theoretically divorced. In the twentieth century, the powers have been somewhat less divided theoretically and completely interchangeable instrumentally.[59] Hence the contradictory but, for their respective periods, entirely accurate assertions of Massachusetts Chief Justice Shaw in his classic 1851 opinion in *Commonwealth v. Alger*[60] that the police and eminent domain powers are "very different,"[61] and of Justice Holmes in his no less classic 1922 opinion in *Pennsylvania Coal Co. v. Mahon*[62] that the separation of the two powers is only "a question of degree."[63]

This reasoning also explains why there was no urgent need for the proposed decisional model in the nineteenth century, while it, or something much like it, has become a virtual necessity in the twentieth century. As long as the paths of the two powers (as both were actually employed by government) crossed infrequently or not at all, the tension between them could be managed with relative ease. Therefore, however fictional the conceptual superstructure of the rule-oriented construction of the takings clause and that construction's allied distinctions, they remained serviceable vehicles for differentiating between the powers. But government's employment of the two powers for similar or identical ends in this century has often made it difficult to distinguish which power is being or should be exercised in a given instance.[64] In addition, Court decisions legitimating these

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[58] See F. Bosselman, D. Callies & J. Banta, supra note 1, at 51.

[59] See text accompanying notes 71-80 infra.

[60] 61 Mass. (7 Cush.) 53 (1851).

[61] Id. at 85.

[62] 260 U.S. 393, 413 (1922). The position advanced in this Article opposes that of commentators who view *Pennsylvania Coal* as an isolated and misconceived deviation from the Court's overall takings jurisprudence and insist that it should be overruled. In its place they urge the reinstatement of the Court's position in Mugler v. Kansas, 123 U.S. 623, 664-69 (1887) and Powell v. Pennsylvania, 127 U.S. 678, 683-87 (1888), that "regulations"—measures that do not authorize a physical invasion of private property—can never be takings because they "destroy" rather than "appropriate" property. See, e.g., F. Bosselman, D. Callies & J. Banta, supra note 1, at 124-38, 238-46; Stoebuck, Police Power, supra note 1, at 1083-89, 1091-93. See generally J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 440-47 (1978). The argument of these commentators would force a return to the rule-oriented construction of the takings clause and to its allied distinctions, results that this Article and its Appendix portray as indefensible both on precedential and policy grounds. *Pennsylvania Coal* is classified more appropriately as a physical invasion than as a regulatory takings case. See note 291 infra.

[63] *Pennsylvania Coal*, 260 U.S. at 416.

[64] In *Loretto*, for example, Judge Meyer of the New York Court of Appeals had to engage in an elaborate analysis, subsequently rejected by the Supreme Court, to conclude that "the Legislature in enacting . . . section 828 . . . intended to act under the police power only." 53 N.Y.2d 124, 138, 423 N.E.2d 320, 326, 440 N.Y.S.2d 843, 849 (1981); see note 141 infra.

changes have caused the conceptual superstructure to totter[65] and, in some respects, to topple altogether.[66] Today the powers are separated from one another principally by the antinomy between the welfare and indemnity principles upon which they are based. Hence, Justice Douglas' epigram that "[t]he law of eminent domain is fashioned out of the conflict between the people's [welfare] interest in public projects and the principle of indemnity to the landowner."[67] While the convergence of the police and eminent domain powers has been addressed more systematically elsewhere by this writer[68] and others,[69] it is useful to substantiate briefly the claim here before reviewing how the decisional model provides for the management of the conflict between the two powers.[70]

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[65] Consider, for example, the evolution of the harm/benefit test formulated by Professor Freund to distinguish between the police and eminent domain powers. Freund argued that government can employ the police power to prevent "harmful," i.e., nuisance-like, uses, but must employ the eminent domain power when it wishes to compel benefits. See note 75 and text accompanying notes 75-76 infra. As recently as its decision in Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978), the Court confirmed its commitment to the test but so broadened the concept of "harm" as to fundamentally change the test's content. Any land use is "harmful," the Court reasoned, if it frustrates some legislatively declared public purpose. Id. at 133 n.30. On this basis the Court concluded that even though the use to which Penn Central wished to devote the airspace over its landmark building was one generally permitted to other landowners in the pertinent zone, New York City could deny Penn Central that use because the use would impair the architectural characteristics of the landmark below. In short, government, under its police power, may compel a landmark owner to provide a community amenity—the landmark building—by precluding the owner from devoting his site to a use that can hardly be deemed nuisance-like insofar as all his nonlandmark owning neighbors are permitted that use.

[66] See Berman v. Parker, 348 U.S. 26 (1954), discussed at text accompanying notes 79-80 infra, in which the Court transformed the police and eminent domain powers into interchangeable instruments to implement government's legislative purposes.

[67] United States ex rel. TVA v. Powelson, 319 U.S. 266, 280 (1943).

[68] See Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 Colum. L. Rev. 1021, 1033-37 (1975).

[69] See, e.g., Beuscher, Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-Called Inverse or Reverse Condemnation, 1968 Urban L. Ann. 1; Note, Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance, 26 Stan. L. Rev. 1439 (1974).

[70] In an earlier essay, I considered the effect of this trend upon the issue of the compensation due for regulatory takings, arguing that the "highest and best use" market value standard conventionally applicable under the "just compensation" requirement of the takings clause should be replaced with a lower standard of "reasonable beneficial use" for certain types of onerous land use or environmental restrictions on private land. See Costonis, supra note 68, at 1049-55. This Article reinforces that argument by claiming that the convergence of the police and eminent domain powers warrants similar flexibility in deciding whether a compensable taking has occurred when "property" is "taken." I would now observe that a comparable shift from a rule- to a presumption-oriented posture is evident in the Supreme Court's treatment of the market value standard in situations in which it concludes that a compensable taking has occurred. In its 1893 decision in Monongahela Navgn. Co. v. United States, 148 U.S. 312, for example, the Court adopted the categorical stance that "[t]here can . . . be no doubt that the

At the time *Commonwealth v. Alger*[71] was decided, government typically employed its eminent domain power to acquire a full fee interest in land.[72] There was less occasion then than now, therefore, to ruminate about the need to resort to that power in situations involving less-than-fee affirmative intrusions by government or negative restrictions on land use. Until well into the twentieth century, moreover, such restrictions were seldom comparable to modern environmental, zoning, or historic preservation controls, whose expansion of the ends pursued by government test the outer limits of substantive due process[73] and whose often severe economic impacts enliven the ongoing debate over regulatory takings.[74] In contrast, the purpose of nineteenth century restrictions on property was the limited and well-

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[just] compensation must be a full and perfect equivalent for the property taken." Id. at 326. A half-century later in United States v. Miller, 317 U.S. 369 (1943), the Court added that "[t]he owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." Id. at 373 (footnote omitted). Despite this sweeping assertion, however, *Miller*, which dealt with the valuation of land whose worth increased as a result of the project occasioning its condemnation, demonstrates the extent of the shift in the Court's analysis. The Court in effect disavowed the assertion's implications, both in its concession a few paragraphs later that "strict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, must in fairness be eliminated in a condemnation case . . . ," id. at 375, and in its reasoning that enhancement in market value must be excluded because "[t]he owners ought not to gain by speculating on probable increase in value due to the Government's activities." Id. at 377. During this century, the presumption favoring market value as the measure of "just" compensation has yielded to alternative valuation standards in a variety of other situations as well. See, e.g., United States v. Virginia Elec. & Power Co., 365 U.S. 624, 635 (1961) (flowage easements lacking a market are to be valued by taking "the nonriparian value of the servient land discounted by the improbability of the easement's exercise"); United States v. Commodities Trading Corp., 339 U.S. 121, 128 (1950) (wartime price ceilings interfering with market forces are constitutionally permissible bases for compensation in the absence of special hardship); United States v. Cors, 337 U.S. 325, 333 (1949) (during wartime emergency, "[i]t is not fair that the government be required to pay the enhanced price which its demand alone has created"); cf. United States v. General Motors Corp., 323 U.S. 373, 382 (1945) (just compensation for a taking of a portion of a long term lease is not the market rental value of the empty property leased on a long term basis, but is the rental value of the property leased by the long term tenant to the temporary occupant). The Court deviates from the market standard presumptively applicable in each of these cases "when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public." United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950).

[71] 61 Mass. (7 Cush.) 53 (1851).

[72] See Cormack, supra note 56, at 225.

[73] For an analysis of that tension in the burgeoning field of aesthetics-inspired land use control, see generally Costonis, Law and Aesthetics: A Critique and a Reformulation of the Dilemmas, 80 Mich. L. Rev. 355, 413-18, 441-46 (1982).

[74] See, e.g., San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (property purchased as site for nuclear power plant rezoned as open space); Agins v. City of Tiburon, 447 U.S. 255 (1980) (land purchased for residential development rezoned for low-density and open space); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (landmark designation interdicted construction of skyscraper on top of Grand Central Terminal); cf. Andrus v. Allard, 444 U.S. 51 (1979) (ban on sale of eagle parts which were protected by federal legislation).

accepted one of preventing uses that palpably threatened community health and safety. The prevalence of this pattern accounts for Professor Freund's classic formulation of the police power/eminent domain distinction:

> Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful.[75]

Many contemporary commentators have not accepted this formulation. In their view, the police power's scope in the modern welfare state should not be limited to preventing "harmful," i.e., nuisance-like, land uses. The police power should extend as well to requiring landowners to use or to refrain from using their land in ways that frustrate legislatively declared goals, the content and economic impacts of which have expanded far beyond those prevalent when Professor Freund wrote.[76]

In addition, courts once viewed eminent domain's "public use" limitation as decidedly more restrictive than the police power's "public purpose" limitation.[77] The distance separating the two powers must have seemed lengthy indeed to judges who believed, for example, that property acquired under eminent domain literally had to be available for the general public's physical use.[78] In *Berman v. Parker*,[79] however, the Supreme Court took the dramatic step of transforming the two powers into interchangeable instruments for implementing government's generic legislative power, stating that "[o]nce the object [of a challenged legislative program] is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end."[80]

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[75] E. Freund, The Police Power: Public Policy and Constitutional Rights § 511, at 546-47 (1904).

[76] See, e.g., Michelman, supra note 3, at 1199-1200, 1235-36; Sax, supra note 41, at 48-50; see also note 65 supra. But see Dunham, A Legal and Economic Basis for City Planning, 58 Colum. L. Rev. 650, 663-69 (1958) (harm/benefit distinction reaffirmed).

[77] See generally Note, The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 Yale L.J. 599 (1949).

[78] See id. at 603.

[79] 348 U.S. 26 (1954).

[80] Id. at 33.

B. The Elements of the Model

1. Presumptive Construction of the Takings Clause

Aside from its predicate in sound compensation policy, the first of the model's four elements—recognition that a measure that takes property is not a per se taking—is supported by the recurrent logic of the Court's takings opinions.[81] If the Court subscribed literally to the

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[81] Professor Michelman evidently would disagree with the presumption-oriented approach advocated in this Article. He argues that identifying fairness as the purpose of the takings clause (which the decisional model does)

> effectively prevents courts from proceeding by use of categories and presumptions. [But it is] feasible . . . for courts to identify those governmental acts which (for example) encroach on free expression, or invade a citizen's privacy, or deal unequally with classes of people, and to prevent such acts in the absence of special justification.

Michelman, supra note 3, at 1247. But why should this be if, as Professor Michelman concedes, "there are . . . powerful reasons supporting at least a distinct presumption in favor of compensating to the limits of feasibility"? Id. at 1180. His response is unsatisfactory, in my judgment. In the areas of expression, privacy, and equal protection, he argues, the Constitution

> provides sufficiently specific guidance to support judicial invalidation of a measure because it is of a certain kind, without the court's having to ask ultimate questions about efficiency and fairness. But no such convenience is available in the just compensation sphere. The court cannot be expected to proceed by presuming that every governmental act perceptibly entailing a capricious redistribution is improper unless specially justified. But between that inquiry and the ultimate question there seems to be no satisfactory stopping place.

Id. at 1247.

Unlike Professor Michelman, I am unable to conclude from the Constitution's language or from the precedents of the Court that the Constitution provides any more "specific guidance" relating to the adjudication of governmental encroachments on equal protection, privacy, or speech interests than to the adjudication of encroachments on property. Given the Olympian perspective—combining jurisprudence, ethics, and political economy—that Professor Michelman uses to examine the takings clause, moreover, questions no less "ultimate" involving values no more precise can be posed with regard to these interests than he poses with regard to property. Nor is it clear why the Court should not hold that "perceptibly . . . capricious redistribution[s]" are "improper unless specially justified." It seems to me, as much of Professor Michelman's essay confirms, that the purpose of judicial supervision pursuant to the takings clause is defined precisely by this responsibility. A partial response to this question may be found perhaps in Professor Michelman's distinction between two types of "capricious redistribution[s]": those resulting from the "capacity of some collective actions to [burden an individual] for no other apparent reason . . . than that someone else's claim to satisfaction has been ranked as intrinsically superior to his own," id. at 1225, and those based on the certainty that "perfection is plainly unattainable" in the distribution of the "benefits and costs associated with each collective measure." Id. If by the use of the qualifier "each" in the foregoing quotation Professor Michelman intends only that the second type of "capricious redistribution" need not be "specially justified," his position is unassailable: no serious student of the takings clause would insist that "perfection" is attainable in every case. One of the greatest strengths of Professor Michelman's essay, in fact, is its explanation of how the underenforcement of the takings clause in this sense may nonetheless comport with either a fairness- or a utility-based conception of the clause's goals.

But this is only a partial response because it leaves unaddressed the first type of "capricious redistribution"—ranking A's claim to satisfaction as "intrinsically superior" to B's claim. It is the first type that has received the far greater share of attention in the Court's precedents and in

rule-oriented construction, its efforts to determine whether property has been taken would focus upon whether the resource in question is a recognized real property interest, such as a fee or an easement, or some equivalent interest in personalty. The question asked would be whether the resource lacks property status either because it is not of a type that can found a property relationship or because some other condition to achievement of this status is lacking. Occasionally, the Court does pose the question in terms of one or the other of these alternatives.[82] Far more often, however, the Court effectively concedes that the resource in question could be or is property and devotes its attention instead to determining whether incidents associated with this property, such as the right of exclusion, must yield without compensation to countervailing governmental interests.

PruneYard Shopping Center v. Robins[83] and *Block v. Hirsh*[84] are illustrative of the Court's opinions employing the presumptive approach. These cases merit special attention because the Court denied compensation in both even though each involved a "physical invasion," the deprivation traditionally viewed as the strongest case for a taking.[85] In *PruneYard*, the Court sustained a California Supreme

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commentary. Any intrusion on an established economic or dominion interest is potentially a result of a governmental choice that is capricious in this sense, and, of course, challenged intrusions are always so labelled by B, the aggrieved property owner. Unless we are to engage in wordplay by denying that *justified* redistributions of property are redistributions nonetheless, redistributions that are noncapricious are distinguished from those that are capricious in the first sense by government's showing that noncapricious redistributions are not takings precisely because they can be specially justified. The decisional model employs an identical premise as a basis for distinguishing presumptive from actual takings.

[82] Illustrative of the first alternative are United States ex rel. TVA v. Powelson, 319 U.S. 266, 276 (1943) (although property taken was potentially more valuable as part of a combination of properties that might be acquired by its owner by exercising a right of eminent domain granted by the state, the proper measure of compensation was the independent value of the separate parcel: "[t]he grant of the power of eminent domain [to a private delegate] is a mere revocable privilege for which a state cannot be required to make compensation"), and United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 69 (1913) (despite riparian owner's interest in flow of navigable river, "that the running water in a great navigable stream is capable of private ownership is inconceivable"). Representative of the second alternative are decisions dealing with the so-called "new property," which encompasses entitlements arising from expectations generated by statutory or regulatory schemes. See Reich, The New Property, 73 Yale L.J. 733 (1964). In these cases, the Court acknowledges that the resource in issue, e.g., welfare payments or employment, may be the subject of a property relationship, but questions whether the pertinent statutory law does in fact confer an entitlement amounting to property status. See, e.g., Bishop v. Wood, 426 U.S. 341, 344-47 (1976) (termination of employment); Goldberg v. Kelly, 397 U.S. 254, 261-62 (1970) (termination of welfare payments). See generally Van Alstyne, Cracks in "The New Property": Adjudicative Due Process in the Administrative State, 62 Cornell L.Q. 445 (1977).

[83] 447 U.S. 74 (1980).

[84] 256 U.S. 135 (1921).

[85] See note 3 and accompanying text supra.

Court opinion[86] holding that a shopping center owner was barred by the free speech provision of the state constitution from excluding political petitioners from the center. Consistent with the model's first element, the Court established the framework for its taking analysis by conceding that "here there has literally been a 'taking' of [the shopping center owner's] right [to exclude]," an interest it characterized as "one of the essential sticks in the bundle of property rights."[87] In *Block*, decided sixty years earlier, the exclusion-denying measure was even more drastic because it authorized former tenants to remain on their landlords' premises beyond the expiration of their leaseholds.[88] In an action to regain *possession* of his premises, the landlord argued that the taking effected by the measure was aggravated by the physical character of the "property" encroached upon, the premises themselves.[89] But the Court, as evidenced by Justice Holmes' opinion, was unmoved:

> The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay.[90]

2. *Due Process-Takings Inquiry*

The model's second element—its due process-takings inquiry—is the one most likely to cause confusion because earlier habits of thought dividing the police and eminent domain powers have caused us to assume that the due process and takings analyses proceeding from those powers should be similarly compartmentalized. But the convergence of the two powers has undermined this assumption.[91]

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[86] Robins v. PruneYard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979).

[87] PruneYard Shopping Center v. Robins, 447 U.S. 74, 82 (1980).

[88] Block v. Hirsh, 256 U.S. 135, 153-54 (1921).

[89] Id. at 142.

[90] Id. at 155.

[91] Judge Oakes has observed that the due process and takings clauses, along with the contracts clause, "ultimately address the same analytic problem: When does [a] legislative act . . . constitute such a great degree of interference with the property right or rights affected as to be unfair or unreasonable, or to constitute a 'taking' and be unjust, and to require . . . the payment of compensation . . . ?" Oakes, supra note 42, at 621. His observation is confirmed by

Due process-takings reasoning bridges the two analyses by providing a basis upon which the competing demands of the welfare and indemnity principles can be mediated through a third principle, often referred to as the "just share" principle,[92] to which the first two are subordinate. Under the just share principle, the taking determination

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the manner in which considerations pertinent to the due process and takings clauses are interwoven in the Court's analysis of measures challenged as exceeding the scope of the police power, see, e.g., Nashville, Chattanooga & St. Louis Ry. v. Walters, 294 U.S. 405 (1935); Delaware, Lackawanna & W. R.R. v. Morristown, 276 U.S. 182 (1928); Mugler v. Kansas, 123 U.S. 623 (1887); Munn v. Illinois, 94 U.S. 113 (1876), and is indirectly suggested, at least, by the existence of a due process clause not only in the fourteenth amendment but also directly prior to the takings clause in the fifth amendment as well. If the "same analytic problem" is involved, it seems more useful to identify the manner in which due process and takings analyses are related than to continue with the fiction that the two are located on different planets.

The Court's opinions in Powell v. Pennsylvania, 127 U.S. 678 (1888); Mugler v. Kansas, 123 U.S. 623 (1887); and Munn v. Illinois, 94 U.S. 113 (1876), are inexplicable under the segregated analysis approach. The Court rendered those decisions prior to its opinion in Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226 (1897), which made the fifth amendment's takings clause applicable to the states through the due process clause of the fourteenth amendment. It is not certain whether the earlier opinions involve "due process" reasoning because they arose under the due process clause of the fourteenth amendment or "takings reasoning" because a takings challenge was explicitly rejected in each.

Professor Stoebuck has premised his argument for compartmentalizing the two types of reasoning upon Lawton v. Steele, 152 U.S. 133 (1894), in which the Court sustained a measure under the due process clause "preserving the fisheries of a State from extinction," id. at 139, by authorizing, inter alia, the summary destruction of fishing nets. In the course of its analysis, the Court stated that

> [t]o justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Id. at 137. Seizing upon the phrase "unduly oppressive," Stoebuck insists that considerations bearing upon the gravity of a measure's impact on property should be confined to classic due process reasoning alone. See Stoebuck, Police Power, supra note 1, at 1065-66; cf. F. Bosselman, D. Callies & J. Banta, supra note 1, at 238 (suggesting that balancing value of regulation against loss in value to property owner is never appropriate in takings analysis). This position is unpersuasive both because of the complications created by the fact that *Lawton* was decided prior to *Chicago, Burlington* and, more important, because of the post-*Lawton* developments in the Court's takings jurisprudence, portrayed in this Article, in which the gravity of a measure's impact does bear on the question whether property has been "taken."

[92] Among the best-known formulations of the "just share" principle is that expressed in Monongahela Navgn. Co. v. United States, 148 U.S. 312 (1893):

> [The takings clause] prevents the public from loading up on one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

Id. at 325. Contemporary affirmations of the principle may be found in, e.g., PruneYard Shopping Center v. Robins, 447 U.S. 74, 82-83 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123 (1978); and United States v. Willow River Power Co., 324 U.S. 499, 502 (1945). For a comprehensive discussion of the principle's historical antecedents and primacy in modern takings theory, see Stoebuck, Eminent Domain, supra note 31, at 583-88.

depends upon whether a linkage exists between the purpose of a measure and the use of the affected property establishing that the proprietor has not been unfairly singled out to bear losses that should be distributed among the public generally.[93] Absent special circumstances,[94] burdens that are not "use-dependent" in this sense are compensable takings because it is the use-dependency linkage that overcomes the singling-out objection.

As with all forms of mediation, this one requires trade-offs. The just share principle requires the welfare principle to yield its claim that all measures enacted in its name are noncompensable: those not predicated on the use-dependency connection are takings. But the same principle secures the noncompensability of measures featuring this linkage, even in the face of the concession that they take property. The converse applies to the indemnity principle which surrenders its former claim that a measure that takes property is a compensable taking, but compensable takings will still be found when government is unable to establish the linkage required by the just share principle. Government's obligation to do so arises more frequently under the presumption-oriented construction of the takings clause than under the rule-oriented construction because the terms "property" and "taken" are construed in a less cramped or artificial manner under the former than under the latter.[95]

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[93] The use-dependency test derives from the Court's classic statement in Munn v. Illinois, 94 U.S. 113 (1876), that

> [p]roperty 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. As formulated, the difficulty with *Munn*'s "clothed with a public interest" doctrine is that it justifies an indiscriminate range of uncompensated intrusions on private property. With the exception of commentators who dismiss the redistributional consequences of a measure as irrelevant to the takings equation, see note 99 infra, takings theorists since *Munn* have wrestled with the problem of determining whether particular "uses" so "affect" the "public interest" that uncompensated intervention is justified.

[94] Possible exceptions, which figure among the Court's most troublesome takings precedents because they lack a basis in principle, include interventions predicated not upon particular property's use-dependent characteristics but upon custom, see discussion of the navigation servitude doctrine in note 111 infra, or upon "necessity" or "emergency." See, e.g., United States v. Caltex, Inc., 344 U.S. 149 (1952) (compensation denied for property destroyed in wartime to prevent its capture and use by the enemy); Miller v. Schoene, 276 U.S. 272 (1928) (compensation denied for trees ordered cut down to prevent the spreading of communicable disease); Bowditch v. Boston, 101 U.S. 16 (1879) (compensation denied for property destroyed to prevent the spreading of fire).

[95] See text accompanying notes 37-38 supra.

This phase of the model, therefore, may properly be associated with due process reasoning insofar as it obligates the reviewing court to identify a controversy's competing welfare and indemnity values and, more importantly, to choose between these sets of values on the basis of the relative weight the court assigns to them. At the same time, due process-takings reasoning must be distinguished from classic due process reasoning. The use-dependency test employed by due process-takings reasoning differs from the "reasonable relationship" test of conventional due process analysis.[96] Use-dependency addresses the connection between a measure's *goals* and the burdened property's *use*, whereas reasonable relationship focuses on the nexus between these *goals* and the *means* employed to achieve them.[97] The burden of use-dependency may or may not be superable by government, depending upon the character of the welfare and property values in question; the "reasonable relationship" test is a test in name only given the Court's disinclination to second-guess the substantive wisdom of legislation that does not implicate civil liberties.[98] The core value of use-dependency is fairness, whether a property owner has been singled out in a manner consistent with the just share principle; the core value of reasonable relationship is rationality or, perhaps, nominal efficiency, whether the measure is reasonably designed to achieve its goals irrespective of its redistributional consequences.[99] Accordingly,

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[96] See note 43 supra.

[97] See, e.g., Nebbia v. New York, 291 U.S. 502, 525 (1934) (milk price regulation) ("[T]he guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (zoning ordinance) ("[I]t must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."). See generally J. Nowak, R. Rotunda & J. Young, supra note 62, at 395-404; L. Tribe, supra note 43, § 8-3, at 436-38.

[98] See note 42 and text accompanying notes 43-47 supra. A measure of the standard's laxity can be found in the Court's decisions in Ferguson v. Skrupa, 372 U.S. 726, 730 (1963), and Nebbia v. New York, 291 U.S. 502, 537-38 (1934). See generally J. Nowak, R. Rotunda & J. Young, supra note 62, at 443-45; L. Tribe, supra note 43, § 8-7, at 450-51.

[99] See, e.g., Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) (ordinance outlawing the operation of brickyards within city limits) ("[The police power] may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily . . . . There must be progress, and if in its march private interests are in the way they must yield to the good of the community."); Powell v. Pennsylvania, 127 U.S. 678, 686 (1888) (statute prohibiting the manufacture and sale of oleomargarine) ("If all that can be said of this legislation is that it is . . . unnecessarily oppressive to those manufacturing or selling . . . oleomargarine . . . , their appeal must be to the legislature, or to the ballot box, not to the judiciary."). See generally J. Nowak, R. Rotunda & J. Young, supra note 62, at 394-95; L. Tribe, supra note 43, § 8-3, at 436-38.

the use-dependency test is more narrowly focused and often is considerably more demanding of government than is the reasonable relationship test.

An example may aid in illustrating the differences between these two tests and, more broadly, in sorting out the questions posed at key points along a spectrum that is bounded by "pure" due process considerations at one pole and by "pure" takings considerations at the other. Assume that State X's highest court has held that the land use systems of each of the state's municipalities must attempt to facilitate the production of a fair share of its region's need for low and moderate income housing.[100] Shortly thereafter, the state legislature amends its zoning enabling act to require all municipalities to designate residential zones in which twenty percent of all units in new developments are set aside for, and priced at levels affordable by, low and moderate income families.[101] The Town of Summit amends its land use ordinance to include such a zone. Assume further that the economics of homebuilding are such that, absent subsidy, the cost of building low and moderate income housing is forty percent greater than the legislatively fixed ceiling on the selling price of this housing; that this loss must be absorbed by the developer; and that, if prorated over the developer's entire project, the loss will substantially reduce the pro-

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Predictably, commentators who favor broad public intervention in support of land use, environmental, or other goals downplay or ignore altogether the redistributional consequences of the intervention as a constraint on the police power. For them, therefore, use-dependency considerations are irrelevant to the takings determination: regulatory measures that satisfy the reasonable relationship test of classic due process may not be invalidated as takings. In the words of one commentator:

> [C]ategorization of land that rationally promotes a legitimate state objective is a permissible means of regulating human conduct. Property interests in land, themselves legitimately subject to redefinition by the state, are affected only consequentially by such regulation; the extent to which those interests confer protected economic expectancies upon their owners also is a legislative, not a judicial, determination.

Donaldson, Regulation of Conduct in Relation to Land—The Need to Purge Natural Law Constraints from the Fourteenth Amendment, 16 Wm. & Mary L. Rev. 187, 213 (1974); see F. Bosselman, D. Callies & J. Banta, supra note 1, at 238-55. Nor is it surprising that their conception of compensation policy stresses the consequential/direct damage distinction, see id., the premise that all private land is held subject to the equivalent of a sweeping police power "servitude," see Donaldson, supra, at 200, and the appropriation/destruction distinction as a means of narrowing the scope of the fifth amendment's term "taken." See F. Bosselman, D. Callies & J. Banta, supra note 1, at 256-58; cf. Stoebuck, Police Power, supra note 1, at 1083-89 (taking consists of a transfer of property from a landowner to an entity possessing the governmental power of eminent domain).

[100] This hypothetical is modeled on the New Jersey Supreme Court case of Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) [hereinafter *Mount Laurel II*]. The facts have been modified for purposes of the example.

[101] Cf. *Mount Laurel II*, 456 A.2d at 446-50 (discussing and approving use of such mandatory set-asides).

ject's profitability.[102] Lovitt Builders, Inc., a developer-owner of land within the zone, brings suit to challenge State X's zoning enabling act and Summit's ordinance on both conventional due process and takings grounds.

The reviewing court will ask different questions under the due process and takings headings, and a decision sustaining the enactment will be much more likely under the former than under the latter. There are two due process questions: First, do state efforts to secure the production of low and moderate income housing serve a legitimate governmental end? Second, is the legislatively-selected system of the twenty percent housing set-aside "rationally related" to this end? As a matter of post-*Lochner* federal due process,[103] the likelihood of a negative response to either question is virtually nil. It is very unlikely that a court would actively scrutinize the legislature's judgment concerning the scope of its police power or the rationality of the means chosen to implement that judgment.[104]

The court's evaluation of the takings challenge would align with the four questions that correspond to the decisional model's four elements:

1. PRESUMPTIVE TAKING INQUIRY: *Has Lovitt's "property" been "taken" by the mandatory set-aside provision*?

2. DUE PROCESS-TAKINGS PHASE: *Is the legislative decision to impose the burden of providing low and moderate income housing on Lovitt (and other similarly situated developers) fair in principle*?

3. PURE TAKINGS PHASE: *Is the obligation, as actually imposed, unduly burdensome given the legislative end in question*?

4. BURDEN OF PROOF: *How exacting should the court's scrutiny of the challenged legislation under the due process-takings and pure takings inquiries be*?

The second question pertains most directly to this subsection's discussion of the differences between the reasonable relationship and use-dependency tests because the fairness-in-principle determination depends upon whether the use-dependency test is satisfied.

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[102] Such consequences are not implausible. See Ellickson, The Irony of "Inclusionary" Zoning, 54 S. Cal. L. Rev. 1167, 1184-91 (1981); Kleven, Inclusionary Ordinances—Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing, 21 U.C.L.A. L. Rev. 1432, 1476-81 (1974).

[103] See text accompanying notes 42-47, 96-99 supra.

[104] See id. Other commentators agree. See Ellickson, supra note 102, at 1212-13; Kleven, supra note 102, at 1492 n.189. Substantive due process evaluations under state constitutions may be much more strict. See Board of Supervisors v. DeGroff Enterprises, Inc., 214 Va. 235, 198 S.E.2d 600 (1973) (invalidating set-asides as a form of proscribed "socio-economic" zoning and as a taking without just compensation).

If the reviewing court regards the mandatory set-aside requirement as taking Lovitt's property,[105] it will commence the due process-takings analysis by examining the relationship between the goal of the enactment—provision of low and moderate income housing—and the use to which Lovitt's property is devoted, construction of residential units for profit. More specifically, the court will ask whether, given this use, it is fair for government to single out Lovitt (and similarly situated developers) to bear the multiple burdens imposed by the requirement: the loss of freedom to select the market for which to build; the obligation to build and sell the set-aside units at a below-cost price and to control their resale price indefinitely into the future; and the disadvantages of marketing the non-set-aside units at a price surcharged to mitigate losses incurred on the set-aside units, and to middle and upper income customers who may prove resistant to buying into an economically and perhaps racially integrated project.

This question has been identified not to answer it,[106] but to demonstrate that it and resolution of the larger indemnity-welfare conflict which it implicates are different from, and markedly more troublesome than, the two "pure" due process questions preceding it.[107] By interweaving the just share principle, the use-dependency test, and the due process-takings inquiry, the decisional model bridges the gap now dividing analysis of physical invasions and regulatory takings. Excepting those commentators who dismiss the redistributional consequences of public intervention as irrelevant to the takings equation,[108] the current debate over regulatory takings may be viewed largely as a debate over which types of use-dependent characteristics render such intervention fair. In its singlemindedness,[109] however,

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[105] Since the decisional model accords the plain meaning to the pertinent terms, see text accompanying notes 37-38, 95 supra, inclusionary ordinances would constitute presumptive takings under the model's first phase.

[106] For contrasting assessments of the question, compare Ellickson, supra note 102, at 1212-13 with Kleven, supra note 102, at 1499-1500.

[107] A major difference between my position and that of Professor Stoebuck merits reiteration here. Given the continued vitality he assigns to *Lawton*'s "unduly oppressive" passage, see note 91 supra, he would view the two inquiries I have isolated as "takings" questions (arising under the model's due process-takings and pure takings phases) as instead raising classic due process questions.

[108] See note 99 supra.

[109] With the principal exceptions of the work of Professor Stoebuck, see, e.g., Police Power, supra note 1; Eminent Domain, supra note 31, an essay by Professor Humbach, see supra note 1, and portions of Professor Michelman's classic work, see supra note 3, at 1184-90, 1226-29, modern takings commentary has generally concerned itself with the problem of regulatory takings, largely as that problem arises in the context of land use and environmental regulations. See generally F. Bosselman, D. Callies & J. Banta, supra note 1; Donaldson, supra note 99;

that debate has tended to ignore the relation between use-dependent considerations and physical invasions. In my judgment these considerations are no less pertinent to physical invasions than they are to regulatory takings.

Physical invasions may be characterized as either location-contingent or use-dependent. Location-contingent invasions, which are explicable solely in terms of the location of the burdened land, are deemed takings[110] unless and perhaps even if a special doctrine such as the federal navigation servitude[111] may be invoked.[112] But use-dependent invasions—those predicated on government's effort to control

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Dunham, supra note 76. In addition, commentators have adopted the paradigmatic takings status of physical invasions as their point of departure for evaluating whether the takings clause's coverage should be *expanded* beyond this indiscriminately defined category to include regulatory takings as well. The manner in which Professor Berger commences his policy analysis of the taking issue is illustrative:

> The only utility of the physical invasion approach is not to decide when compensation should be denied but rather when it should be paid. *It is universally agreed that the government must compensate for its physical taking of property.* However the converse—that where there has been no invasion there need be no compensation—is not, in general, the law, nor should it be.

Berger, supra note 3, at 172 (emphasis added).

[110] See, e.g., United States v. Causby, 328 U.S. 256 (1946) (frequent flights immediately above landowner's property constitute a taking); United States v. Cress, 243 U.S. 316 (1917) (constant flooding deemed a permanent physical occupation, hence a taking).

[111] See generally Note, Determining the Parameters of the Navigation Servitude Doctrine, 34 Vand. L. Rev. 461 (1981); Note, The Navigational Servitude and the Fifth Amendment, 26 Wayne L. Rev. 1505 (1980).

Physical invasions that government claims are noncompensable under the navigation servitude doctrine are troublesome precisely because they are location-contingent rather than use-dependent. For a discussion of the doctrine's long history, see Humbach & Gale, Tidal Title and the Boundaries of the Bay: The Case of the Submerged "High Water" Mark, 4 Ford. Urb. L.J. 91 (1975), which contends that riparian owners can reasonably be expected to have envisaged the invasions the doctrine authorizes; it may be questioned whether these foreseeable invasions, too, should not be compensable takings. Also instructive in this regard is the comparison Professor Humbach has drawn between navigation and avigation (overflight) servitudes. See Humbach, supra note 1, at 248 n.24. The avigation servitude, he notes, "seems to be receiving narrower treatment. Not only are subjacent landowners' rights defined according to state law, . . . but compensation is allowed for regular overflights within the avigation zone." Id. (citation omitted). He correctly argues that "avigation easements [should not] eventually achieve the status of navigation easements" because, unlike navigation easements, they deprive "an owner of an ordinary advantage which he has every reason to expect to enjoy since there is no way of knowing in advance that an airport will become his neighbor." Id. at 264 n.93; cf. Baxter & Altree, Legal Aspects of Airport Noise, 15 J. L. & Econ. 1 (1972) (proposing a system requiring compensation for impairment of prior investment by subsequent airport development). For the view that the navigation servitude doctrine should be scrapped as unprincipled and exploitative of private property, see Brady, The Navigation Easement and Unjust Compensation, 15 J. Mar. L. Rev. 357 (1982) (" 'Just compensation,' as applied by the Court, means the best possible deal the government can get when acquiring the land of its citizens. It means the ability of government to ignore the value in the market place in order to protect national resources.").

[112] See note 304 infra.

legislatively-declared evils associated with the burdened land's use—should not be categorized as takings[113] *provided that government establishes a plausible connection between the evil and the use of the land.* In such instances, the presence of any particular "physical" characteristic should not independently determine the invasion's status.[114] A court might reasonably consider that characteristic, however, in fixing the burden of proof government must meet to overcome the takings presumption.[115]

A modification of the housing set-aside example is illustrative. Suppose that for reasons unrelated to exclusionary zoning considerations, State X's legislature authorizes its municipalities to require builders to convey to them interior subdivision streets and an amount of parkland for the recreation needs uniquely attributable to the subdivision in question. Summit adopts such requirements. Denied subdivision approval upon its refusal to dedicate in fee the required land, Lovitt asserts that the exactions work a taking of its property. Is this claim more likely to prevail than is Lovitt's assertion that the housing set-aside requirement constitutes a taking?

Were the physical invasion variable to count as heavily as conventional wisdom suggests, the answer would have to be yes. If taken seriously, moreover, *Loretto*'s per se rule for permanent physical occupations would compel the holding that the street-parkland dedication is a taking, while relegating the non-trespassory housing set-aside requirement to the flaccid multifactor balancing test. But these results are contrary to commentary[116] and decisional law[117] in the subdivision exaction field and to our intuitive sense of fairness. While the constitutionality of set-aside requirements has not yet been widely litigated,[118]

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[113] See, e.g., PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); Block v. Hirsh, 256 U.S. 135 (1921); cf. Marsh v. Alabama, 326 U.S. 501 (1946) (private property—a company town—devoted to uses that in all significant respects were equivalent to those of a municipality, is subject to first amendment speech servitude).

[114] But see *Loretto*, 102 S. Ct. at 3175-76.

[115] See text accompanying notes 137-40, 236-37 infra.

[116] See, e.g., Johnston, Constitutionality of Subdivision Control Exactions: The Quest for a Rationale, 52 Cornell L.Q. 871 (1967); Juergensmeyer & Blake, Impact Fees: An Answer to Local Governments' Capital Funding Dilemma, 9 Fla. St. U.L. Rev. 415 (1981).

[117] For a discussion of representative cases see Johnston, supra note 116; Juergensmeyer & Blake, supra note 116, at 416 n.6.

[118] Compare Board of Supervisors v. DeGroff Enterprises, Inc., 214 Va. 235, 198 S.E.2d 600 (1973) (sustaining takings challenge to set-aside ordinance) with In re Egg Harbor Assocs., 185 N.J. Super. 507, 449 A.2d 1324 (App. Div.), certif. granted, 91 N.J. 552, 453 A.2d 868 (1982) (rejecting takings challenge to set-aside provision). See also *Mount Laurel II*'s favorable discussion of set-asides, 456 A.2d at 446-50.

thoughtful commentators characterize the question as a close one because the relationship between subdivision development and community or regional need for low and moderate income housing is problematic.[119] But because the nexus between such development and subdivision exactions for streets and parklands is straightforward,[120] the constitutionality of these exactions is widely, if not universally, conceded.[121]

These considerations indicate that the uncritical but prevalent assumption that physical invasions are paradigmatic takings[122] im-

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[119] Compare Ellickson, supra note 102, at 1211-14 (arguing that set-asides are takings) with Kleven, supra note 102, at 1490-1528 (arguing that set-asides do not constitute takings).

[120] See Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 380, 176 N.E.2d 799, 802 (1961) (an exaction is permissible only when the need for the exaction is specifically and uniquely attributable to the activity of the subdivider). For more liberal formulations of the requisite nexus, see, e.g., Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 640, 484 P.2d 606, 612, 94 Cal. Rptr. 630, 636 (1971) (upholding constitutionality of act that required that "the amount and location of land or fees shall bear a reasonable relationship to the use of the facilities by the future inhabitants of the subdivision"); Longridge Builders, Inc. v. Planning Bd., 52 N.J. 348, 350, 245 A.2d 336, 337 (1967) (per curiam) (assuming ordinance could apportion cost of off-site improvements to a subdivision, subdivider could be required to bear only that portion of cost that "bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision").

Although the Supreme Court has not ruled upon the validity of such measures, it seemed improbable until *Loretto* that the Court would disturb these state holdings in view of the position it has taken in assessing police-power based, grade-separation financing schemes authorizing government to require railroad companies to share the cost of realigning their tracks to accommodate highway development. The Court has held these impositions to be legitimate police power exercises if they "bear some reasonable relation to the evils to be eradicated or the advantages to be secured." Nashville, Chattanooga & St. Louis Ry. v. Walters, 294 U.S. 405, 429 (1935); see Atchison, Topeka & Santa Fe Ry. Co. v. Public Utils. Comm'n, 346 U.S. 346 (1953); cf. Panhandle E. Pipe Line Co. v. State Highway Comm'n, 294 U.S. 613, 622 (1935) (public order requiring pipeline company to absorb cost of moving its pipeline to accommodate new state highway invalid because pipeline did not constitute threat to public safety). *Loretto*'s distinction between measures obligating a landowner to perform an act or incur an expense, which are not governed by a per se rule, 102 S. Ct. at 3179 n.19, and measures authorizing permanent occupation of the claimant's land, which are governed by a per se rule, id. at 3175-76, calls these state court opinions into question. Subdivision statutes requiring mandatory dedication of land are an extreme form of the second type of measure while those requiring the payment of a fee in lieu of dedication are in form the first type but are functionally equivalent to the second.

[121] See Johnston, supra note 116, at 922-23; Juergensmeyer & Blake, supra note 116, at 421-33.

[122] See, e.g., *Loretto*, 102 S. Ct. at 3179; Berger, supra note 3, at 170-72; Humbach, supra note 1, at 262-67. The same error is committed by those who, like the *Loretto* Court, approach the physical invasion problem from the perspective of Blackstone's classic assertion that

> [s]o great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. *If a new road, for instance, were to be made through the grounds of a private person*, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land.

properly attributes to use-dependent invasions the constitutional defects of most location-contingent invasions. In addition, it ignores that, until *Loretto*, the physical invasions characteristically condemned as takings by the Court have been location-contingent.[123] The paradigmatic taking therefore should be premised upon failure to satisfy the use-dependency test, not upon the physical or regulatory character of the intervention.

3. *Pure Takings Inquiry*

The model's third element is designated the "pure takings" phase because its purpose is to assess the permissible severity of a measure's impact on property. Although the takings analysis typically focuses upon this question, such an isolated focus is misconceived because the judgment that a measure "goes too far" may be predicated (1) on due process-takings reasoning alone or (2) on a combination of due process-takings and pure takings analyses. To illustrate the first possibility, suppose that Summit is unable to persuade the court that the housing set-aside requirements can be justified by Lovitt's use of its land. Under the model, Summit would be permitted to enforce the set-aside only once it compensates for Lovitt's loss, whether or not that loss falls short of denying Lovitt the reasonable beneficial use of its land. The example is problematic not because of the magnitude of Lovitt's loss but because of the unfairness of singling Lovitt out to bear the loss.

When a combination of due process-takings and pure takings analyses is necessary to resolve a takings controversy, the model posits

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1 W. Blackstone, Commentaries 139 (7th ed. Oxford 1775) (lst ed. Oxford 1765) (emphasis added). Absent substantial qualification, Blackstone's categorical claim is an inaccurate description of past and present American compensation practice. Today, subdividers are required to dedicate in fee not only roads "through [their] grounds" but also land for parks, schools, and other community facilities. See note 116 supra. Mandatory dedications are consistently upheld against takings challenges if they satisfy the use-dependency test, that is, if the need for the exaction is attributable to the subdivision.

In the late colonial period and the early days of the Republic when Blackstone's *Commentaries* were highly influential, see F. Bosselman, D. Callies & J. Banta, supra note 1, at 90, "the normal, if not universal, pattern was [for government] to pay *only* for [roads or other public improvements sited through] improved or enclosed land." Stoebuck, Eminent Domain, supra note 31, at 582 (emphasis added) (footnote omitted); see Parham v. Justices, 9 Ga. 341, 346-48, 355 (1851) (recounting but disapproving of this practice). Since denial of compensation for the taking of unenclosed or wild land may be justified on the basis of a special benefits rationale—that is, that the enhancement in value accruing to the land not taken by virtue of the public improvement is greater than the value of the land taken—it is less germane to use-dependency considerations than denial of compensation for subdivision exactions. Whatever their rationales, however, both examples (unenclosed land and subdivision exactions) undermine Blackstone's assertion as interpreted by the Court in *Loretto*.

[123] See cases cited in note 110 supra.

that *a measure "goes too far" if the burden it imposes is greater than necessary to implement legislative goals previously adjudged fair in principle under the due process-takings analysis.* For example, a court might approve the concept of parkland exactions in principle, citing the nexus between subdivision development and the increased need for recreational open space, but might invalidate a particular exaction as excessive in relation to that need.[124] Conversely, impositions that severely reduce or even destroy the profitability of land may not be takings if they are necessary to effectuate measures deemed fair in principle. Suppose that a manufacturer acquires land and constructs a plant uniquely fitted to produce a chemical. It is subsequently discovered that the chemical possesses the toxic properties of dioxin. Can it be seriously questioned that government may exercise its police power to ban further production even though that action will deny the manufacturer an economic return on its investment?[125]

These examples illustrate that, of itself, a reduction in value caused by public intervention is no more determinative of the presence or absence of a taking than is the physical character of such intervention.[126] Concededly, drastic reduction in the economic utility of land

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[124] Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961).

[125] Cf. Mugler v. Kansas, 123 U.S. 623 (1887) (statute prohibiting manufacture of malt liquor does not take brewers' property even though the buildings and machinery are of "little value if not used for the purpose of manufacturing beer").

[126] On its face, the proposition that a mere reduction in value of private property by government action is not determinative of the taking question would seem contrary to dicta in the Court's land use and environmental cases, see text accompanying notes 44-46 and note 74 supra, that a restriction denying a landowner an economically viable use of his property is a taking. But as both the dioxin hypothetical and the Court's decision in *Mugler* exemplify, a taking will not be found even in light of a measure's economic effects if, on the basis of the use-dependency inquiry conducted in its due process-takings analysis, the Court concludes that the infringement is fair in principle. The Court's dicta simply reflect that it does not currently view welfare goals such as landmark or open space preservation as compelling enough to justify a measure that shifts the cost of preserving those resources to their owners as fair in principle if the consequences of that shift are as ruinous as hypothesized. That interpretation falls well short of the absolutist claim that *no* welfare-indemnity clash can be envisaged in which, given the competing values and use-dependency characteristics of the burdened property in question, a shift of this nature can ever be justified. Indeed, the dioxin and *Mugler* examples seem to establish the contrary. Because the Court's pure takings analysis—does a measure go too far?—is so pervasively conditioned by its prior due process-takings inquiry—is the imposition fair in principle given the competing welfare and indemnity values and the use-dependency characteristics of the burdened property?—it is impossible to fix with certainty the point at which reduction in the value of burdened property will constitute a taking if the taking claim is premised on the variable of diminution in value alone. Although the problematic character of such efforts has been widely noted among the commentators, see, e.g., Michelman, supra note 3, at 1190-93; Sax, supra note 41, at 50-60; Stoebuck, Police Power, supra note 1, at 1062-65, they have overlooked that the problem is

or a permanent physical invasion is more likely to constitute a taking. Nonetheless, because the welfare-indemnity conflict implicates a broader array of considerations, it cannot be resolved by reference to these factors alone.

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rooted in the intimate connection between what this Article has termed the due process-takings and pure takings phases of takings analysis.

Contrary to other commentators, see, e.g., Sax, supra note 41, at 41; Stoebuck, Police Power, supra note 1, at 1062, I do not view the position that reduction in value of property is not determinative of the taking issue as incompatible with Justice Holmes' reasoning in Pennsylvania Coal Co. v. Mahon, 260 U.S. 394 (1922). Concededly, there is language in the opinion suggesting otherwise. Among the pertinent passages are Holmes' assertions that "when [diminution in value] 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," id. at 413; that "[t]o make it commercially impractical to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it," id. at 414; and that "the natural tendency of human nature is to extend the [police power] qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." Id. at 415. But this language must be read in context. The structure of Holmes' analysis is precisely that envisaged for the decisional model's due process-takings phase, namely, identification and weighing of the controversy's competing welfare and indemnity values. Hence, Holmes asserted that the "statute does not disclose a public interest sufficient to warrant so extensive a destruction of the [property owner's] constitutionally protected rights." Id. at 414. In weighing the considerations that bear on the welfare and indemnity balance, Justice Holmes treated the "extent of diminution" as only "[*o*]*ne* fact," id. at 413 (emphasis added), among others including, e.g., the proscribed use's effect on personal safety, id. at 414, the "private" nature of the seller-buyer relationship controlled by the challenged measure, id. at 413-14, the capacity of these parties and of government to anticipate the problem addressed in the measure by acquiring subsurface as well as surface rights to the land in question, id. at 415, and, in view of this capacity, the unfairness of imposing the costs of this omission on the proprietor, id. at 416. One may disagree with the adequacy of Holmes' assessment of these additional considerations, but one cannot deny that, along with the diminution in value factor, he cited them as elements in an interlocking set of variables to be reviewed in light of the larger indemnity-welfare conflict posed by the challenged measure. An additional factor ignored by the commentators is that the objectionable measure in *Pennsylvania Coal* was not a "mere" regulation, but as asserted in note 291 infra, a physical invasion that effectively preempted *any* rights that the proprietor may have had in the burdened property.

Other takings opinions of Holmes confirm both the compatibility of his analyses with that of the decisional model and his recognition that the diminution in value factor must be evaluated within a context essentially equivalent to that afforded by the model. See, e.g., Block v. Hirsh, 256 U.S. 135 (1921) (discussed in text accompanying notes 88-90 supra); Erie R.R. v. Board of Pub. Util. Comm'rs, 254 U.S. 394 (1921); Noble State Bank v. Haskell, 219 U.S. 104 (1911); Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908). *Erie*, a railroad grade crossing case, is particularly germane in view of the proprietor-railroad's objection that the measure requiring it to bear a portion of mandated grade separation costs could bankrupt it. See *Erie*, 254 U.S. at 409. Noting that the welfare and indemnity values implicated by the grade crossing measure were public safety and the railroad's economic necessities, respectively, id. at 410, Holmes responded that "[g]enerically, the streets represent the more important interest of the two." Id. Stressing the powerful use-dependent basis for the challenged imposition, id. at 410-13, Holmes frontally dismissed the diminution in value objection: "If the burdens imposed are so great that the road cannot be run at a profit it can stop, whatever the misfortunes the stopping may produce," id. at 411. These words are hardly those of an analyst whose attachment to the diminution in value test is so passionate as to preclude him from heeding the other factors in the decisional model's calculus.

Although their verbal packaging differs, numerous opinions of the Supreme Court may be readily explained by the due process-takings/pure takings dichotomy. Particularly instructive are cases addressing police power-created access rights of political petitioners,[127] tenants,[128] and non-employee labor organizers[129] because in each case the governmental intervention was a "physical invasion." The due process-takings question reflected in these cases is the same: Can a relationship be established between the purpose of the challenged measure and the use of the invaded land so that government may fairly require the landowner's exclusion rights to yield to a stranger's access rights?[130] The pure takings question in these cases is also the same: Assuming that the measure is fair in principle, does the access right created impose a greater burden on the landowner's economic or dominion interests than is necessary to effectuate the measure's purpose?[131]

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[127] See PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

[128] See Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921); Block v. Hirsh, 256 U.S. 135 (1921).

[129] See NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). Elaborating on *Babcock* are Central Hardware Co. v. NLRB, 407 U.S. 539, 543-45 (1972) and Hudgens v. NLRB, 424 U.S. 507, 521-22 (1976). In the *Babcock* line of cases, orders of the National Labor Relations Board, issued under § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1)(1976), were challenged by employers as ultra vires rather than on takings grounds. But the labor organization cases may here be grouped with the cases cited in notes 87-88 supra because they present the same functional issue—accommodation of the right of a proprietor to exclude with statutorily created access rights of third persons. Fifth amendment protection of an employer's property rights, moreover, was implicitly recognized by the Court in *Babcock*: "Organization rights are granted to workers by the same authority, the National Government, that preserves property rights." 351 U.S. at 112. Similarly, in *Central Hardware*, the Court stated: "The Board and the courts have the duty to resolve conflicts between organization rights and property rights, and to seek a proper accommodation between the two." 407 U.S. at 543; see also Eastex, Inc. v. NLRB, 437 U.S. 556, 580 (1978) (Rehnquist, J., dissenting) ("From its earliest cases construing the National Labor Relations Act the Court has recognized the weight of an employer's property rights, rights which are explicitly protected from federal interference by the Fifth Amendment to the Constitution."). An employer's challenge to a Board order was framed in takings terms in NLRB v. Cities Serv. Oil Co., 122 F.2d 149, 152 (2d Cir. 1941) ("It is not every interference with property rights that is within the Fifth Amendment and we see no basis for invoking the Constitution in the present situation."). See also Fafnir Bearing Co. v. NLRB, 362 F.2d 716, 722 (2d Cir. 1966). Finally, in *Loretto*, 102 S. Ct. 3164 (1982), the Court acknowledged the constitutional relevance of the labor organization cases but characterized those intrusions as "temporary and limited" while the invasion authorized by § 828 was deemed "permanent." Id. at 3175 n.11.

[130] See PruneYard Shopping Center v. Robins, 447 U.S. 74, 87 (1980); NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956); Block v. Hirsh, 256 U.S. 135, 155-56 (1921).

[131] See PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980); NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113-14 (1956); Block v. Hirsh, 256 U.S. 135, 156-57 (1921).

Subject to the qualification discussed in note 129 supra, *Babcock* illustrates the manner in which the Court has scrutinized the relationship between legislative purpose and permissible infringement on a proprietor's dominion interest. In framing this inquiry, the Court stated:

4. *Government's Burden of Proof*

The decisional model's fourth element is the burden of proof that government must meet to satisfy inquiries under the due process-takings and pure takings phases. This element's importance is manifest given the open-textured character of the respective fairness and severity standards of these two phases, yet it is also the element on which the Court's takings jurisprudence provides the least assistance. But if the Court's Bill of Rights jurisprudence is to be the guide—as I believe it should be—then one can expect, first, that the burden will be graduated and, second, that the level of scrutiny employed by the Court in particular controversies will depend upon the identity of the competing welfare and indemnity values at issue and the precise manner in which government infringes on the indemnity values.

The Court has not as yet enunciated a sliding scale of burdens for takings clause litigation akin to that employed in other civil liberties litigation. Rather, it has oscillated between the extremes of *Loretto*'s demanding per se rule for permanent physical occupations and the deferential presumption of legislative validity for all other interventions. If the Court's identification of a libertarian dimension in private property proves durable, this pattern will be refashioned, with the character of the competing values proving crucial in the burden's selection. Not all police power values are equal; neither are those relating to property. Thus the precise character of the property value or values implicated in a controversy must be clarified. Measures impinging upon economic values will continue to receive lesser protection; those affecting dominion values will be identified as such and receive greater protection, although not the absolute immunity from

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> This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interefere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.

351 U.S. at 112. The Court has repeatedly insisted that the burden on an employer's property rights be related to the Act's legislative purpose: "What is a 'proper accommodation' in any situation may largely depend upon the content and the context of the § 7 rights being asserted." Hudgens v. NLRB, 424 U.S. 507, 521 (1976). As the Court explained, "[t]he locus of that accommodation . . . may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." Id. at 522.

infringement afforded them in *Loretto*. Government's burden will be less stringent in conflicts between public safety and a landowner's economic interest in property,[132] for example, than in conflicts in which a less well-established police power goal is opposed to the proprietor's dominion interest.[133] The precise character of the property value or values implicated in a controversy must also be clarified.[134]

The parallel between these prescriptions and those prevailing in conventional civil liberties litigation is evident. The Court's recent decisions in the first amendment area, for example, have tended to gauge the depth of judicial scrutiny of a measure alleged to offend the freedom of speech to the type of expression in question. Commercial[135] and, perhaps, pornographic speech,[136] for instance, receive less protection than other, more valued forms of expression. One might anticipate the emergence of a similar pattern for takings litigation, with a graduated burden depending upon the character of the values identified in the due process-takings phase.

Finally, the form assumed by the intervention, i.e., affirmative easement, affirmative covenant or servitude, or negative easement, will also influence determination of the level of judicial scrutiny. Later discussion of *Loretto* concedes, for example, that measures such as section 828 which impose obligations akin to affirmative easements

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[132] See Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-96 (1962) (balancing the danger posed to children by an open sand and gravel pit against the owner's right to exploit the site's mining potential).

[133] *Loretto*, which pitted the public's interest in access to the embryonic cable television medium against landlords' right to exclude those characterized by the Court as "strangers" to their property, see text accompanying notes 195-204 infra, may be viewed as representative of this type of conflict.

[134] The task of clarifying the precise character of the property values implicated in a controversy is not exhausted simply by differentiating property's economic from its dominion interest. As later discussion of *Loretto* will illustrate, see text accompanying notes 214-18 infra, the dominion interest itself comprehends values that may be further subdivided on the basis of differences entitling them to greater or lesser protection.

[135] See, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562-63 (1980) ("The Constitution . . . accords a lesser protection to commercial speech [traditionally subject to government regulation] than to other constitutionally guaranteed expression."); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976) (commercial speech does not lack "all" protection); Bigelow v. Virginia, 421 U.S. 809, 821 (1975) (commercial advertising enjoys a "degree" of first amendment protection).

[136] See, e.g., FCC v. Pacifica Found., 438 U.S. 726, 745-47 (1978) (sexual and excretory language "not entitled to absolute constitutional protection under all circumstances," especially because "broadcasting is uniquely accessible to children"); Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976) (plurality opinion) ("society's interest in protecting [erotic materials] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate").

are inherently troublesome.[137] To use terminology connoting the distinctions of an earlier day, these obligations invade corporeal rather than incorporeal property; the property interest acquired is both lost (destroyed) to the owner and appropriated to government or its delegate; and the injury is direct rather than consequential. If, in addition, the obligation is expressly premised on a particular use of the burdened property, it is likely to be of indefinite duration, and therefore to appear permanent rather than temporary. Although this Article[138] and the unmistakable trend of the Court's modern takings jurisprudence[139] deny that a takings determination should rest only on one or more of these distinctions, that position does not deny that the decisional model should consider the factors to which these distinctions point. This can best be accomplished by assigning the factors a role parallel to that played by presumptively disfavored forms of government intervention in civil liberties litigation. Just as content-based distinctions trigger more exacting scrutiny in first amendment litigation,[140] for example, the foregoing factors should do the same in takings litigation.

II

Loretto v. Teleprompter Manhattan CATV Corp.

The introduction to this Article premised the case for the proposed decisional model on five basic considerations. First, the broad per se rule (predicating takings on the finding that property has been taken) should yield to the model's presumptive approach because the per se rule is unsatisfactory on linguistic, historical, and functional grounds. Second, the narrow per se rule (predicating takings on an intrusion's physical character alone) should also yield; the same policy considerations should govern the evaluation of physical invasions as govern regulatory incursions. Third, however pertinent to these considerations, the distinctions historically allied to both versions of the per se rule do not afford an independent foundation for takings determinations. They are simply too crude to serve as vehicles for mediat-

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[137] See text accompanying notes 356-58 infra.

[138] See text accompanying notes 1-2 supra.

[139] See text accompanying notes 48-53 supra, 283-355 infra.

[140] See, e.g., Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 515 (1981) ("city may not choose the appropriate subjects for public discourse"); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) (first amendment means that government has "no power to restrict expression because of its message, its ideas, its subject matter, or its content"). See generally L. Tribe, supra note 43, § 12-2, at 581; Farber, Content Regulation and the First Amendment: A Revisionist View, 68 Geo. L.J. 727, 729-30 (1980).

ing the welfare-indemnity conflict that underlies all takings controversies. Fourth, the sharp division between due process and takings reasoning impedes judicial efforts to assess both the fairness in principle and the permissible severity of measures challenged as takings. Finally, the Burger Court's emerging recognition of the dominion, or liberty, interest in property requires a more discerning standard of judicial scrutiny for takings litigation than is afforded either by the per se rule, which is overly solicitous of that interest, or by the multifactor balancing test, which errs in the other direction.

The *Loretto* Court ignored and exacerbated the problems inherent in these considerations. In its analysis of the constitutional challenge to section 828,[141] the *Loretto* Court gleaned from its prior decisions four categories of obligations challenged as takings: (1) those

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[141] Adopted in 1973, § 828 limits the landlord's right both to exclude and to impose charges on cable companies and tenants. See N.Y. Exec. Law § 828(1)(a)-(b) (McKinney 1982). The former subsection flatly bars landlords from interfering with the facilities' installation. Id. § 828(1)(a). The subsections concerning imposition of charges are less straightforward. While they prevent landlords from receiving any payment from their tenants in exchange for permitting cable television services, id. § 828(1)(b), they obligate cable companies and tenants to bear the "entire cost" of the facilities' installation, operation, and removal, id. § 828(1)(a)(ii), and require the companies alone to "indemnify" landlords for any damage caused by these actions, id. § 828(1)(a)(iii). Section 828 therefore imposes no out-of-pocket costs on landlords; in addition, it assures them that the installations will conform to "such reasonable conditions as are necessary to protect the safety, functioning and appearance of [their] premises, and the convenience and well-being of other tenants." Id. § 828(1)(a)(i).

But § 828 also prohibits landlords from imposing charges for the use of their property on the companies "in excess of any amount which the [State Cable Television Commission] shall, by regulation, determine to be reasonable." Id. § 828(1)(b). Subsequent to § 828's passage, the State Cable Commission ruled that "in the absence of a special showing of greater damages attributable to the taking," landlords may demand no more than a one time, one dollar fee from cable companies. In the Matter of Implementation of Section 828 of the Executive Law, N.Y. State Comm'n on Cable Television, Statement of General Policy 4 (1976). This determination was based on proceedings in which the Commission solicited comments from landlords, tenants, cable trade associations, and other interested groups, and reviewed "condemnation-type appraisal reports [on two buildings] which concluded that the value of the section 828 'easement' acquired on the respective apartment buildings was 'nominal.' " Id. at 3-4. The Commission's presumption favoring the one dollar payment reflected its judgment that circumstances applicable to these two buildings were "typical" of the class generally. Id. at 4.

The New York legislature chose to regulate the relations of landlords, tenants, and cable companies in this manner rather than to allow them to be determined by market forces because the marketplace alternative already had been tried and found wanting. Prior to passage of § 828, landlords had charged cable companies "onerous fees." *Loretto*, 53 N.Y.2d 124, 141, 423 N.E.2d 320, 328, 440 N.Y.S.2d 843, 851 (1981) (quoting testimony of Joseph C. Swidler, Chairman, Public Serv. Comm'n, before the Joint Legislative Comm. considering § 828). These fees, often five percent of the gross operating revenues due a company from the tenants in a landlord's building, see *Loretto*, 102 S. Ct. at 3169, had been passed on by the companies to the tenant-subscribers. These charges and other obstacles to tenant cable access were so problematic, in fact, that the report initially proposing the legislation that includes § 828 advised that "[t]he most useful thing government could do at this time is to assure that landlords do not impose obstacles

restricting the uses to which an owner's land may be devoted;[142] (2) those requiring him to perform acts on his land;[143] (3) those obligating him to suffer "temporary physical invasions"[144] of his land by government or its delegates, and (4) those obligating him to suffer "perma-

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to tenant subscription to CATV." Regulation of Cable Television by the State of New York, Report to the [State Public Service] Commission by Commissioner William K. Jones 181-82 (1970) [hereinafter Jones Report]. But tenants were not the sole beneficiaries of § 828. Since apartment buildings constitute an important component of cable television service grids, particularly in the metropolitan New York area, tenant access difficulties were impeding the penetration of cable systems statewide as well. Jones Report, supra, at 206. In its statement of findings the legislature recognized that unless the medium's "maximum penetration" was secured as "rapidly as economically and technically feasible," access to the "valuable educational and public services" promised by the developing medium would be restricted for New York citizens, municipalities, and public and business groups as well. N.Y. Exec. Law § 811 (McKinney 1982).

Section 828 was challenged by Mrs. Loretto on behalf of herself and similarly situated landlords as an "uncompensated trespass and condemnation of property that constitute a 'taking' without due process." *Loretto*, 98 Misc. 2d 944, 945, 415 N.Y.S.2d 180, 181 (S. Ct. 1979). The summary dismissal by a New York trial judge of her claim that the section effected a "taking" entitling her to the "5% of Teleprompter's gross revenues that was customarily paid to landlords before the adoption of the Statute," id., was affirmed by an intermediate court, 73 A.D.2d 849, 422 N.Y.S.2d 550 (1979), and by the New York Court of Appeals, 53 N.Y.2d 124 423 N.E.2d 320, 440 N.Y.S.2d 843 (1981). In light of § 828's provision for compensation, see § 828(1)(b), and the State Cable Commission's ruling with respect to that provision, see In the Matter of Implementation of Section 828 of the Executive Law, N.Y. State Comm'n on Cable Television, Statement of General Policy 4 (1976), Teleprompter argued that § 828 could be sustained alternatively as a valid exercise of police power, see Brief for Respondents at 19-59, or eminent domain power. See id. at 60-74; *Loretto*, 53 N.Y.2d at 127-28, 132-33, 136-37, 423 N.E.2d at 323, 325-26, 440 N.Y.S.2d at 846, 848 (1981). But the New York Court of Appeals majority interpreted § 828 in a manner that eliminated the eminent domain prong of Teleprompter's position. In its view § 828's imposition of "*an upper limit* upon the amount that may be demanded . . . rather than a *requirement* that such a company pay compensation" established that the legislature "intended to act under the police power only." 53 N.Y.2d at 138, 423 N.E.2d at 326, 440 N.Y.S.2d at 849 (emphasis in original) (citation and footnote omitted); cf. 53 N.Y.2d 124, 155, 423 N.E.2d 320, 336, 440 N.Y.S.2d 843, 859 (1981) (Gabrielli, J., concurring) (upholding § 828 as valid legislative exercise of eminent domain power because of provision for just compensation through payment of amount set by Commission plus indemnification for any actual damages). Given this interpretation of the statute by a majority of the state's highest court, the Supreme Court had no choice but to view the controversy as one that squarely presented the issue of whether § 828 was a taking because it exceeded the bounds of the police power.

[142] See *Loretto*, 102 S. Ct. at 3171. Representative cases include, e.g., Agins v. City of Tiburon, 440 U.S. 255 (1980) (limitation on number of units to be built on land zoned for open space/low density use); Penn Cent. Transp. Co. v. New York City, 438 U.S. 178 (1978) (ban against building above a landmark).

[143] See *Loretto*, 102 S. Ct. at 3178-79.

[144] Id. at 3172. Illustrative cases include, e.g., PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) (private property subject to speech servitude favoring political petitioners); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (private navigable waters subject to public easement of passage).

nent physical occupations"[145] by either.[146] According to the Court, measures imposing the first three obligations are presumptive takings which therefore must be evaluated under the multifactor balancing test,[147] necessitating an inquiry into whether the challenged measure "achieves an important public benefit or has only minimal economic impact on the owner."[148] "Permanent physical occupation[s]," on the

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[145] See *Loretto*, 102 S. Ct. at 3171-73. Representative cases include, e.g., United States v. Lynah, 188 U.S. 445 (1903); St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).

[146] *Loretto*, 102 S. Ct. at 3171-76. What the Court actually did was to assemble a series of decisions that relied on the above-outlined distinctions in deciding whether a taking had occurred. The most pertinent cases are vintage material dating roughly from the late nineteenth to the first third of the twentieth century. Many involved government-authorized navigation improvements that flooded a claimant's land. Within this category, the Court confined its discussion to two century-old cases, Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871) (construction under state authority of a dam that permanently flooded plaintiff's property constituted a taking) (discussed in 102 S. Ct. at 3171-72), and Northern Transp. Co. v. City of Chicago, 99 U.S. 635, 642 (1878) (construction of a temporary dam was not a taking because the obstruction impaired only the use of the property even though it denied plaintiffs access to their property) (discussed in 102 S. Ct. at 3172). The Court relegated subsequent cases of this type, most of them dating from 1903 to 1924, to a string cite. See 102 S. Ct. at 3172.

Two other cases cited by the Court addressed a telegraph utility's obligation to compensate owners for the placement of its telephone poles on their property. Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 540 (1904) (poles located along railroad's right of way) (discussed in 102 S. Ct. at 3173); St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893) (poles located along city streets) (discussed in 102 S. Ct. at 3172-73).

More recent cases referred to by the Court can be divided into two categories. The first includes regulatory takings cases containing dicta acknowledging that physical invasions are more likely than regulatory incursions to constitute takings. See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (discussed in 102 S. Ct. at 3171, 3174); Andrus v. Allard, 441 U.S. 51 (1979) (discussed in 102 S. Ct. at 3173 n.6). The second category consists of physical invasion cases in which the "invaders" were not objects but persons holding the benefit of government-authorized affirmative easements intended to advance such interests as worker self-organization, see Central Hardware Co. v. NLRB, 407 U.S. 539 (1972) (discussed in 102 S. Ct. at 3175 n.11); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) (same), state-protected expression, see PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) (discussed in 102 S. Ct. at 3175), or transit in the nation's navigable waters or airspace, see Kaiser Aetna v. United States, 444 U.S. 164 (1979) (discussed in 102 S. Ct. at 3175); Griggs v. Allegheny County, 369 U.S. 84 (1962) (cited in 102 S. Ct. at 3174); United States v. Causby, 328 U.S. 256 (1946) (discussed in 102 S. Ct. at 3173). These more recent physical invasion cases obviously gave the most trouble to the Court because they had been resolved under the presumptive approach even though the easements involved were comparable to the one imposed by § 828 in all respects but the trespass-by-person versus trespass-by-object distinction. *Causby* and *Griggs* involved trespasses by object (overflights by airplanes), but these invasions were intermittent rather than continuing and, although found to be takings, were not "permanent physical occupations." See text accompanying notes 298-301 infra. Curiously, the Court nonetheless treated these cases as though they substantiated its per se rule. See 102 S. Ct. at 3175-76.

[147] *Loretto*, 102 S. Ct. at 3174.

[148] Id. at 3176.

other hand, are takings "without regard to other factors that a court might ordinarily examine"[149] and hence are per se takings.

In view of the sharp line drawn by the Court between the first three and the fourth of these obligations, it would appear that the Court, while rejecting the broad per se rule, endorses the narrower version of the rule for permanent physical occupations, contrary to the decisional model. In the case of the first three obligations at least, the Court's stance presumably reflects both its skepticism of the distinctions' resolutive force in takings litigation and its willingness to entertain due process-takings considerations through the crude medium of the multifactor balancing test. But *Loretto* suggests that rigid adherence to the distinctions and to compartmentalization of due process and takings reasoning remain the order of the day for permanent physical occupations. The Court's identification of a dominion interest in property and its views concerning the degree of protection to which that interest is entitled cannot be determined from the foregoing categorization and are discussed separately below.[150]

The question to be addressed in this section is why permanent physical occupations, more usefully described as continuing trespasses by object,[151] should be governed by a per se rule while a presumptive approach applies to other incursions. In practical effect, other invasions may impinge more severely on property than do permanent physical occupations. Consider, for example, the effect on an employer's dominion or economic interest of repeated trespasses onto its workplace[152] by union organizers or, similarly, the effect on the interests of a shopping center owner suffering repeated trespasses at its shopping center by political activists.[153] Depending upon the circumstances, these invasions are surely as disruptive as the occupation by cable equipment of a minute portion of a landlord's apartment building roof. Public actions obligating a landowner to suffer trespasses by government engineers to destroy his petroleum terminal,[154] by firefighters to raze his building,[155] or by state entomologists to cut down his cedar trees[156] may have been similarly disruptive. None of these

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[149] Id. at 3174.

[150] See text accompanying notes 195-204 infra.

[151] See notes 179-86, 347-55 infra.

[152] See cases cited in note 129 supra.

[153] See PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

[154] See United States v. Caltex, Inc., 344 U.S. 149, 155-56 (1952) (no compensation due for property destroyed to prevent its use by the enemy).

[155] See Bowditch v. City of Boston, 101 U.S. 16, 19 (1879) (no compensation due for buildings destroyed to prevent spread of conflagration).

[156] See Miller v. Schoene, 276 U.S. 272, 279-80 (1928) (no compensation due for destruction of cedar trees infected with rust fungus which, while harmless to cedar trees, ravages apple trees).

measures was deemed a per se taking when litigated, however, and most were not held to be takings at all.

The following section critiques the Court's attempt to justify the narrow per se rule on the basis of the Court's appeal to the purposes of the takings clause, its use of the distinctions allied to the clause's rule-oriented construction, its implicit reliance on due process-takings considerations in the face of its disavowal of their relevance, and its assessment of section 828's relative impact on landlords' dominion and economic interests in their property. The next section then formulates *Loretto*'s issues as they would have been formulated had the Court employed the decisional model.

The purpose of Part II is *not* to argue that section 828 is a valid police power enactment; the Court's decision to the contrary is by no means absurd. Rather, Part II is intended first to demonstrate that, viewed against the body of the Court's better-reasoned takings precedents, *Loretto*'s per se rule is aberrational, and second to illustrate the decisional model's functioning by contrasting the Court's per se analysis with a simulated analysis under the model.

A. Loretto: *Description and Critique*

1. *Appeal to the Purposes of the Takings Clause*

The Court's argument that section 828 subverts the purposes of the takings clause posits that the clause's principal goal[157] is to safeguard the proprietor's entitlements of exclusion, use, and disposition with respect to *any portion whatever* of its property.[158] To substanti-

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[157] In conjunction with this property-protective goal, the Court stressed the ease of administering a per se rule. 102 S. Ct. at 3176-77. That rule, it noted, "avoids otherwise difficult line drawing problems" because it treats all occupations as takings, whatever the "size of the area permanently occupied," id., and "presents relatively few problems of proof" because "[t]he placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute," id. at 3177. This reasoning is difficult to credit. Per se rules are designed to encourage efficiency; but they are not invoked until the underlying conduct, examined in light of the guiding principles of the laws which govern 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. It can hardly be predicted that all permanent physical occupations will subvert the principles underpinning the takings clause as they have been defined elsewhere in this Article and by the Court. See text accompanying notes 91-99 supra, 166-67 infra. *Loretto*'s narrow per se rule ought therefore to be rejected lest the efficiency it promises is purchased in derogation of fairness.

[158] 102 S. Ct. at 3176-77. Elsewhere in the opinion the Court emphasized that permanent physical occupations are takings "to the extent of the occupation," id. at 3175-76, and that "whether the [§ 828] installation is a taking does not depend on whether the volume of space it occupies is bigger than a bread box," id. at 3178 n.16.

ate this extravagant conception of the clause's property-protective purpose and its application to section 828, the Court turned to *United States v. General Motors Corporation*,[159] in which it had identified "property" as the right to "possess, use, and dispose of it."[160] Of these incidents, the right to possess, or to exclude, predominated in its reasoning in *Loretto*, explaining its evident distaste for the "special kind of injury [incurred] when a *stranger* directly invades or occupies the owner's property"[161] and its plaint that "to require . . . the owner to permit another to exercise complete dominion literally adds insult to injury."[162] To like effect is the Court's explanation of why a standard more lenient on government applies in the case of obligations other than permanent physical occupations. Although it candidly acknowledged that other impositions may impose far graver economic harm than do permanent physical occupations,[163] it nonetheless portrayed the latter as "qualitatively more severe . . . since the owner may have no control over the timing, extent, or nature of the invasion."[164] Given this characterization of the clause's overriding purpose, the Court's separate determination that the "property" infringed upon by section 828 was coextensive with the "property" "taken," i.e., the cable-occupied space,[165] led inexorably to the conclusion that section 828 indeed effected a compensable taking.

Perhaps the most charitable characterization of the Court's purposes analysis is to call it strained. The gravest defect of the analysis is that of the opinion as a whole: its failure to acknowledge that fairness is the taking clause's dominant goal[166] and, hence, its failure to address explicitly the issue of section 828's fairness to government and the classes benefited by section 828 as well as to landlords. It is no response that the Court impliedly acknowledged this value by denying government the power to encroach upon landlords' rights of exclusion, use, and disposition. *All* takings controversies feature governmentally-authorized incursions on one or more of these interests. In many, the Court has declined to find a taking under circumstances far more prejudicial to the proprietor than were those present in *Loretto*. Given

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[159] 323 U.S. 373 (1945).
[160] Id. at 378 (discussed in 102 S. Ct. at 3176).
[161] 102 S. Ct. at 3176 (emphasis in original).
[162] Id.
[163] Id.
[164] Id.
[165] Id. at 3177.
[166] See, e.g., cases cited in note 92 supra. The policy underpinnings for this position are persuasively recounted in Professor Michelman's classic essay, supra note 3.

the opinion's characterization of the takings clause's purposes, however, the takings determination was made to turn only upon the *fact* of the incursion, not upon the presence or absence of a *justification* for it.[167]

Even if section 828's effects are "qualitatively more severe" than those of interventions assuming different forms, the question remains whether the appropriate judicial response is the absolute ban of a per se rule or the less drastic, but still demanding, requirement that government satisfy a proportionately greater burden in justifying these effects.[168] Adjustments of the latter type are commonplace in conventional civil liberties litigation.[169] *Loretto* offers no clue why a similar response would be inappropriate in takings litigation. Nor do I think that the rejection of this response can seriously be defended given the implausibility of the claim that all permanent physical occupations are necessarily unfair, as that term is defined in the decisional model's due process-takings and pure takings analyses.

Another unexplained deviation from the Court's prior jurisprudence is *Loretto*'s definition of the plaintiff's "property" as her "[cable-]occupied" space alone, not as the aggregate of her fee rights in her parcel and its improvements.[170] In prior decisions addressing fractional takings such as that involved in *Loretto*, the Court has equated the property burdened with that aggregate, and has evaluated the severity of less-than-fee encroachments against this aggregate rather than against the property taken.[171] Equating the two types of property, of course, rendered the taking total, not fractional, and enabled

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[167] See 102 S. Ct. at 3175-76.

[168] See text accompanying notes 132-40 supra.

[169] See authorities cited in note 47; text accompanying note 53 supra.

[170] See text accompanying note 165 supra.

[171] In Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978), for example, the Court sustained a ban on the construction of a 50-story building in the airspace above a landmark despite its owner's insistence that this discrete block of unoccupied space, the "property taken," should be considered as "property" separate and apart from the land and building below, the "property burdened." Id. at 130. But that argument fell before the Court's response that

> "[t]aking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site."

Id. at 130-31. Accord Andrus v. Allard, 444 U.S. 51, 65-66 (1979) (refusing to evaluate a restriction on an owner's right to sell personalty separately from his other rights in the "bundle" of personalty ownership); cf. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (characterizing the claimant's affirmative easement to mine coal as the "property" both burdened and taken by a mining ban) discussed in note 291 infra.

the Court to reason that section 828 required Mrs. Loretto to suffer the "insult" of "having to permit another to exercise *complete dominion*" over her "property."[172] It is difficult to imagine a more outcome-determinative formulation of *Loretto*'s issue.

2. *Argument from Precedent: Reliance on the Rule-Oriented Distinctions*

The Court's attempt to justify the narrow per se rule pursuant to the traditional distinctions is no more persuasive than its appeal to the purposes of the takings clause. The distinctions' evolution, present status, and relation to section 828 are exhaustively detailed in this Article's Appendix. That investigation's conclusions may be summed up in three propositions. First, section 828 clearly falls on the wrong side of the direct/consequential damages,[173] appropriation/destruction,[174] and property as thing/as relation pairings,[175] a fact that might

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[172] 102 S. Ct. at 3176 (emphasis added).

[173] The Court stressed that the damage inflicted by § 828 was direct rather than consequential because it resulted from § 828-authorized activities conducted on the landlord's land and building rather than on a neighboring parcel. Id. at 3172. The Court contrasted the § 828 intrusion with that addressed in its 1878 decision in Northern Transp. Co. v. City of Chicago, 99 U.S. 635 (1878), which entailed noncompensable "consequential damages" because the intervention took the form of the denial of a landowner's access to an *adjoining* river and road by a public project that also contributed to his building's collapse. In explaining a result that seems egregious now, but was commonplace in the last century, 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 [takings clause]." Id. at 642; see text accompanying notes 261-70, 286-309 infra.

[174] 102 S. Ct. at 3174. Section 828 was vulnerable under the appropriation/destruction distinction since the statute transferred control of the landlord's cable-occupied space to Teleprompter and its subscribers, enabling them to enjoy the benefits of providing or receiving cable television service. Important to the Court's discussion of this distinction was United States v. Central Eureka Mining Co., 357 U.S. 155 (1958), in which it had employed the distinction to reject a takings challenge to a war order obligating nonessential gold mines to cease operations in order to conserve manpower for use in mines the government deemed more essential to the war effort. Summarizing *Central Eureka* in *Loretto,* the Court observed:

> Over dissenting Justice Harlan's complaint that "as a practical matter the Order led to consequences no different from those that would have followed the temporary acquisition of physical possession of these mines by the United States," . . . the Court reasoned that "the Government did not occupy, use, or in any manner take physical possession of the gold mines or the equipment connected with them."

102 S. Ct. at 3174; see text accompanying notes 271-77, 310-21 infra.

[175] The Court's physical conception of property appeared at two levels in *Loretto.* It defined the "property" taken as the cable-occupied space only, not as a fractional interest in the landlord's fee (its land and buildings considered as the collective physical resource in which the fee was held). 102 S. Ct. at 3177-78; see text accompanying notes 170-72 supra. Also influencing, if not preordaining, *Loretto*'s outcome was the Court's hostility to the entitlement granted Teleprompter by § 828 to exercise "complete dominion," id. at 3176, over the landlord's

well have sealed its fate in an earlier day. Second, its status under the permanent/temporary pairing is problematic: the Court's decisions over the last century ascribe no less than four connotations, each with different juridical consequences to the distinction,[176] and *Loretto* fails to indicate which one or group of these connotations it intends in applying the distinction to section 828.[177] Of greatest import, however, is the final conclusion: whether section 828 ran afoul of three or all four of the distinctions is largely beside the point today. Whatever force they might once have had to control the takings outcome on a per se basis is now spent.[178]

It is useful to differentiate between the first three distinctions and the fourth. A group of the Court's modern opinions, which *Loretto* endorses,[179] categorically establish that intrusions "violating" the former distinctions are not per se takings. The intrusions litigated in these cases, however, featured repeated entries by persons[180] who did not also deposit *their* property on the burdened owner's property as did the cable company in *Loretto*. Thus I have characterized the section 828 intrusion as a continuing (rather than intermittent) trespass by object (rather than person).[181] Ultimately, therefore, *Loretto* resolves itself into what might be called the "bread box" issue:[182] whether a continuing, *but minor*, trespass by object should be governed by a per se rule.

"property" by locating its own "property"—again physically characterized as Teleprompter's cable equipment—on that property. See text accompanying notes 193-204 infra; see also text accompanying notes 258-60, 280-304 infra.

[176] See text accompanying notes 278-82, 321-55 infra.

[177] The only generalization I dare venture from the Court's indiscriminate use of the labels "permanent" and "temporary" is that an intrusion is "permanent" for *Loretto*'s purposes if it is of indefinite duration, redistributes some interest in real property, and takes the form of a continuing trespass by object. Policy- and precedent-based anomalies posed by this generalization are recounted in text accompanying notes 366-72 infra.

[178] See text accompanying notes 356-72 infra.

[179] Representative opinions from this group include, e.g., PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) (conflict between access rights of political petitioners and exclusion rights of shopping center owner) (discussed in 102 S. Ct. at 3175); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (conflict between public access rights under navigation servitude doctrine and private marina developer's exclusion rights) (discussed in 102 S. Ct. at 3175); Hudgens v. NLRB, 424 U.S. 507 (1976) (conflict between nonemployee union organizers' access rights and employers' exclusion rights) (noted in 102 S. Ct. at 3175 n.11).

[180] See note 179 supra.

[181] See text accompanying notes 347-55 infra.

[182] The term derives from the Court's assertion that "whether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a bread box." *Loretto*, 102 S. Ct. at 3176 n.16.

Contrary to the Court's indiscriminate claims[183] regarding the protection afforded by its precedents to such de minimis interferences with property, there are no precedents directly on point: *Loretto* is a case of first impression.[184] But the Court's precedents that are closest in point, including virtually all of those cited in *Loretto*, undermine the bread box rule because each entails a continuing trespass by an object working a significant interference with the land so burdened.[185]

Rejection of the bread box rule is compelled by the thesis of this Article that a taking should not be declared unless an intervention is unfair in principle or, if fair, is unduly intrusive in relation to the legislative purpose in question.[186] A decisional standard such as the bread box rule which ignores an intervention's purposes and impacts to concentrate instead on its "physical" form alone provides no assurance that either prong of this prescription will be satisfied.

3. *Due Process Considerations in* Loretto*: Denied Yet Applied*

Loretto's treatment of due process considerations is decidedly ambivalent. Their relevance is flatly denied, then seemingly conceded, but ultimately rejected by reasoning which, paradoxically, is due process-takings based. As to the flat denial, the Court asserted that the statute's validity under the due process clause is a "separate question" from its validity under the takings clause[187] and refused to "address [the landlord's] contention that section 828 deprives her of property without due process of law."[188] In addition, the Court spurned Teleprompter's claim that the linkage between section 828's goals and the use of the burdened property for rental purposes satisfied the use-dependency test[189] by asserting, "[w]e fail to see . . . why a physical occupation of one type of property but not another type is any less a physical occupation,"[190] a reply fully consistent with its foregoing statements. If takings are to be predicated solely on the basis of a physical invasion's character, such a nexus is indeed irrelevant: all

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[183] Illustrative of these claims is the Court's statement that "[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." Id. at 3171.

[184] See text accompanying notes 350-55 infra.

[185] See id.

[186] See text accompanying notes 91-123 supra.

[187] *Loretto*, 102 S. Ct. at 3171.

[188] Id. at 3179 n.20.

[189] Id. at 3178 & n.17.

[190] Id. at 3178.

"permanent physical occupations" must fall before the per se rule, however forceful their justification under the use-dependency test.

But the Court's other objections to the test bring in due process considerations through a side door. The test, says the Court, "proves too much" because it would allow "the government to require a landlord to devote a substantial portion of his building to vending and washing machines [owned by strangers]"; "it would even allow the government to requisition a certain number of apartments as permanent government offices."[191] More broadly, the Court objected that the test would authorize government to restructure the common law allocation of property rights between landlords and tenants. "[G]overnment," the Court warned, "does not have unlimited power to redefine property rights."[192]

One may concede the Court's conclusions under both objections but deny its premise that the use-dependency test is the culprit. On the contrary, the Court's parade of horribles establishes the test's indispensability as a principled means of averting these results. The question the Court failed to ask in its only foray into what is, in fact, due process-takings reasoning is *why* our sense of justice would be shocked if government were to claim that, without compensation, it may requisition apartments at will, or, more generally, engage in boundless modification of property rights. Implicit in the Court's selection of hypotheticals is the sense, which I share, that, if it indiscriminately approved such claims, government could single out property owners for losses that they should not be required to bear.

The singling out objection is forceful, however, because the property in question may not be devoted to uses that would justify an imposition of the type hypothesized, *not* because that imposition takes the form of a permanent physical occupation. The truly difficult issue posed by the section 828 intrusion is whether the landowner's devotion of her property to rental uses (and the concomitant relationships among herself as landlord, her tenants, and the cable television company) affords a fair basis for singling out Mrs. Loretto (and other similarly situated landowners) to bear the intrusion on an uncompensated basis.[193] The Court's failure to appreciate the centrality of the

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[191] Id. at 3178 n.17.

[192] Id. at 3178 (citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980)); see note 210 infra.

[193] Under the decisional model this issue would be addressed in the due process-takings inquiry. See text accompanying notes 208-20 infra. The issue of the relative intrusiveness of the § 828 imposition would arise under the model's pure takings inquiry. See text accompanying notes 221-27 infra. As between the two inquiries, the view offered presently is that the due process-

use-dependency inquiry to this issue,[194] or expressly to engage the fairness-in-principle issue that it so starkly poses, is as distressing as the Court's related failure to credit fairness as the overriding concern of the takings clause.

4. Property as Dominion

In my judgment these omissions can best be explained by the Burger Court's apparent tendency to elevate property's dominion interest to a status coequal with, or even superior to, that of conventional civil liberties interests. That section 828's inroads on landlords' dominion interest worried the Court more than the statute's restrictions on their economic interest is undeniable. As already noted,[195] the Court stressed section 828's exclusion-denying consequences over those relating to limitations on use and disposition. A similar emphasis is apparent in the Court's attitude toward the statute's exclusion-denying subsections as contrasted with its rate-regulation subsections[196] and, relatedly, in the Court's stringent posture toward measures authorizing the presence of "strangers" on one's land as contrasted with its decidedly more tolerant attitude toward measures allocating economic gains and losses in pursuit of valid police power goals.[197] Fi-

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takings inquiry is clearly more problematic than the pure takings inquiry. See text accompanying notes 208-27 infra.

[194] The Court's consideration of Teleprompter's use-dependency contention, which the Court referred to as the "broad 'use-dependency' argument," 102 S. Ct. at 3178 n.17, is limited to a single footnote and its accompanying paragraph in text, id. at 3178 & n.17.

[195] See text accompanying notes 161-64 supra. In stressing the dominion interest's primacy in *Loretto*, I do not mean to suggest that the Court denied that § 828 also intruded upon the landlord's economic interest. To the contrary, the Court explicitly cited as one basis for its decision the "historically-rooted expectation of compensation," 102 S. Ct. at 3179, and commented as well that "the right to use and obtain profit from property . . . is clearly relevant," albeit not "independently sufficient to establish a taking," id. at 3176. Nor did it ignore that the landlord's motivation in bringing suit was to vindicate her right to charge Teleprompter an entry fee for the cable-occupied space atop her roof. Id. at 3170, 3177 n.15 (landlord's testimony that she would be able to obtain higher selling price for building without the installation); id. at 3179 (pre-1973 fee not necessarily a proper measure of the value of the property taken).

[196] See 102 S. Ct. at 3169-70. It is noteworthy that nowhere in its opinion does the Court object to the rent control aspect of § 828, i.e., the statute's prohibition against a landlord charging its tenants for access to cable television.

[197] Illustrative is the Court's unreceptiveness to the claim that, as drafted, § 828 was less objectionable than if it had required landlords *at their own expense* to provide cable television hook-ups for their tenants. See Brief for Respondents at 20, *Loretto*, 102 S. Ct. 3164 (1982). In the Court's judgment, this alternative would have presented a "different question . . . since the landlord would own the installation. Ownership would give the landlord the rights to the placement, manner, use, and possibly the disposition of the installation." 102 S. Ct. at 3179 n.19. Conceding that the landlord would be worse off economically under this alternative, the Court confirmed its greater solicitude for the dominion than for the economic interest by

nally, there is the Court's pronounced displeasure with the entitlement section 828 granted to strangers to place their property (the cable equipment) indefinitely on the property (the cable-occupied space) of unconsenting landlords.[198]

Loretto's omissions and excesses also seem to be the product of the psychological attraction exerted by tangible property, a factor which has not gone unnoticed in the takings field. To Justice Holmes' earlier-quoted observation that the visibility of "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,"[199] might be added Professor Michelman's more recent counsel that the "psychological shock, the emotional protest, the symbolic threat to all property and security, may be expected to reach their highest pitch" in the face of the "stark spectacle of an alien, uninvited presence in one's territory, especially government."[200]

Loretto renders the Holmes-Michelman counsel apocryphal. *Loretto*'s phrase "permanent physical occupation," its absolutist per se reasoning and indiscriminate bread box rule, its identification of the property burdened by section 828 with the property taken by it, its anachronistic use of once vital but now tottering distinctions, its unwillingness to entertain seriously Teleprompter's use-dependency argument, and, most shocking of all, its omission of a fairness analysis are only some of the manifestations of tangible property's mesmerizing powers.

In the Court's view there were only two alternatives for resolving *Loretto*: the narrow per se rule and the multifactor balancing test. Because the Court conceived that section 828 infringed principally upon landlords' dominion interest, its choice of the rule was inevitable: the multifactor balancing test is ill-attuned to dominion-related values.[201] At the level of principle at least, *Loretto* was not a simple case. The Court's response was dictated in part by the doctrinal poverty that presented it with a Hobson's Choice between standards that either overshot (per se rule) or undershot (multifactor balancing test) the mark. Within limits, moreover, the psychological attraction of tangible property should not be ignored in takings determina-

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asserting that "[t]his Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." Id. at 3178.

[198] 102 S. Ct. at 3178-79 & n.19.

[199] Block v. Hirsh, 256 U.S. 135, 155 (1921); see text accompanying note 90 supra.

[200] Michelman, supra note 3, at 1228.

[201] See text accompanying notes 42-53 supra.

tions.[202] But the Court's takings jurisprudence deserves better, and the Court has demonstrated that it can do better. The proposed decisional model derives largely from the Court's better-reasoned takings opinions, as this Article's footnotes testify. In addition, the Court has largely avoided overreacting to reasonable legislative limitations upon tangible property,[203] thereby remaining faithful to Justice Holmes' corrective admonition that such property, no less than intangible property, is not "exempt from the legislative modifications required from time to time in civilized life."[204]

B. Loretto*: Alternative Analysis Under the Decisional Model*

This section explores the territory between the per se rule and the multifactor balancing test by examining how *Loretto*'s taking challenge would be evaluated under the decisional model. Its purposes are both negative and affirmative. Negatively, it undertakes to correct the Court's misconceptions of the model's use-dependency component as condoning government's uncompensated seizure of private office space[205] or, more lurid still, government's boundless reconfiguration of property rights.[206] Affirmatively, it seeks to further illuminate the model's elements in a context in which the model's virtues and drawbacks readily lend themselves to comparison with the per se rule and the multifactor balancing test.

1. Taking Presumption

Analysis under the model would begin with the premise that the principal goal of the takings clause is to insure that costs associated with public projects that redistribute property rights not be unfairly imposed on a few for the benefit of the many, absent equalization of the position of the few through compensation. A presumption would operate that compensation is due when, from the standpoint of real (or personal) property law and ordinary language, property is taken. That presumption would be triggered by section 828, under which affirmative easements ("property") are transferred ("taken") to cable

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[202] While generally critical of the physical invasion "test" for its failure to distinguish between severe and trifling encroachments on property's economic interest, Professor Michelman suggests that utilitarians might approve it because it prevents "special risks to the sense of security [they wish] to inculcate . . . ." Michelman, supra note 3, at 1185, 1229.

[203] See, e.g., cases cited in notes 127-29 supra.

[204] Block v. Hirsh, 256 U.S. 135, 155 (1921).

[205] See text accompanying note 191 supra.

[206] See id.

companies and tenants at the expense of landlords. Whether government can overcome this presumption depends upon the answers to three questions: Is the redistribution fair in principle? If so, is the required yielding of the landlords' property rights greater than necessary to achieve the purposes of section 828? How forceful must government's showing be on both counts? These inquiries correspond to those conducted, respectively, under the model's due process-takings, pure takings, and burden of proof analyses.[207]

2. Due Process-Takings Analysis

The due process-takings inquiry would identify section 828's welfare goals; its impact on landlords' economic and dominion interests, and the values those interests protect; the type and use of the property burdened, and the legal relationships among the classes—landlords, tenants, and cable companies—having an interest in that property; and the character of the property interest taken. As discussed below, these elements also enter into the determination of the government's burden of proof.

The purpose of this abbreviated discussion is to contrast analysis under the decisional model with analysis under the Court's per se rule, not to draft a revised opinion for *Loretto*. Thus the way an inquiry under the decisional model would have worked in *Loretto* will not be addressed in detail here. Nonetheless, it seems appropriate to observe that these elements present a very different picture of *Loretto*'s indemnity and welfare value clash than that portrayed by the Court and to consider how these differences might affect an evaluation of section 828 under the decisional model.

a. Welfare Values. In the Court's view, *Loretto* was a simple two-class affair which pitted the right of landlords to exclude (conceived of largely in terms of the dominion interest) against the right of "strangers," the cable companies, to enter and place their "property" for profit upon landlords' "property."[208] The due process-takings inquiry would suggest instead that section 828 benefited two other classes—tenants and cable service subscribers generally[209]—and that the New York legislature intentionally subordinated the interests of cable companies to those of tenants and cable subscribers. The statute regulates landlord-tenant relations by preventing landlords from ob-

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[207] See text accompanying notes 91-140 supra.

[208] See text accompanying notes 195-204 supra.

[209] See note 141 supra (recounting legislative history of § 828).

structing tenants' receipt of cable television and thereby facilitates the development of a medium which promises important communications and education benefits to tenants and to other cable subscribers statewide.[210] While obviously essential to this scheme, the access rights that section 828 grants to cable companies are but a means to these ends, not ends in themselves.

Moreover, contrary to the Court's portrayal, the class of "property" burdened is apartment buildings, not cable-occupied space.[211] This class of property is unique in two ways: the manner in which rights, including the right to exclude outsiders, are held in it, and the legal relationship between the owners and occupants of the building. As to the first, rights of exclusion are *already* divided between landlords and tenants. Tenants hold both exclusive possessory rights to their apartments (which generally make up most of the building's interior) and nonexclusive easements to many of the building's interior and exterior common spaces. Section 828 simply enlarged the nonexclusive easements of tenants to include cable-occupied space as an additional appurtenance to the leaseholds of the tenants.[212] To characterize the cable companies as "strangers" to the landlords' "property," therefore, is to misunderstand the three-cornered relationship among landlords, tenants, and cable companies envisaged by the legislature.

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[210] Id. Reinforcing this reading of the purposes and legislative history of § 828 is the explicit holding of Judge Meyer for the New York Court of Appeals:

> [T]he State may proscribe a trespass action by landlords generally against a cable TV company which places a cable and other fixtures on the roof of any landlord's building, in order to protect the right of tenants of rental property, who will ultimately have to pay any charge a landlord is permitted to collect from the cable TV company, to obtain cable TV service in their respective apartments. The bases upon which the Legislature may do so are its power to regulate landlord-tenant relationships and its power to encourage development of an educational medium.

Loretto, 53 N.Y.2d at 153, 423 N.E.2d at 335, 440 N.Y.S.2d at 858. The Supreme Court's invalidation of Judge Meyer's conclusion that § 828 was not enacted under the legislature's eminent domain power in no way impeaches the authoritativeness of his interpretation of the purposes of § 828.

[211] See *Loretto*, 102 S. Ct. at 3176-77; see also text accompanying notes 170-72 supra.

[212] For applications of the appurtenance doctrine in New York, see, e.g., Newport Assocs., Inc. v. Solow, 30 N.Y.2d 263, 266-68, 283 N.E.2d 600, 602, 332 N.Y.S.2d 617, 620-21 (1972) (long-term lessee holding neighboring property in fee entitled, under zoning ordinance, to exploit and thus to destroy air space rights of leased premises), cert. denied, 410 U.S. 931 (1973); Lyon v. Bethlehem Eng'g Corp., 253 N.Y. 111, 113-14, 170 N.E. 512, 513 (1930) (unless lease expressly provides otherwise, tenant acquires right to place advertising signs on roof and exterior walls of building as appurtenance to leasehold); Stahl & Jaeger v. Satenstein, 233 N.Y. 196, 197, 135 N.E. 242, 242 (1922) (Cardozo, J.) (lease of an entire floor carries with it the appurtenant right to exclude advertising signs from the exterior walls of that floor). See generally 1 M. Friedman, Friedman on Leases § 3.2 (1974); 1 J. Rasch, New York Landlord & Tenant Including Summary Proceedings §§ 138-142 (2d ed. 1971 & Supp. 1983).

Under the legislative scheme, cable companies were acting as tenants' business invitees;[213] their access rights to the cable-occupied space were derivative of and subordinate to the tenants' access to this same space.

b. Indemnity Values. Contrary to the Court's apparent assumption, a landowner's dominion interest is not monolithic but rests on a variety of values, from those touching on privacy, personality, and autonomy concerns[214] to those closely allied to economic interests in property.[215] Identifying the values protected by the dominion interest that a particular taking allegedly violates is crucial for the decisional model. Otherwise, the model cannot intelligibly establish how the dominion interest should be weighted in the indemnity-welfare balance. Nor could the model determine how heavy the government's burden of proof should be in attempting to overcome the triggered presumption of a taking.

For example, the dominion interest of a structure's owner might import the values suggested in William Pitt's declaration that

> [t]he poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake, the wind may

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[213] The entitlement of a tenant's business invitee to piggyback his access rights on those of the tenant is well-established in landlord-tenant law. See, e.g., Federal Waste Paper Corp. v. Garment Center Capital, Inc., 268 A.D. 230, 232-33, 51 N.Y.S.2d 26, 28 (1944) (waste paper collectors may use freight elevators to remove waste paper at tenants' request), aff'd mem., 294 N.Y. 714, 61 N.E.2d 451 (1945); Eagle Spring Water Co. v. Webb & Knapp, Inc., 236 N.Y.S.2d 266, 279-80 (Sup. Ct. 1962) (absent lease provisions to the contrary, landlord could not prohibit suppliers of bottled drinking water from entering building to supply tenants). See generally 1 J. Rasch, supra note 212, § 448; 49 Am. Jur. 2d Landlord & Tenant § 200 (1970). Concededly, cable companies differ from typical business invitees insofar as the appurtenance to which they have access rights and their status as invitees are initially founded in statute, not in a private ordering relationship between themselves and tenants over which landlords retain significant veto powers. But, in modern times, virtually all facets of the landlord-tenant relationship have been controlled by legislatures and courts with respect to both increasing tenants' entitlements vis-à-vis landlords and denying such veto power as landlords may have had at common law over these entitlements. See generally R. Schoshinsky, American Law of Landlord and Tenant (1980). If anything, therefore, the statutory basis of the business invitee argument advanced on behalf of Teleprompter in text strengthens that argument rather than weakens it.

[214] The notion of property as safeguarding a spectrum of values that are noneconomic has been increasingly recognized. In addition to commentary on the Burger Court's solicitude for the dominion or liberty interest in property, see authorities cited in notes 50-51 supra, thoughtful treatment of the topic from varying perspectives includes, e.g., Dunham, Property, City Planning, and Liberty, in Law and Land 28 (C. Haar ed. 1964); Radin, Property and Personhood, 34 Stan. L. Rev. 957 (1982); Reich, supra note 82; Rodgers, Bringing People Back: Toward a Comprehensive Theory of Taking in Natural Resources Law, 10 Ecol. L.Q. 205 (1982); Note, Public Use, Private Use, and Judicial Review in Eminent Domain, 58 N.Y.U. L. Rev. 409 (1983).

[215] Illustrative is a value presently termed the landlord's "management interest." See text accompanying note 217 infra.

> enter, the rain may enter—but the King of England cannot enter—
> all his force dares not cross the threshold of the ruined tenement.[216]

If so, then the decisional model would accord substantial weight to dominion interest and assign a correspondingly greater burden of proof to the government.

But the values comprehended by the dominion interest of Pitt's "poorest man" in his "ruined tenement" would seem to be worlds apart from those involved in the dominion interest of a Manhattan landlord, whose apartments are rented for profit to the general public and, when rented, are the subject of their tenants' exclusive possession. The precise property values affected by section 828, therefore, approach those on the economic interest side of the spectrum. In conventional landlord-tenant law, such values are grouped under the rubric of the landlord's "management interest": the right to be free of undue interference from tenants or invitees of tenants in conducting the commercial ventures to which her building is devoted.[217] Just as *Loretto* showed lesser solicitude for economic interests in property,[218] so the decisional model would assign such values a lesser weight and would ease the government's burden of proof.

Section 828 admittedly impinges on landlords' management interest by transforming cable-occupied space into a leasehold appurtenance and cable companies into business invitees. Furthermore, section 828 clearly redistributes property rights from landlords to tenants because prior to the statute's adoption landlords were able to license use of their property to cable companies at a significant profit. Under the model's use-dependency test, section 828's status would turn principally on the use of the landlords' "property" for rental purposes. The fairness of these consequences must thus be assessed in light of the legal relationship between landlords and tenants. In that regard, it must be noted that few relationships in this century have been subject to such extensive legal modifications and regulations as that between landlord and tenant.[219] How much that consideration and the policies upon which it is based should have influenced the *Loretto* Court is open to debate. Shockingly, the Court neglected to consider it at all, instead dismissing it with the *ipse dixit* that "government does not have unlimited power to redefine property rights."[220]

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[216] 15 Hansard, Parliamentary History of England (1753-1765) 1307 (1st ed. London 1813).

[217] See cases and authorities cited in note 213 supra.

[218] See text accompanying notes 195-204 supra.

[219] See generally R. Schoshinsky, supra note 213.

[220] 102 S. Ct. at 3178. As authority for this proposition, the *Loretto* Court cited Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) (asserting that "a state by *ipse*

3. *Pure Takings Analysis*

If section 828 were found to be fair in principle,[221] would the statute satisfy the model's pure takings analysis? The inquiry would ask how severely the statute encroaches upon landlords' property interest in view of the alternative means, if any, by which the purposes of the statute could have been effectuated. If, relative to those purposes, the encroachment were unduly onerous, section 828 would constitute a taking despite its fairness in principle; if the encroachment were not unduly onerous, there would be no taking.

The New York legislature's assessment of the relationship between the encroachment and its purposes is reflected in a study under-

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dixit may not transform private property into public property without compensation"), a case clearly inapposite to *Loretto*. The *Webb* Court explicitly acknowledged that the challenged measure—a statute crediting a county with the interest accruing on an interpleader fund deposited in its court registry, even though the county also deducted from the fund a separate charge for the services of the court clerk, id. at 164-65—failed to survive scrutiny under *classic due process reasoning*, let alone under takings reasoning. The *Webb* Court emphasized that "*[n]o police power justification* is offered for the deprivation," and that "[n]either the statute nor [the county] suggest [sic] *any reasonable basis* to sustain the taking of the interest earned by the interpleader fund." Id. at 163 (emphasis added).

More pertinent to *Loretto* is PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), which addressed the validity of an intrusion in the form of an affirmative easement in the challenger's shopping center. Writing for the *PruneYard* Court, Justice Rehnquist stressed that the fifth amendment gave the states broad latitude to "define 'property' in the first instance." Id. at 84. The concurring opinion of Justice Marshall, id. at 89, is difficult to square with the views he expressed as author of the majority opinion in *Loretto*. In *PruneYard*, Justice Marshall rejected the claimant's property rights-based argument, stating that his "approach would freeze the common law as it has been construed by the courts, perhaps at its 19th-century state of development." Id. at 93. Justice Marshall's concern is by no means novel, having been asserted by the Court, as he acknowledged in *PruneYard*, almost a century earlier in Munn v. Illinois, 94 U.S. 113 (1887):

> A person has no property, no vested interest, in any rule of the common law. . . . Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.

Id. at 134. The Court's assertion of the narrow per se rule in *Loretto*, therefore, clashes with its general willingness to accord the legislative branch substantial latitude to refashion property rights in response to social and technological change.

[221] Had the Court employed the decisional model rather than making a fetish out of "permanent physical occupations," it may well have found § 828 fair in principle. For example, the majority opinion states: "[O]ur holding . . . in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building." 102 S. Ct. at 3179. The opinion also stresses that "[s]tates 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." Id. at 3178.

taken on its behalf prior to the statute's adoption.[222] The study recommended that

> legislation should make clear that landlords have no standing to impede the delivery of CATV services to their tenants. Landlords may insist that the CATV operator (or tenant) bear the entire cost of the installation; that the installation conform to such reasonable requirements as the landlord may impose to protect the safety, operation or appearance of his building; and that the CATV operator (or tenant) agree to indemnify the landlord for any damage incurred by the installation. Beyond this, the landlord has no legitimate interest. The tenant, on the other hand, has as much interest in receiving CATV service as he has in receiving mail, telephone communications, or over-the-air television signals. And landlord impediments to the extension of CATV service is disadvantageous not only to the personal interests of tenants, but to the development of the CATV interest industry.[223]

Comparison of section 828 with the study's recommendations suggests that the study accurately represents the New York legislature's intent. But the legislature went beyond the study's recommendations. In addition to requiring that landlords be indemnified "for any damage caused by the [cable equipment's] installation, operation or removal,"[224] the legislature provided that landlords would be entitled to such payments from cable companies "in exchange for permitting cable television service on or within [their] property or premises" as the State Cable Commission "shall, by regulation, determine to be reasonable."[225]

On its face, section 828 would appear to be carefully tailored to afford maximum protection to landlords' property interest. And, given the Court's assessment of the encroachment-purposes relationship in opinions sustaining other kinds of physical invasions, section 828 would appear to be constitutional.[226] Nevertheless, the Court curtly dismissed section 828's system of safeguards, characterizing

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[222] See Jones Report, supra note 141, at 207.

[223] Id. at 206.

[224] N.Y. Exec. Law § 828(1)(a)(iii) (McKinney 1982).

[225] Id. § 828(1)(b).

[226] In PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), for example, the Court sustained a state's decision to favor political petitioners' access rights over a landowner's right to exclude. The Court was satisfied that the intrusion was not unduly onerous because "[t]he decision of the California Supreme Court makes it clear that the PruneYard may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions," id. at 83, and that the appellees "were orderly, and they limited their activity to the common areas of the shopping center," id. at 83-84.

them as "somewhat limited."[227] In my judgment, that response masks the Court's fundamental position that the taking presumption is irrebuttable in the case of permanent physical occupation, or, more accurately, that the takings clause states a rule in such instances, not a presumption.

4. Burden of Proof

As earlier discussion indicated, the decisional model provides for a graduated burden of proof, keyed to the welfare and indemnity interests implicated by the challenged intervention and the form that the intervention assumes.[228] Property interests divide between economic and dominion interests, and the dominion interest may be further subdivided as illustrated by my contrast between Pitt's "poor man" in his "ruined tenement" (personality, privacy, and autonomy values) and the Manhattan landlord (management values).[229]

As applied to section 828, these criteria point to rejection of both the per se rule's insuperable burden and the multifactor balancing test's presumption of validity in favor of an intermediate level of scrutiny similar to that employed in gender discrimination cases[230] and in controversies pitting first amendment values against zoning values.[231] The per se rule, by rendering the presumption of a taking irrebuttable, condemned out of hand a measure that advances powerful welfare values while imposing burdens that are no more onerous than those the Court has deemed fair in other takings contexts. Contrary to *Loretto*'s reasoning, moreover, these values are not exclusively, nor even primarily, associated with securing an entrepreneurial advantage for cable companies at the expense of landlords.[232] Rather, section 828's principal beneficiaries are tenants and cable subscribers statewide:[233] the welfare values served are regulation of

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[227] 102 S. Ct. at 3179 n.19.

[228] See text accompanying notes 132-40 supra.

[229] See text accompanying notes 214-18 supra.

[230] See, e.g., Craig v. Boren, 429 U.S. 190 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). See generally Karst, The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 53-55 (1977); Wilkinson, The Supreme Court, The Equal Protection Clause, and The Three Faces of Constitutional Equality, 61 Va. L. Rev. 945, 950-53 (1975).

[231] See Schad v. Mt. Ephraim, 452 U.S. 61, 68-71 (1981) (requiring a "narrowly drawn" regulation furthering a "sufficiently substantial governmental [interest]"); Costonis, supra note 73, at 447-58.

[232] See text accompanying notes 195-204 supra.

[233] See text accompanying notes 208-12 supra.

the landlord-tenant relationship (by removing landlord impediments to tenant cable television access) and, more broadly, the promotion of a novel educational-communications medium.[234] Finally, the dominion interest values affected by section 828—values associated with landlords' management interest and not with privacy and personality concerns—fell sufficiently close to the economic side of the property values spectrum to justify a lesser burden of proof.[235]

At the same time section 828 warrants a level of scrutiny more demanding than the multifactor balancing test affords. While the statute did not seriously infringe upon dominion interests, it did implicate the landlords' "psychological" interest in their tangible property. I have already referred to Holmes' and Michelman's delineation of this interest.[236] If we are to believe social scientists, the Holmes-Michelman observation confirms a perception of property that is widely and tenaciously held in our society and others.[237] Requiring government to make a more than minimally plausible case for the fairness of measures that interfere with this psychological interest is a proper judicial function, I believe, at least where the protection given to this interest is constitutionally based.

Conclusion

This Article has argued that the Court should abandon its current reliance on the per se rule for "permanent physical occupations" and the multifactor balancing test for all other types of encroachments, and should rely instead on a model similar to that used to evaluate infringements on expression and other civil liberties. The per se rule is indiscriminate. In treating all encroachments alike, it overreacts to tangible property's psychological attraction by invalidating even trivial threats to values that may relate tenuously to the core concerns of the dominion interest—privacy, personality, and autonomy. The multifactor balancing test, on the other hand, falls short of the promise represented by what Professor Michelman rightly describes as the "redeeming qualities" and "cores of valid insight" of the standards it comprehends.[238]

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[234] See note 210 supra.

[235] See text accompanying notes 214-18 supra.

[236] See text accompanying notes 199-200 supra.

[237] See generally R. Ardrey, The Territorial Imperative: A Personal Inquiry Into the Animal Origins of Property and Nations (1966) (synthesizing the results of research by psychologists, sociologists, anthropologists, and other social scientists that substantiate the linkage asserted by Holmes and Michelman between tangible property and the entitlement to exclusive possession).

[238] Michelman, supra note 3, at 184.

It seems naive to me, however, to criticize the test for failing to predict the outcome of particular controversies or, what might be the same thing, for leaving substantial play for judicial value judgments in determining these outcomes. These results are inevitable and, as argued above,[239] even healthy incidents to any system that, like ours, commits the management of the takings issue to judges. But litigants, professional observers, and society as a whole deserve assurance that whatever value judgments are ultimately necessary to transform a debate into a decision proceed from a coherent framework. This framework should identify and categorize the competing values; identify the preferred values to resolve the fairness in principle (due process-takings) and permissible severity (pure takings) inquiries; and, to the extent that ultimate value judgments are capable of defense on logical and policy grounds, set forth that defense. The integrity of individual takings decisions, in short, depends less on the actual outcomes as such than on the consistent, even-handed application of a coherent decisional approach over time. As presently constituted, the multifactor balancing test cannot provide this assurance.[240]

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[239] The entire decisional model assumes the importance of and necessity for judicial value choices. See text accompanying notes 81-140 supra.

[240] At base, the multifactor balancing test is no test at all but an amalgam of standards serving differing, often conflicting priorities. As described by Professor Michelman, these standards derive from a set of further "tests": (1) the physical invasion test, which in its earliest version maintained that a broad array of physical invasions created compensable takings and which remains highly important as a likely index to one kind of taking, Michelman, supra note 3, at 1184-90; (2) the diminution of value test, which measures the severity of a private owner's economic loss, id. at 1190-93; (3) the social gain/private loss test, which balances the public good promoted by a governmental regulation against the individual harm it causes, id. at 1193-96; (4) the private fault/public benefit test, which asks whether a regulation merely restrains harmful private conduct or expropriates private property for positive public enrichment, id. at 1196-1201; and (5) the enterprise/arbitration test, which contrasts noncompensable regulation of property by government as arbiter in conflicts over the constant redefinition of property rights with compensable takings of property by government as public entrepreneur and participant in commerce, id. at 1200-01. See the Court's subsequent explanation of these tests in Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978). There the Court identified the following factors as elements of a balancing test to determine whether a "taking" has occurred: (1) a physical invasion by government, id. at 124; (2) severe economic impact by governmental action on the value of the claimant's property, id. at 125; (3) the relation between the social value of a regulation and the private losses it imposes, id. at 125-26; and (4) the acquisition of resources for uniquely public functions, id. at 128.

The diminution in value standard, however, may function at cross purposes with the social good/private loss and private fault/public benefit standards because the latter two apparently would permit government to impose serious economic damage on property owners, despite the supposed prohibition of the former standard. Likewise, as *Loretto* pointedly illustrates, the physical invasion standard may be at odds with the diminution in value standard. Moreover, all of these tests may clash with the enterprise/arbitration standard which, in the view of its leading academic proponent, approves as noncompensable exercises of the police power both regulatory measures that strip land of its economic value, Sax, supra note 41, at 63, and physical intrusions,

Transition to the proposed decisional model will require changes of terminology and of substance in the Court's takings jurisprudence. Although the Court has already poured great quantities of the model's new wine into the vintage bottles of that jurisprudence, a variety of issues await original development or further clarification. The Court should examine, for example, the relationship between use-dependency considerations and what might be called the expectation factor, that is, the assumption that, independent of their use-dependent characteristics, particular classes of property will be liable to uncompensated intervention in the future because they have been subject to such intervention in the past. If presented as an original question, for example, it is dubious whether the compensation immunity government enjoys under the navigation servitude doctrine should be sustained insofar as that doctrine proceeds solely on the basis of burdened land's location-contingent rather than its use-dependent characteristics.[241] Should a takings jurisprudence relying on the proposed decisional model abruptly terminate, whittle away at, or grandfather in, that immunity?[242]

The model's burden of proof element should be aligned with its counterpart in civil liberties litigation generally. Due allowance must be made in that effort for the bifurcation between property's economic and dominion interest as well as for other considerations unique to takings litigation. Further refinement of the analysis of the dominion interest is needed, moreover, to avoid *Loretto*'s error of confusing the dominion interest's personal autonomy values with its entrepreneurial autonomy values.

Bifurcation of property's economic and dominion interests also necessitates reevaluation of the premise that (monetary) "compensation" will always be "just" for takings injuries. Precisely how does government compensate for the loss in personal autonomy suffered by Pitt's "poor man," or, for that matter, the loss of entrepreneurial autonomy suffered by Mrs. Loretto? The plaint of the first, as pre-

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id. at 67. Moreover, these difficulties do not disappear when these criteria are combined under the rubric "multifactor balancing test." Yet the Court took precisely that path in *Penn Central*, its most elaborate effort to date to explain the multifactor balancing test. Indeed, the Court cited both Michelman and Sax, see 438 U.S. at 128, without acknowledging the fundamental conflicts dividing these authors.

[241] See note 111 and text accompanying notes 110-13 supra.

[242] The abrupt termination option is advocated by Brady, supra note 111; the whittling away option is employed by Kaiser Aetna v. United States, 444 U.S. 164 (1979) (discussed in note 304 infra); and the grandfathering-in option is exemplified by United States v. Rands, 398 U.S. 121 (1967) (holding that value attributable to location of riparian land may be disregarded in fixing condemnation award).

sented by Pitt, and of the second, as characterized by the *Loretto* Court, is not that they can no longer charge the King or cable companies an entry fee. It is that these "intruders" have "physically invaded" the autonomous domains of their victims, inflicting an injury more akin to the forced quartering of troops than to deprivation of the opportunity to sell tickets to the domain within. Should the Court respond by borrowing the Calabresi-Melamed distinction between property and liability rules,[243] sanctioning the first injury by prohibiting the intervention *even if government justifies it as an eminent domain exercise*, while reserving for the second injury the lesser sanction of payment in the form of "just compensation"? Or is the dominion interest sufficiently protected if the Court threatens to force government to pursue the eminent domain route more frequently by intensifying judicial scrutiny of measures infringing on that interest?[244]

Finally, doctrinal elaboration of the use-dependency standard will remain a central concern of takings jurisprudence. But my expectation that a permanent or definitive formulation of the standard will be found is of a more modest and pluralistic order than that of commentators who suggest that the takings issue can be resolved by some "comprehensive view" or unifying substantive standard.[245] Con-

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[243] See Calabresi and Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1092 (1972) (suggesting that property rules apply when the holder of an entitlement must be paid in a voluntary transaction to transfer the entitlement, and that liability rules apply when someone may destroy the entitlement if he is willing to pay an objectively determined value for it).

[244] The effectiveness of this threat should not be underestimated. Consider, for example, the quandary presented for Teleprompter and cable television companies generally by the Court's determination that § 828 effected a taking. Machinery must now be developed and back-compensation payments provided for literally thousands of apartment building owners. The period covered by the payments will probably have to encompass at least that between enactment of § 828 in 1974 and the date of the Supreme Court's decision in *Loretto*. Cf. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting) (suggesting that the remedy for a measure effecting an uncompensated taking is compensation calculated on the premise that the measure took a temporary easement lasting from the date of its enactment to the date of its judicial invalidation). If the cable companies wish to continue these easements indefinitely, moreover, the courts must fix additional compensation. Some of the extraordinary complexities created by these requirements are detailed in the latest New York Court of Appeals opinion in the *Loretto* saga. See Loretto v. Teleprompter Manhattan CATV Corp., 58 N.Y.2d 143, 446 N.E.2d 428, 459 N.Y.S.2d 743 (1983).

[245] As defined by Professor Ackerman, see B. Ackerman, Private Property and the Constitution 11 (1977), the function of a "comprehensive view" is to "provide a set of standards by which policymakers may determine the proper content of legal rules and evaluate the performance of the legal system as a whole." Illustrative of the sweeping standards—which may or may not satisfy Professer Ackerman's criterion—that are found in the literature are those requiring compensation for all marketplace losses other than those resulting from public regulation of

trary to these commentators, I believe that each age must address the taking issue anew because perceptions of use-dependency, like those of the concept of property itself, are closely bound up with the age's overall political and social currents. Stasis cannot be anticipated—indeed, it would be stifling—if, as Professor Philbrick has advised, property has "varied infinitely in character and content from century to century and from place to place,"[246] and "[c]hanging culture causes

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"harmful" land uses, see Dunham, supra note 214; or for losses imposed when government acts in its "entrepreneurial" capacity, see Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971). My difficulties with such approaches can only be hinted at here. I am distressed, for example, that while these authors revile the Court for the imprecision and unpredictability of its takings jurisprudence, they advance prescriptions that promise no improvement at all. Illustrative is Professor Ackerman's use of Professor Michelman's utilitarian scheme involving the concepts of "efficiency gains," "demoralization costs," and "settlement costs," Michelman, supra note 3, at 1214-18, to which Professor Ackerman adds a further distinction between what he terms the "Appeal to General Uncertainty" and the "Appeal to Citizen Disaffection." B. Ackerman, supra, at 44-54. With these verbal tools, he undertakes to construct a series of decisional models that, he argues, might usefully be applied by the courts in takings controversies. See id. at 71-112. I am totally unpersuaded that concepts so abstract, ambiguous, and resistant to empirical testing as those Professor Ackerman espouses could significantly increase either the precision of the Court's present takings jurisprudence or its predictability of result. No more plausible to me is Professor Ackerman's optimism over the institutional capacity or disposition of judges to employ such models. Concerns similar to mine, I suspect, account for Professor Michelman's caveat at the outset of his essay that "[i]t is debatable whether what follows is an essay in constitutional law," Michelman, supra note 3, at 1166, and for his recommendation that the judiciary play a diminished role in the formulation and administration of compensation policy, id. at 1171. These concerns also figure prominently in reviews of Professor Ackerman's work by other thoughtful observers of the takings scene. See, e.g., Epstein, The Next Generation of Legal Scholarship (Book Review), 30 Stan. L. Rev. 635 (1978) (reviewing B. Ackerman, Private Property and the Constitution (1977)); Krier & Schwartz, Talking about Takings (Book Review), 87 Yale L.J. 1295 (1978) (same).

I also admit to the suspicion that, however characterized, these views are byproducts of the authors' particular substantive values—environmental protection and the virtues of the marketplace being among today's favorites. Professor Sax's ruminations about the takings clause, for example, seem largely to track his notion that "[t]he abandon with which private resource users have been permitted to degrade our natural resources may be attributable in large measure to our limited conception of property rights," Sax, supra, at 150, just as Professor Dunham's or, more shrilly, Professor Siegan's views of the clause reduce essentially to efforts to constitutionalize their commitment to the largely unfettered workings of the marketplace. See Dunham, supra note 214, at 43; B. Siegan, Land Use Without Zoning *passim* (1972).

I am also disconcerted by the tendency of these commentators to approach takings jurisprudence with expectations of elegance, comprehensiveness, and clarity that are rarely encountered in judicial opinions and scholarly comment evaluating other constitutional interests, particularly those protected through open-ended provisions such as the due process and equal protection clauses. Why these expectations are appropriate for an institution as protean as property, see text accompanying notes 246-47 infra, but not for these other interests, is never explained.

[246] Philbrick, Changing Conceptions of Property in Law, 86 U. Pa. L. Rev. 691, 691 (1938). In addition to the many examples furnished by Professor Philbrick, see Powell, The Relationship Between Property Rights and Civil Rights, 15 Hastings L.J. 135, 140-48 (1963) (cataloguing the range of fundamental modifications recorded in Anglo-American law since the twelfth century

the law to speak with new imperatives, invigorates some concepts, devitalizes and rings to obsolescence others."[247]

Because these admonitions are demonstrably sound, I have been careful throughout this Article to distinguish the instrumental question "How should courts manage litigation under the takings clause?" from the ultimate question "What is property?" To run the two questions together by conditioning a response to the first upon the definitive resolution of the second assures the unproductive ambivalence and conflict that pervade current takings commentary.[248] The second question appeared when human governance commenced. It will disappear, undoubtedly still unresolved, only when human governance ends.

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affecting the proprietor's rights to dispose of and use property—the two "powers" of which property "mainly" "consists," according to Professor Powell).

[247] Philbrick, supra note 246, at 696.

[248] Professor Michelman's ambivalence about the relation between the two questions, for example, mars his classic defense of this Article's central thesis, that fairness is the takings clause's overriding goal. See Michelman, supra note 3. His recognition of the questions' separability would seem to appear in the essay's introductory caveat that "[i]t is debatable whether what follows is an essay in constitutional law," id. at 1166, since "what follows" is largely an exploration of the ultimate question of the content of the property concept itself through the combined perspectives of political science, economics, ethics, and other extralegal disciplines, see id. at 1203. Throughout the essay, however, Michelman criticizes the Court's takings opinions and the standards employed in them for failing to provide a satisfactory response to this ultimate question. See id. at 1183-1201. In running the two questions together, his criticism places beyond reach a coherent definition of the Court's role in managing takings litigation, thereby encouraging an unduly pessimistic assessment of how the Court actually has been fulfilling that role. His confusion of the two questions also creates a disappointing response to the judicial management question: namely, that whatever that management role may be, it should be deemphasized in favor of an enlarged legislative role. Id. at 1245-57. I certainly agree that legislatures should assume greater responsibility in this area and have written extensively over the last decade on the topic of incentive zoning to persuade them to do so. See, e.g., J. Costonis, Space Adrift: Landmark Preservation and the Marketplace (1974) (discussing the transfer of development rights, a legislatively-implemented device for compensating landowners for losses resulting from land use restrictions); Costonis, supra note 68 (same). But it is unavoidable that under state and federal constitutions, takings cases are brought before and must be decided by judges.

Michelman's ambivalence does not appear in the work of Ackerman and other adherents to the comprehensive view or unifying substantive standard approach. See note 245 supra. For them, the Court's role as manager of the takings clause should be measured by the Court's success in stating and, in particular controversies, implementing, whatever "comprehensive" or substantive view they hold of property. Some of my concerns with this premise are expressed in note 245 supra. A precisely opposite approach has been adopted by commentators who despair of the feasibility of linking the judicial role to such ultimate considerations. See Humbach, Book Review, 39 U. Pitt. L. Rev. 793 (reviewing B. Ackerman, Private Property and the Constitution (1977)); Stoebuck, Police Power, supra note 1, at 1073, 1075-79. These commentators take refuge in the rule-oriented construction of the takings clause and advocate a positivistic role for the Court limited to a closely textured interpretation of the language of the takings clause, in particular its terms "property" and "taking." See note 31 supra.

APPENDIX

"Permanent Physical Occupations" Versus "Temporary Invasions": A Distinction Without a Difference

Elsewhere in this Article I contend that the use of the rule-oriented distinctions in *Loretto v. Teleprompter Manhattan CATV Corp.*[249] is so anachronistic that the opinion can only be characterized as aberrational. This Appendix is designed to substantiate my contention through a three-phase discussion. First, it sets the analytical stage with a discussion of a remarkable nineteenth century New Hampshire Supreme Court opinion, *Eaton v. B. C. & M. R. R.*,[250] which portrays the distinctions in relation to, and often in open disagreement with, the prevailing views of its time. The Appendix then chronicles the Supreme Court's development of the distinctions in the century following *Eaton*, concluding that, in general, the Court has come to share *Eaton*'s skepticism of the distinctions' supposed conclusive force in the takings field, and that in certain key respects it has even magnified that skepticism. My claim that *Loretto* is aberrational is addressed directly in the concluding section of this Appendix by exposing the gap that divides these intervening trends from the Court's retrograde use of the distinctions in *Loretto*.

A. The Distinctions in Eaton

As in so many cases of the period, the physical invasion in *Eaton* was of the location-contingent, not the use-dependent, variety. It featured damages to a farmer's land located along the path of a railroad authorized by statute to construct its tracks on determined

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[249] 102 S. Ct. 3164 (1982); see text accompanying notes 141-204 supra.

[250] 51 N.H. 504 (1872). The court was interpreting the state constitution, which did not have a takings clause identical to that of the federal Constitution, but the difference is immaterial for our purposes: "[a]lthough the constitution of this State does not contain, in any one clause, an express provision requiring compensation to be made when private property is taken for public uses, yet it has been construed by the courts, in view of the spirit and tenor of the whole instrument, as prohibiting such taking without compensation. . . ." Id. at 510-11.

The opinion is remarkable not only as a period piece but, as detailed in the text following note 282 infra, as a harbinger of the Supreme Court's eventual treatment of the distinctions. Written by Justice Jeremiah Smith, later a member of the Harvard Law School faculty, the opinion has been widely noted and praised. Professor Cormack, for example, described the lengthy opinion as being "as able as it is long, and, . . . perhaps the best known and most influential of those written by [Justice Smith]," Cormack, supra note 56, at 238; Professor Beale lauded it as a "masterly essay on the nature of property . . . and the meaning of a 'taking' by eminent domain . . . [which] established the law as it is generally held to-day upon an impregnable basis." Beale, Jeremiah Smith, 35 Harv. L. Rev. 1, 2 (1921).

rights of way. While building its tracks, the railroad removed a natural flood barrier from a parcel adjacent to the farm, causing intermittent flooding of the farm. The railroad's defense against the farmer's taking claim evidently was premised on the four distinctions that, consistent with the development ethic of the times, were widely used to bar or impede recovery against location-contingent interventions.

The railroad argued that "property" is only corporeal, a thing that must be "physically invaded" before it is taken.[251] Since the excavation that caused the flooding was done on an adjacent parcel, the farm was not directly invaded.[252] The intermittent floods, moreover, were "temporary," not "permanent" invasions, and hence could not constitute a taking because the farmer was not "permanently ousted" from his farm.[253] In addition, his conceded losses were not compensable as takings, but were merely the "consequential damage" of a statutorily authorized project conducted in a non-negligent manner.[254] Finally, while the railroad "destroyed" the farmer's use of the flooded portion of the farm, it neither acquired formal fee title to it, nor "appropriated" it to its own use since its purpose in breaching the barrier was to construct its tracks, not to conduct " 'the [flood] water in a given course' on to the plaintiff's land."[255]

In his opinion for the court, Justice Smith employed two standards to evaluate the preceding distinctions. The first standard was the familiar just share principle which, in his formulation, provides

> "[p]roperty taken for public use from one or more individuals only, by right of eminent domain, is taken not as his or their share of an apportioned public burthen, but as something distinct from and more than his or their share of the public burthens, and therefore the justice and necessity of a constitutional provision for compensation."[256]

Matched to the just share principle was Justice Smith's second decisional criterion: "The real substance of the injury, not its technical name in legal phraseology, is the criterion whereby to determine whether it falls within the constitutional restriction."[257]

In dismissing the railroad's argument that compensation is due only for direct intrusions on corporeal resources, Justice Smith re-

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[251] *Eaton*, 51 N.H. at 511-12.

[252] Id. at 513-14.

[253] Id. at 511, 525.

[254] Id. at 510, 513, 519-21.

[255] Id. at 512, 513.

[256] Id. at 519 (quoting Booth v. Town of Woodbury, 32 Conn. 118, 130 (1864)).

[257] Id. at 526.

jected the view that property merits greater protection when conceived of as a physical resource rather than as a relationship between an "owner" and a resource, physical or otherwise. "[A]lthough in common parlance [the term is] frequently applied to a tract of land . . . ," he reasoned, "in its legal signification [it] 'means only the rights of the owner in relation to it,' " and, in particular, "the right . . . to possess, use, enjoy, and dispose of [land]."[258]

The implications of Smith's proposition are that the resource underlying a property relationship may be corporeal (land) or noncorporeal (a right to use a parcel owned by another) and that public acts may effect a taking of either type of property relationship. Government's flooding of A's land may take a fee or less-than-fee interest in it; its flooding of the adjacent parcel may destroy the benefit of an easement held by A in that parcel.[259] A precise examination of the act in question is therefore necessary to determine both the quantum of the property interest taken by the act and the parcel or parcels to which the property interest pertains. Although this analysis may seem obvious to modern eyes, it was not when *Eaton* was decided. Courts then often used the terms "physical" and "invasion" to deny compensation in two circumstances, both present in *Eaton*: first, when the challenged act occurred on a parcel other than A's parcel (the natural barrier cut by the railroad was located on a parcel adjacent to the plaintiff's farm), and second, when the property interest taken fell short of a full fee interest (intermittent flooding of a portion of the plaintiff's farm was the equivalent of the taking of an affirmative easement, not of a fee).[260]

Justice Smith also questioned the uncritical manner in which contemporary courts employed the direct/consequential damage distinction. Imprecision in the use of the phrase " 'consequential damage,' " he observed, had " 'introduce[d] an equivocation which is fatal to any hope of a clear settlement.' "[261] Its use to deny compensation is appropriate, he stressed, only when it connotes losses suffered as a result of governmental acts that, had they been the acts of a private party, would not have given rise to a cause of action between those private parties.[262] But if these acts would have done so, "there seems no good reason for establishing an arbitrary rule that such damage can

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[258] Id. at 511 (quoting Wynehamer v. People, 13 N.Y. 378, 433 (1856)).
[259] Id. at 514-15.
[260] Id. at 512-15.
[261] Id. at 519.
[262] Id. at 520.

in no event amount to a 'taking of property.' "[263] He curtly rejected the development-ethic based argument that "the building of a railroad is a work of great public convenience and benefit," responding that "[i]f the work is one of great public benefit, 'the public can afford to pay for it.' "[264]

Justice Smith's discussion of the direct/consequential damage distinction also highlights three additional considerations which were often overlooked in the last century. First, the concept was used principally to deny compensation in situations in which the public acts occurred not on the claimant's land, but on an adjoining parcel, and either denied the claimant the benefit of an easement he held on that parcel, such as an easement of access to an adjoining street,[265] or transferred to government the benefit of an affirmative easement on the claimant's own land, such as the right to divert water over the plaintiff's land in *Eaton*.[266] Second, denying compensation in these instances is tantamount to holding either that an easement is not "property" for constitutional purposes,[267] or that government's obligations to landowners are measured by a different and lesser standard than are those of private parties,[268] or both. The former holding flows from the conception of property as a physical thing; the latter, from the reluctance of nineteenth century judges to hinder development projects by holding government or its delegates liable for private losses resulting from these projects. Third, many courts that viewed the concepts of "consequential damage" and "compensable loss" as mutually exclusive did so only because they "blindly follow[ed]"[269] the English practice of the time, which was to deny compensation if the public project causing the damage was authorized by statute and conducted in a nonnegligent manner. This view was "error," Justice Smith advised, because the provision of compensation is a matter of constitutional right in the United States, not a function of legislative discretion as in England.[270]

His criticism of the "destruction/appropriation" distinction manifests similar impatience with the takings jurisprudence of his day. It

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[263] Id.

[264] Id. at 518 (quoting Hinchman v. Paterson Horse R.R., 17 N.J. Eq. (2 C.E. Green) 75, 80 (1864)).

[265] See Northern Transp. Co. v. City of Chicago, 99 U.S. 635 (1878); note 309 infra.

[266] *Eaton*, 51 N.H. at 529-31.

[267] See id. at 514-15.

[268] See id. at 527.

[269] Id. at 516.

[270] Id. at 517.

too had been used to limit compensation practice by requiring injured landowners to demonstrate not only that they had lost something ("destruction") as a result of a governmental act but also that the government had gained something ("appropriation"). Applied most strictly, "appropriation" meant that government either acquired the formal fee title to private land, or its acts effected an " 'exclusive appropriation,' . . . 'a complete ouster,' [or] an absolute or total conversion of property."[271] A somewhat less strict but still demanding alternative required the property interest lost by the owner to be essentially the same as that which the government intended to gain.[272]

Justice Smith rejected the first alternative because it effectively rewrote the takings clause to read: "No person shall be divested of the formal title to property without compensation, but he may, without compensation, be deprived of all that makes the title valuable."[273] He rejected the second alternative as well. The railroad company had invoked it in *Eaton*, arguing that it had not taken a flowage easement on the plaintiff's farm because its purpose in removing the flood barrier was to improve the right of way for its tracks, not to conduct the flood " 'water in a given course' on to the plaintiff's land."[274] Whatever the company's intent, Justice Smith replied, its act had "ha[d] that result,"[275] and the company sought "[i]n effect . . . [to] assert a right to discharge water on the plaintiff's land."[276] That right is an "easement,"[277] he concluded, and its taking must be compensated.

The final distinction addressed in *Eaton* was that between "temporary" and "permanent" invasions. Smith rejected the railroad's argument that intermittent acts of flooding did not constitute a taking because they were "temporary" for two reasons. First, it confused the duration of the *easement*, as an interest in real property, with the duration of the *physical acts* privileged under the easement,[278] wrongly assuming that intermittent interventions could not give rise to easements in real property. That interventions occur episodically, he reasoned, is not determinative of whether an easement has been taken; that question depends instead upon whether these episodic

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[271] Id. at 511.
[272] See text accompanying note 255 supra.
[273] 51 N.H. at 511.
[274] Id. at 513.
[275] Id.
[276] Id. at 514.
[277] Id.
[278] Id.

interventions are likely to recur indefinitely. Since the intermittent flooding of the plaintiff's farm was likely to recur indefinitely, the servitude to which it gave rise was no less "permanent" than if the farm had remained under four feet of water after the initial flood. Justice Smith concluded that "[a] right of 'occasional flooding' is just as much an easement as a right of 'permanent submerging'; it belongs to the class of easements which 'are by their nature intermittent—that is, usable or used only at times.' "[279]

Justice Smith observed that the railroad also incorrectly assumed that while continuing—i.e., "permanent"—interventions could qualify as invasions of an owner's *real property* interest, lesser—i.e., "temporary"—interventions could not.[280] He conceded that interventions that were permanent in this sense could take interests in real property. But he denied that temporary interventions could never do so. They might, he reasoned, provided that they were more substantial than single-instance trespasses on land, such as those necessitated by a government inspection or boundary survey. Such slight, nonrecurring entries, he reasoned, are "technical trespass[es]," imposing "merely nominal" damages and taking no interest in real property at all.[281] But recurring trespasses could take a real property interest in the form of a "permanent servitude"[282] if their character warranted that conclusion.

B. Eaton*'s Distinctions in the Supreme Court*

Eaton presaged the dominant trends in the Supreme Court's treatment of the rule-oriented distinctions. The Court now recognizes that "property" consists of an owner's relationship to a resource, physical or otherwise, and that "property" for constitutional purposes is essentially the same as "property" under common and statutory law. Likewise, it has come to acknowledge that property may be "taken" whether it is appropriated or "merely" destroyed.

These trends have not reached stasis by any means. On the contrary, the Court continues to debate them to the present day. But such tugging and pulling is a predictable accompaniment of the Court's ongoing reshaping of the takings mosaic discussed in the introduction to this Article. I would venture to suggest that debate ostensibly addressed to an analysis of the distinctions alone is better inter-

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[279] Id. (quoting J.L. Goddard, The Law of Easements 125 (1880)).
[280] Id. at 514-15.
[281] Id. at 525.
[282] Id.

preted as debate over what should be the ultimate design of that mosaic.

1. The Property and Consequential Damage Distinctions

Eaton's conception of property as relation appears in a variety of the Court's opinions of which *United States v. General Motors Corp.*[283] is representative. *General Motors* clarifies that a relationship linking a holder to nonphysical resources is no less "property" than one linking the holder to physical resources:[284]

> [i]t is conceivable that [the term "property" in the takings clause], was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase [in the Court's interpretation of the takings clause] has been the latter. . . . The constitutional provision is addressed *to every sort of interest the citizen may possess.*[285]

In addition to adopting this more sophisticated concept of property, the Court has required compensation for a variety of losses that would not have been compensable under a strict nineteenth century consequential damage standard. These losses may result from measures affecting the holder's enjoyment of his fee, benefit of his easement appurtenant in a parcel adjoining his fee-held land, and benefit of his

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[283] 323 U.S. 373 (1945) (governmental taking of a leasehold is compensable under fifth amendment takings clause).

[284] The extent of the shift from property as thing to property as relation is further evidenced by the Court's recognition that not only can nonphysical resources be subjects of a taking, but that government interference with relations to physical resources will not necessarily be a taking. For example, in Block v. Hirsh, 256 U.S. 135 (1921), the Court cautioned that "[t]he fact that tangible property [i.e., a property relationship founded on a physical resource] is also visible" does not mean that it is "exempt from the legislative modifications required from time to time in civilized life." Id. at 155.

[285] 323 U.S. at 377-78 (emphasis added) (dictum because a leasehold estate can be possessed by the lessee, and hence is "corporeal" or "physical"). Consistent with this dictum in *General Motors*, the Court has found fifth amendment "property" in a holder's relationship to such nonphysical resources as easements, see, e.g., Panhandle E. Pipe Line Co. v. State Highway Comm'n, 294 U.S. 613 (1935) (rights of way for pipe and telephone lines); United States v. Cress, 243 U.S. 316 (1917) (right to unobstructed water flow); United States v. Welch, 217 U.S. 333 (1910) (right of way across land of others), franchises associated with realty, see Monongahela Navgn. Co. v. United States, 148 U.S. 312 (1893) (franchise to exact tolls), and mechanics liens associated with personalty, see Armstrong v. United States, 364 U.S. 40 (1960) (construction liens on boats).

easement in gross in another's parcel. Under the first category, the Court has refused to apply the consequential damage standard to affirmative encroachments that effectively destroy the holder's enjoyment of his fee[286] or that transfer an affirmative easement in that fee to government.[287] The Court also appears to have recognized a fee owner's right to be free of nuisance-type activities as "property" in a decision requiring compensation for "special and peculiar" damages suffered by a landowner as a result of the operation of a railroad nearby.[288] Finally, the Court has suggested that it may be ready to view even publicly-imposed negative easements as takings if the restrictions essentially destroy the economic value of the holder's fee.[289] Decisions within the second category are exemplified by those holding government's destruction of a fee owner's right of way on adjoining land compensable;[290] those within the third, by an opinion requiring compensation for interference with a utility company's pipeline right of way.[291]

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[286] See United States v. Lynah, 188 U.S. 445 (1903) (flooding caused by governmentally authorized navigation project totally destroyed economic value of private land); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871) (same).

[287] See, e.g., Griggs v. Allegheny County, 369 U.S. 84 (1962) (overflight easement); United States v. Causby, 328 U.S. 256 (1946) (same); United States v. Cress, 243 U.S. 316, 329 (1917) (flowage easement).

[288] Richards v. Washington Terminal Co., 233 U.S. 546, 553 (1914). One commentator has labeled such takings "condemnation by nuisance." See Stoebuck, Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect, 71 Dick. L. Rev. 207, 208-09 (1967).

[289] See San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 633 (1981) (while the Court held that it lacked jurisdiction over the case because the lower courts had not entered final judgments on remedies, it stated that "the federal constitutional aspects of [the entitlement to a monetary remedy for loss of value because of an open-zoning regulation] are not to be cast aside lightly. . . ."); Agins v. Tiburon, 447 U.S. 255, 260 (1980) (while the enactment of a zoning amendment reducing the permissible density of an affected parcel is not a taking, the application of such a law which "denies an owner economically viable use of his land" may be); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 & n.36 (1978) (landmarks law restricting modification of building not a taking provided law permits a "reasonable beneficial use of the landmark site"). Important qualifications respecting this broadly stated view are set forth in text accompanying notes 125-26 and note 126 supra.

[290] United States v. Cress, 243 U.S. 316, 329 (1917) (government flooding destroyed adjacent landowner's affirmative easement over flooded parcel); United States v. Welch, 217 U.S. 333, 339 (1910) (same).

[291] Panhandle E. Pipe Line Co. v. State Highway Comm'n, 294 U.S. 613 (1935) (government ordered pipeline company to modify placement of its pipes to conform to plans for public highway project).

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), the most controversial of the Court's takings decisions, was a physical invasion rather than a regulatory takings case if viewed as a deprivation of the benefit of an easement in gross in another's property. The Court there held that a mining ban adopted to prevent the collapse of superjacent houses was a taking where prior to the enactment of the statute, a mining company had reserved the right to mine coal under the

Decisions in these three categories also validate *Eaton*'s insight that the "real substance of the injury" is the proper criterion for determining whether a physical invasion is compensable. The Court's flooding and overflight cases, for example, scrutinize the actual impacts of the challenged public acts to determine if they are substantial enough to constitute a taking at all, and, if so, to establish the quantum of the interest taken. When takings of either fee or less-than-fee interests have been found, the injury has been deemed substantial indeed. In *Pumpelly v. Green Bay Co.*[292] and *United States v.*

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plaintiff's property or under public property. Some commentators treat the case as a regulatory taking by attaching the "regulatory" label to all measures that are negative in form, as the mining ban certainly was, and by applying conventional analysis. See, e.g., F. Bosselman, D. Callies & J. Banta, supra note 1, at 133-36, 238; Stoebuck, Police Power, supra note 1, at 1062-63. This reasoning, however, ignores that the character of both the property burdened and the property taken must be examined to determine whether the government action is a regulatory taking or a physical invasion. In true regulatory takings cases, such as Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); Andrus v. Allard, 444 U.S. 51 (1979), the property burdened is the claimant's fee (or its equivalent in personalty) and the property taken is a less-than-fee interest in it, usually a negative easement precluding some spectrum of the burdened property's possible uses. The question posed in these cases is whether the value of the residual uses that are not prohibited by government restrictions adds up to a "reasonable beneficial" or "economically viable" use of the property burdened. See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 & n.36 (1978) (government restrictions "permit reasonable beneficial use of the landmark site"; if restriction operates so that landmark site ceases to be "economically viable," burdened property owner may obtain relief); cf. Andrus v. Allard, 444 U.S. 51, 66 (1979) (government restriction does not necessarily restrict owner's ability "to derive economic benefit" from its burdened property).

In *Pennsylvania Coal*, however, the majority of the Court viewed the property burdened and the property taken as the same—that is, either as the company's affirmative easement or, perhaps, *profit à prendre* to mine coal below the homeowner's fee. Justice Brandeis disagreed, denying that the statute effectively thwarted the enjoyment of the company's easement. He reasoned that "[f]or aught that appears the value of the coal kept in place by the restriction may be negligible as compared with the value of the . . . [coal] which may be extracted despite the statute." 260 U.S. at 419 (Brandeis, J., dissenting). Nevertheless, the Court concluded that the government's mining ban totally trumped the company's affirmative easement. Significantly, the Court suggested in a later case that *Pennsylvania Coal* was not a regulatory takings case, stating that "[i]t should be emphasized that in *Pennsylvania Coal* the loss of profit opportunity was accompanied by a *physical restriction against the removal of the coal.*" Andrus v. Allard, 444 U.S. 51, 66 n.22 (1979) (emphasis added). Under the analysis offered here, the negative restriction was "physical" in the sense that it extinguished an affirmative easement, while the restrictions in true regulatory takings cases merely impinge on a landowner's fee interest, leaving him free to possess it, to exclude others from it, and to use it in ways not precluded by the restriction.

An additional source of confusion is the tendency of commentators to equate regulatory measures with those diminishing, see Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978), or, perhaps, totally eliminating, see San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting), the profitability of a private resource. But physical invasions can produce the same result, as indicated in Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177 (1871), and in *Pennsylvania Coal* itself.

[292] 80 U.S. (13 Wall.) 166 (1871).

Lynah,[293] the Court declared that takings had occurred because government-authorized flooding caused "almost complete destruction of the [land's] value" in the first,[294] and rendered the land in the second an "irreclaimable bog, . . . deprived of all value."[295] Flooding cases in which only easements are taken are governed by the *United States v. Cress*[296] standard that "it is the character of the invasion, not the amount of damage resulting from it, *so long as the damage is substantial*, that determines the question whether it is a taking."[297] Overflight cases are governed by the same standard. The flights in *Causby v. United States*[298] caused the "destruction of the use of [the land] as a commercial chicken farm,"[299] and those in *Griggs v. Allegheny County*[300] so injured the landowners' enjoyment of their homes as "eventually [to cause] their removal therefrom as undesirable and unbearable for residential use."[301]

The Court's unwillingness to invalidate even very substantial physical invasions further buttresses the "real substance of the injury" standard. These invasions include encroachments on the landowner's right to exclude based upon rental housing,[302] labor relations,[303] and a

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[293] 188 U.S. 445 (1903).

[294] *Pumpelly*, 80 U.S. (13 Wall.) at 177.

[295] *Lynah*, 188 U.S. at 468-69.

[296] 243 U.S. 316 (1917).

[297] Id. at 328 (emphasis added).

[298] 328 U.S. 256 (1946).

[299] Id. at 259.

[300] 369 U.S. 84 (1962).

[301] Id. at 87.

Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922), and Kaiser Aetna v. United States, 444 U.S. 164 (1979), emphasize that substantial injury has been an element of takings in contexts other than governmental overflights or flooding. In *Pennsylvania Coal*, the Court's finding of a taking was predicated largely on Justice Holmes' observation that "to make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." 260 U.S. at 414. The Court found a taking in *Kaiser Aetna* in the government's attempt to require a developer to allow public access to his marina because it interfered significantly with his "investment-backed expectations," 444 U.S. at 175, by threatening to transform his private marina into a "public aquatic park," id. at 169.

[302] Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921); Block v. Hirsh, 256 U.S. 135 (1921). In these cases, the Court sustained emergency rent control measures that prohibited landlords from recovering possession of the premises occupied by their tenants under expired leases as long as the tenants continued to perform their obligations under the leases. Justice McKenna noted in dissent in *Block* that the controls "withdraw the dominion of property from its owner," 256 U.S. at 161, and analogized the landlord's right to recover possession to the right granted landowners under the third amendment to prevent the quartering of troops in their houses without their consent, id. at 165.

[303] See Central Hardware Co. v. NLRB, 407 U.S. 539 (1972) (acknowledging limitations on the owner's right to exclude uninvited, nonemployee labor organizers); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) (same).

miscellany of health, safety, and wartime concerns viewed by the Court as falling under the umbrella of public necessity.[304]

Additional inroads upon the direct/consequential damage distinction can be summarized briefly. Consistent with *Eaton*, the Court has viewed the English application of this distinction as inappropriate in the United States, expressing its disapproval of the readiness of American courts to follow "[t]he doctrine of the English cases . . . , sometimes with scant regard for distinctions growing out of the consti-

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The decisions of the Supreme Court and of lower federal courts evaluating the organization rights of both employees and nonemployees on an employer's premises have repeatedly recognized that, improperly exercised, these rights can seriously interfere with the conduct of the business in question, whether the premises be a hospital, see NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 782-84 (1979); Beth Israel Hosp. v. NLRB, 437 U.S. 483, 495 (1978), a ship, see NLRB v. Cities Serv. Oil Co., 122 F.2d 149, 151 (2d Cir. 1941), or a lumber camp, see NLRB v. Lake Superior Lumber Corp., 167 F.2d 147, 151-52 (6th Cir. 1948). Cf. Agricultural Labor Relations Bd. v. Superior Court, 16 Cal. 3d 392, 546 P.2d 687, 128 Cal. Rptr. 183 (1976) (administrative regulation granting a qualified right of access to agricultural property by farm labor organizers upheld); State v. Shack, 58 N.J. 297, 277 A.2d 369 (1971) (trespass statute held inapplicable to government field worker trying to organize and otherwise aid migrant workers).

[304] See, e.g., United States v. Caltex, 344 U.S. 149, 154 (1952) (destruction of oil terminal to prevent its use by enemy); Miller v. Schoene, 276 U.S. 272, 279 (1928) (destruction of rust-infected cedar trees to prevent spread of disease to apple trees); Bowditch v. City of Boston, 101 U.S. 16, 18-19 (1879) (destruction of building to contain conflagration).

To these cases should be added United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913), a decision whose significance is heightened for this Article's purposes by the Court's subsequent decision in Kaiser Aetna v. United States, 444 U.S. 165 (1979). One issue in *Chandler-Dunbar* was whether the compensation due to the power company for the federal government's acquisition of its fee in the bed of a navigable river should include the fee's value for water development purposes. See 229 U.S. at 68-69. Although the company conceded that the government enjoys extensive powers to control the nation's navigable waterways under the commerce clause, id. at 62-63, it denied that the government could "exclude the rights of riparian owners to construct in the river . . . such appliances as are necessary to control and use them for commercial purposes" without compensation. Id. at 61. The Court rejected that contention, stating that the company's property was " 'a qualified title, a bare technical title . . . subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public rights of navigation.' " Id. at 64 (quoting Scranton v. Wheeler, 179 U.S. 141, 163 (1900)). In a passage recognizing that under at least some circumstances "permanent physical occupations" are not per se takings, and, indeed, are not takings at all, the Court stressed:

> If [Congress'] judgment be that structures placed in the river and upon such submerged land, are an obstruction or hindrance to the proper use of the river for purposes of navigation, it may require their removal and forbid the use of the bed of the river by the owner in any way which in its judgment is injurious to the dominant right of navigation. So, also, it may permit the construction and maintenance of tunnels under or bridges over the river . . . .

Id. at 62.

I find unpersuasive the response suggested in United States v. Willow River Power Co., 324 U.S. 499, 510 (1945), that *Chandler-Dunbar* and similar cases do not controvert the per se rule because, as applications of the federal navigation servitude doctrine, they simply reflect that the riparian owner has no property right to exclude government in the first place. Whatever else may

tutional restrictions upon legislative action under our system."[305] The Court has generally placed government on the same footing as private parties regarding liability for private losses caused by public projects.[306] Finally, it has tended to go behind the distinction to determine whether a more specific and cogent ground exists for allocating the costs of such projects.[307]

I do not deny that the property as thing and consequential damages concepts retain some vitality today, and that there are contexts in which the direct/consequential damage distinction makes sense, as *Eaton* recognized.[308] But a measure of how far the mighty have fallen appears in a comparison of the cases reviewed in this section with the Court's 1878 decision in *Northern Transportation Co. v. City of Chicago*[309] in which it employed these concepts to deny compensation to a

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be said about that doctrine, it is a creature not of positive law but of an interest analysis in which the Court has required the riparian owner's liberty and economic interests to yield to the public's navigation interest. Id. at 506; see authorities cited in note 111 supra. More to the point, the Court's subsequent decision in Kaiser Aetna v. United States, 444 U.S. 165 (1979), demonstrates that the riparian owner's right to exclude is by no means effaced by the doctrine, and that government's denial of that right can constitute a taking even when the physical intrusion in question is not "permanent." In *Kaiser Aetna*, a riparian owner-subdivision developer challenged a federal order to open its private marina to the public without compensation. Id. at 69. Although the Court conceded that the owner's subjacent land was flowed by the "navigable waters of the United States," id. at 170-72, it nonetheless held that the government's demand that the owner's right to exclude yield to the public's right of access was a taking.

[305] Richards v. Washington Terminal Co., 233 U.S. 546, 553 (1914). The Court noted that "while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for private nuisance of such a character as to amount in effect to a taking of private property." Id.

[306] Illustrative is the Court's declaration in United States v. Dickinson, 331 U.S. 745 (1947), a flooding case, that "[p]roperty is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time." Id. at 748. The government's status as a jural actor under the takings clause is discussed at length in, e.g., Cormack, supra note 56, at 232-33, 240. 258-59; Lenhoff, Development of the Concept of Eminent Domain, 42 Colum. L. Rev. 596 (1942).

[307] Illustrative is United States v. Welch, 217 U.S. 333 (1910), holding government liable for the taking of a landowner's right of way easement over an appurtenant parcel, an injury that probably would not have been compensable under the nineteenth century consequential damage standard. Writing for the Court, Justice Holmes adverted to the Court's loose employment of the consequential damage concept in precedents cited by the government but observed that the actual "ground of such decisions is that the plaintiff's rights are subject to superior public rights, or that he has no private right, and that his damage, though greater in degree than that of the rest of the public, is the same in kind." Id. at 339.

[308] See text accompanying notes 261-62 supra.

[309] 99 U.S. 635 (1878) (city's construction of temporary dam in a river to allow construction of a tunnel was not a taking, even though plaintiffs were thereby denied total access to their premises).

landowner stranded in his collapsed building because of a nearby public project.

2. *"Destruction" vs. "Appropriation"*

The Court also has severely diluted both formulations of the appropriation concept noted in the *Eaton* discussion:[310] that government must either acquire the formal fee title to property taken or use the property lost by the owner before a taking can be found. Even prior to *Eaton*, the Court held that when government performs acts on private land that would give rise to a right of action if done by private party, there is a taking provided that the interest taken is a fee simple absolute.[311] Its twentieth century opinions go much further. One group of cases holds that, depending on the governmental acts in question, affirmative easements as well as fee interests may be taken.[312] A second group dispenses altogether with the notion of appropriation, conceived in physical invasion terms, by recognizing that negative restrictions may be takings of a fee or less-than-fee interest in land depending upon the extent to and manner in which they destroy land's economic value.[313] In a passage that might prove influential in future takings decisions, Justice Brennan stressed that these nontrespassory measures

> can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it.[314]

The Court has rejected the view that government must affirmatively use the resource destroyed in order to "take" property. Illustrative is *United States v. General Motors Corp.*,[315] in which the government temporarily occupied premises held by tenants under long-term leaseholds. Relying upon the affirmative use-by-government premise,

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[310] See text accompanying notes 271-77 supra.

[311] Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).

[312] See, e.g., Griggs v. Allegheny County, 369 U.S. 84 (1962) (overflight easement); United States v. Causby, 328 U.S. 256 (1946) (same); United States v. Cress, 243 U.S. 316 (1917) (flowage easement).

[313] See cases cited at note 74 supra.

[314] San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652 (1981) (dissenting opinion on dismissal for lack of final judgment).

[315] 323 U.S 373 (1945).

the United States insisted that destruction of fixtures occasioned by the tenant's temporary removal from the premises was not a taking because the government neither intended to nor would benefit from these fixtures.[316] In reasoning similar to *Eaton*'s treatment of this formulation of the distinction, the Court responded:

> In its primary meaning, the term "taken" would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. 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.[317]

Even more antithetical to this formulation, of course, are the Court's more recent decisions recognizing that nontrespassory use restrictions can effect takings.[318] The uses denied to landowners in these cases can scarcely be said to have been appropriated by government for its own affirmative use.

As with the consequential damages concept discussed in the preceding section, the destruction/appropriation distinction has not been totally discarded by the Court. For example, in *United States v. Central Eureka Mining Co.*,[319] although decided thirteen years after *General Motors*, the Court employed the distinction to deny that an order shutting down certain gold mines during World War II was a taking even though the order in effect destroyed the value of the claimant's mines. But two propositions can be advanced without qualification. First, the Court has progressively retreated from the mechanical nineteenth century use of the distinction to delineate the police and eminent domain powers (the former being said to "destroy" property; the latter, to "appropriate" it).[320] Second, *Central Eureka* and other twentieth century opinions employing the distinction to deny compensation in the face of egregious losses to private landowners by governmental acts stand out as the most criticized of the Court's takings analyses.[321]

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[316] Id. at 383-84.

[317] Id. at 378 (footnote omitted).

[318] See cases cited in note 74 supra.

[319] 357 U.S. 155 (1958).

[320] See, e.g., Powell v. Pennsylvania, 127 U.S. 678 (1888); Mugler v. Kansas, 123 U.S. 623 (1887).

[321] For example, Professor Sax dismissed as "preposterous" the Court's use of the destruction/appropriation distinction as the basis for its decision in *Central Eureka*. Sax, supra note 41, at 48.

3. *"Permanent Occupation" vs. "Temporary Invasion"*

In reviewing the Court's treatment of the permanent occupation/temporary invasion distinction, it is useful to comment separately on the permanent/temporary and occupation/invasion pairings. Four variants of the first pairing can be detected in the Court's opinions: one divides intrusions affecting real property interests from those impinging upon other kinds of interests; a second describes the physical nature of the governmental act; a third delineates the duration of the real property interest taken; and a fourth portrays the extent of the dominion being exercised by government over private land.

The issue posed in cases employing the first variant is whether government's trespassory acts occur with sufficient frequency or with the requisite intent to intrude upon a *real property* interest of the claimant. If so, these acts, which may involve the entry of persons or objects, are deemed "permanent."

"Permanent" acts constituting a taking of a real property interest have been of two kinds: "continuous" and "intermittent." Illustrative of the first, which by their nature are limited to entry by objects, is the oft-cited permanent flooding of private land.[322] Examples of the second, which may entail entry by persons as well as objects, are flooding which, although intermittent, is certain to recur over time;[323] firing of a single shot over a private resort with the intent to continue doing so;[324] and entry by the public-at-large into a private marina.[325]

On the other hand, acts deemed "temporary" under this variant do not take a real property interest although they may constitute tortious invasions or, in *Eaton*'s phrase, "technical trespasses." Examples of temporary intrusions include government's firing of two shots over a private resort without intent to continue the firing;[326] its damage to a private bridge pier by blasting in conjunction with a navigation project;[327] and the single- or limited-instance entry of its inspectors[328] and troops[329] in the performance of their official duties.

Under the second variant, a "permanent" trespass is one that is continous while a "temporary" trespass is one that occurs within a

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[322] See United States v. Lynah, 188 U.S. 445 (1903); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).

[323] Jacobs v. United States, 290 U.S. 13 (1933); United States v. Cress, 243 U.S. 316 (1917).

[324] Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922).

[325] Kaiser Aetna v. United States, 444 U.S. 164 (1979).

[326] Peabody v. United States, 231 U.S. 530 (1913).

[327] Keokuk & Hamilton Bridge Co. v. United States, 260 U.S. 125 (1922).

[328] Montana Co. v. St. Louis Mining & Milling Co., 152 U.S. 160 (1894).

[329] YMCA v. United States, 395 U.S. 85 (1969).

discrete, usually brief, period of time. The permanent deposit of water or debris on land[330] constitutes permanent trespass; intermittent flooding,[331] or single or multiple entries,[332] is considered temporary. Although permanent intrusions are more likely to be takings because their impact tends to be more pronounced, the permanent/temporary categories under this variant do not necessarily correspond with the takings/nontakings categories. The Court's precedents do not indicate that permanent intrusions will invariably be takings, although those that have been so characterized have consistently had substantial effects on the claimant's land.[333]

Conversely, temporary trespasses may constitute takings. Illustrative is the intrusion in *United States v. Cress*,[334] in which the Court rejected government's defense that it had not taken the claimant's land because its flooding of that land was "intermittent" and therefore "temporary." Precisely tracking *Eaton*'s rejection of an identical defense, the Court responded that "[t]here is no difference of kind, but only of degree, between a permanent condition of continual overflow by back-water and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other."[335] Trespasses deemed "temporary" and held not to be takings have included entry onto private land by labor organizers,[336] by persons exercising expression rights,[337] and by water when the intermittent flooding was less frequent and less substantial than the flooding in *Cress*.[338]

The Court has also used the permanent/temporary distinction to describe the duration of the real property interests allegedly taken. If all takings were in fee, this third variant would be unnecessary, of course, because their duration would be potentially infinite. In fact,

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[330] See cases cited in note 322 supra.

[331] See cases cited in note 323 supra.

[332] See, e.g., PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Hudgens v. NLRB, 424 U.S. 507 (1976); Central Hardware Co. v. NLRB, 407 U.S. 539 (1972); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922).

[333] See text accompanying notes 292-301 supra.

[334] 243 U.S. 316 (1917).

[335] Id. at 328.

[336] See, e.g., Hudgens v. NLRB, 424 U.S. 507 (1976); Central Hardware Co. v. NLRB, 407 U.S. 539 (1972); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); NLRB v. Cities Serv. Oil Co., 122 F.2d 149, 152 (2d Cir. 1941) (statute permitting union officials on board ship to speak with crew is not an interference "within the Fifth Amendment").

[337] PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

[338] Sanguinetti v. United States, 264 U.S. 146 (1924).

the Court has been confronted with claimed takings of property interests of various durations. In addition to fees, these interests have included leaseholds of definite or indefinite duration[339] and a variety of easements. Some easements, like fees, are of potentially infinite duration.[340] Others last only as long as the burdened land is devoted to a particular use.[341] Still others, as recently suggested by Justice Brennan,[342] may exist until a court determines that the noncompensatory measure in question is a taking and government opts to terminate the measure, compensating the claimant for the taking of a "temporary easement" only.

As with the second variant, invasions labelled "temporary" under the third may nevertheless be takings. For example, government may condemn a leasehold or temporarily seize an enterprise for national security purposes.[343] Moreover, trespasses that are "temporary" in the third sense, but not found to be takings, may interfere substantially with the proprietor's economic or dominion interest. Illustrative are statutorily authorized rights of tenants to remain on the landlords' premises after the expiration of their leases[344] and of non-employee union organizers to enter an employer's workplace.[345]

The final variant arises in cases in which a taking has been found, and the issue is whether the real property interest taken is a fee or an easement. The inquiry in these cases is comparable to determining whether a private person's adverse use of another's land has ripened into one of these interests. The key to both inquiries is the extent of dominion exercised by the "non-record" owner. The Court has tended to use the label "permanent" for trespasses in which government

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[339] See, e.g., United States v. Peewee Coal Co., 341 U.S. 114 (1951) (coal mine seized indefinitely to avert nationwide miners' strike); United States v. General Motors Corp., 323 U.S. 373 (1945) (leasehold condemned to permit government agency to occupy warehouse indefinitely).

[340] See, e.g., United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950) (flowage easement necessitated by operation of dam); United States v. Cress, 243 U.S. 316 (1917) (same).

[341] Despite the variety of Court opinions dealing with use-dependent intrusions of indefinite duration, see, e.g., cases cited in notes 127-29 supra, I have been unable to find any in which the Court has applied the labels "temporary" or "permanent" to the intrusions in this third, durational sense. Accordingly, the *Loretto* Court's characterization of the intrusion by the cable fixtures as "permanent" in this durational sense, see *Loretto*, 102 S. Ct. at 3178, is original to that case, and not one derived from precedent.

[342] San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting).

[343] See cases cited in note 339 supra.

[344] See Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921); Block v. Hirsh, 256 U.S. 135 (1921).

[345] See cases cited in note 336 supra.

exercises complete or substantially complete dominion over private land, and "temporary" for lesser incursions. So employed, the terms are synonymous, respectively, with "total" takings (those in which government obtains a fee) and "partial" takings (those in which it obtains an easement).[346]

Discussion of the occupation/invasion distinction has been deferred to this point because *Loretto*'s premise that these terms have different connotations simply is not substantiated by the Court's prior cases. On the contrary, the very precedents cited in *Loretto* to support the premise use the terms interchangeably.[347] The distinction the Court was trying to draw, I suspect, was not that between occupations and invasions as such, but between indefinite occupations or invasions by objects ("continuing trespasses by object") and intermittent occupations or invasions by persons. The Court has labelled only the former "permanent" in its inverse condemnation cases.[348] More significantly, the trespasses featured most prominently in *Loretto* as illustrating "permanent occupations" were occupations by objects,[349] while those characterized as "temporary invasions" were occupations by persons.[350]

I have been unable to find any precedent by the Court to support *Loretto*'s bread box rule that a per se takings rule governs a continuing trespass by object that has only a minor effect on the owner's dominion or economic interest in the property. Nor did the Court cite one. Neither the flooding[351] nor the telegraph cases[352] featured as the main-

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[346] See, e.g., United States v. Causby, 328 U.S. 256, 267-68 (1946); United States v. Cress, 243 U.S. 316, 327-29 (1917).

[347] Citing, e.g., Sanguinetti v. United States, 264 U.S. 146 (1924), and United States v. Cress, 243 U.S. 316 (1917), the *Loretto* majority asserted that "this Court has consistently distinguished between flooding cases involving a permanent physical occupation . . . and cases involving a more temporary invasion." *Loretto*, 102 S. Ct. at 3172. In *Sanguinetti*, however, the Court stated that, to be a taking, flooding must "constitute an actual, permanent *invasion* of the land." 264 U.S. at 149 (emphasis added). Similarly, in *Cress*, it stated: "That overflowing lands by permanent back-water is a direct *invasion*, amounting to a taking, is settled. . . ." 243 U.S. at 327-28 (emphasis added).

[348] See, e.g., United States v. Lynah, 188 U.S. 445, 469 (1903) (farmland "permanently flooded" by government-built dams); St. Louis v. Western Union Tel. Co., 148 U.S. 92, 99 (1893) (occupation of public space by telegraph poles is "permanent and exclusive"); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177-78 (1871) (flooding caused by construction of claim inflicted "irreparable and permanent" injury to farmland).

[349] See cases cited in note 348 supra.

[350] Included were PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) (trespass of shopping center by political petitioners), and Kaiser Aetna v. United States, 444 U.S. 164 (1979) (trespass of private marina by general public).

[351] See United States v. Cress, 243 U.S. 316 (1917); United States v. Lynah, 188 U.S. 445 (1903); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).

[352] See Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 540 (1904); St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893).

stay of *Loretto*'s per se rule are factually on point. Rather, they support *Eaton*'s "real substance of the injury" standard. The flooding cases consistently stress the severity of the trespass by object,[353] whether the interest found to have been taken is a fee or an easement, "continuous" or otherwise. Of the telegraph cases cited, only the Court's 1892 opinion in *St. Louis v. Western Union Telegraph Co.*[354] is pertinent, but it too must be categorized with the flooding cases as an example of a trespass by object significantly interfering with the land invaded or occupied.[355]

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[353] See text accompanying notes 292-97 supra.

[354] 148 U.S. 92 (1893).

The other opinion cited, Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 540 (1904), is inapposite because the telegraph company conceded that the authorization it had received from the federal government to locate its poles along the railroad's right of way derived from the government's eminent domain power. Id. at 559.

[355] The issue in St. Louis v. Western Union Tel. Co., 195 U.S. 540 (1904), was whether an 1866 federal statute authorizing telegraph companies to construct their poles and lines on the "post roads of the United States" precluded the city of St. Louis from charging the defendant an annual rental fee for telegraph poles and lines installed on the city's streets. While the facts of *Western Union* are similar to those of *Loretto*, they differ in one crucial regard since Western Union's intrusion was in no sense "minor." Competition among diverse users for street space is a recurring and serious problem for municipal administrators. See Cooper & Costonis, Space Over Streets (unpublished report prepared for the Rockefeller Brothers Fund 1977) (on file at the New York University Law Review). Using streets as a means of public transit is sometimes incompatible with using them as locations for telegraph lines and other bulky objects or projections such as kiosks, awnings, and trash receptacles. Id. Therefore, courts generally, and the Supreme Court in *Western Union* specifically, have stressed that a city "has the full control of its streets, and in this respect represents the public in relation thereto." Western Union, 148 U.S. at 100. The Court devoted numerous passages in its opinion to the problem of incompatibility, including one observing that

> the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive. It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of a highway and personal travel, wholly lost to the public. . . . By sufficient multiplication of telegraph and telephone companies the whole space of the highway might be occupied, and that which was designed for general use for purposes of travel entirely appropriated to the separate use of companies and for the transportation of messages. . . . To that extent it is a use different in kind and extent from that enjoyed by the general public.

Id. at 99. Read in context, therefore, the Court in *Western Union* did not label the telegraph company's intrusion as "permanent" and "exclusive" to demonstrate that a minor intrusion is a per se taking, as the Court supposed in *Loretto*, see 102 S. Ct. at 3172-73, but to show that the intrusion in question was anything but "minor."

The encroachment upon the "negligible, unoccupied space," see Jones Report, supra note 141, at 207, devoted to cable equipment atop Manhattan apartment buildings is scarcely comparable. Not only is diversion of that space to cable uses fully compatible with the functioning of the structure below as an apartment building, but it also enhances the building's attractiveness to prospective tenants who wish to subscribe to a cable television service. Moreover, the landlord who bars or hinders cable installations does not bear a relation to his tenants comparable to that between a city and its "general public," because she acts in contravention, rather than in support of the tenants' legislatively declared interests. See text accompanying note 141 supra.

C. Eaton's *Distinctions in* Loretto

In view of the Court's treatment of *Eaton*'s nineteenth century distinctions prior to *Loretto,* its use of them in *Loretto* leads to two conclusions. First, the distinctions do not warrant *Loretto*'s per se rule because none of them justifies that strict rule. Second, theirs should be the admittedly influential, but nonetheless subordinate role of assisting the Court to fix the government's burden in overcoming the takings presumption. Their use in defense of the narrow per se rule might be warranted if the Court's categorical opposition to "permanent physical occupations" were supported by more than its intuitive sense that "a physical intrusion by government [is] a property restriction of an unusually serious character."[356] However appealing that sentiment may be, to base a per se rule on it alone ignores the Court's numerous approvals of intrusions under circumstances no less grave than those presented in *Loretto.*[357] But it would be going too far to deny the importance of the distinctions altogether. Undoubtedly government's burden in overcoming the takings presumption triggered by section 828 should be demanding. The intrusion it authorizes is overtly "physical," directly impinges on the claimant's land, appropriates a recognized real property interest to the specific use of government's delegates, is of indefinite duration, and, by virtue of these factors, threatens the owner's dominion and economic interests in its property. In combination, moreover, these factors certainly magnify the concerns voiced by Professor Michelman over the "stark spectacle of an alien, uninvited presence in one's territory."[358]

Turning to the distinctions themselves, we may consider the appropriation/destruction and direct/consequential damages pairings together because *Loretto*'s treatment of each of them suffers from the same fault. The Court seems to reason that because a taking is more readily found when a measure appropriates rather than destroys prop-

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Although distinguishable from *Loretto* on this basis, *Western Union* does support *Loretto* in a more significant respect. Its statement offered in defense of its holding that compensation was due the city that "it matters not for what that exclusive appropriation is taken," 148 U.S. at 101, is a direct analogue to *Loretto*'s assertion that a permanent physical occupation is a taking "without regard to the public interests that it may serve," *Loretto,* 102 S. Ct. at 3171. Behind both propositions lies the premise that due process considerations have no role to play in takings analysis. That question is addressed in text accompanying notes 187-94 supra.

[356] 102 S. Ct. at 3171.

[357] See text accompanying notes 302-04 supra.

[358] Michelman, supra note 3, at 1228 (footnote omitted); see text accompanying notes 199-200 supra.

erty, or directly rather than consequentially injures it, a taking *must* be found in such instances. But as established in the preceding section, the Court's precedents demonstrate the contrary. Despite the saliency of appropriation in those cases, the Court either found no taking[359] or, if it did, considered additional factors in reaching its conclusion.[360] These precedents also counter the Court's direct/consequential damages reasoning. The injuries addressed in these precedents resulted from direct invasions of the claimant's land, not as consequences of governmental activity elsewhere.

The Court's manipulation of these pairings is objectionable on broader grounds as well. Paradoxically, its regression to nineteenth century formalism could undermine its evident solicitude for property rights by revitalizing ill-considered precedents that deny property owners compensation on the spurious ground that, however grievous or unfairly imposed, the injuries suffered resulted from a governmental act that merely "destroyed" the claimants' property rights,[361] or injured them only "consequentially."[362] The regression is exacerbated by its gratuitousness because on *Loretto*'s facts, the Court had no occasion to speak to the legal effects of destruction or of consequential damages. Section 828 clearly did appropriate the cable-occupied space, and, equally clearly, the landlord's fee was the situs of the injury section 828 inflicted.

The Court's tilt towards a conception of property as thing rather than as relation also permeates *Loretto*. The Court equated the property burdened by section 828 solely with the cable-occupied space rather than with the landlord's entire fee package of land and build-

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[359] See, e.g., PruneYard Shopping Center v. United States, 447 U.S. 74 (1980) (no taking where state required shopping center to permit distribution of political pamphlets and petitions on its premises); Central Hardware Co. v. NLRB, 407 U.S. 539 (1972) (no taking where statute authorizes union organizers to distribute literature on company property); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921) (no taking when, in response to a housing crisis, statute authorizes tenants to remain in possession of leased premises after expiration of lease); Block v. Hirsh, 256 U.S. 135 (1921) (same).

[360] See, e.g., Hudgens v. NLRB, 424 U.S. 507 (1976) (proper accommodation between workers' statutory right to picket and private property rights depends on nature and strength of the respective rights in each case); Griggs v. Allegheny County, 369 U.S. 84 (1962) (emphasis on county's failure to fulfill its duty to acquire easements in land and air space sufficient to permit operation of airport); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) (employer could ban nonemployee distribution of union literature on its property if union organizers could reach employees by reasonable efforts through other channels of communication).

[361] See United States v. Central Eureka Mining Co., 357 U.S. 155 (1958) (no taking where government required nonessential gold mines to cease operations during wartime).

[362] See Northern Transp. Co. v. City of Chicago, 99 U.S. 635 (1878) (no taking even where city's construction of temporary dam in a river denied plaintiffs access to their premises because no entry was made upon their property).

ing,[363] thus equating the property taken with the property burdened. Doing so enabled the Court to assert that section 828 authorized Teleprompter to exercise "complete dominion" over Mrs. Loretto's "property."[364] Furthermore, the Court's "qualitative" distinction between trespasses by object and by person is irrelevant if property is viewed as a relation and not as a thing. Either type of trespass threatens to take property by denying its owner the right to exclude. A taking, if found, derives from the elimination of this right from the relation of owner to resource, not from the nature of the trespass. But *Loretto*'s per se rule is based on the nature of the trespass and not on the elimination of the right.[365]

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[363] See text accompanying notes 170-72 supra.

[364] *Loretto*, 102 S. Ct. at 3176.

[365] The Court acknowledged that trespasses by persons are not governed by the per se rule, a position it could hardly avoid in view of its prior decisions in such cases as *PruneYard* and *Kaiser Aetna*. The § 828 intrusion is a per se taking, it reasoned, because it authorized a non-owner to place its thing, cable equipment, upon the owner's thing, space atop her apartment building. In the Court's words:

> [A]n owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property. . . . [P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury.

Loretto, 102 S. Ct. at 3176 (emphasis in original). The Court's regression to a nineteenth century predisposition to view "invasions" of "physical" resources as takings also caused it to turn two of its modern precedents, Andrus v. Allard, 444 U.S. 51 (1979), and United States v. General Motors Corp., 323 U.S. 373 (1945), on their heads. Following the lead of Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978), discussed in note 171 supra, *Andrus* asserted that the severity of a fractional encroachment upon a privately-owned resource—"the destruction of one 'strand' of the bundle"—should be evaluated against the measure's impact on the rights associated with the property burdened, that is, on the resource as a whole. See 444 U.S. at 65-66. But in a passage that purports to "borrow" *Andrus*' "bundle/strand metaphor," the Court insisted that § 828 "chops through the bundle [of the landlord's property rights], taking a slice of every strand," *Loretto*, 102 S. Ct. at 3176, an argument that makes sense only if these rights are the sole rights the landlord holds in her burdened property. But *Andrus* teaches that these rights encompass her rights to her entire fee package of land and building, not merely those in the property taken, the cable-occupied space alone. Cf. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), discussed in note 291 supra. With similar imprecision, the Court seized upon *General Motors*' statement that among the rights in property are those "to possess, use and dispose of it," 323 U.S. at 378 (quoted in *Loretto*, 102 S. Ct. at 3176), but ignored the preceding phrase which stated that property connotes "the group of rights inhering in the citizen's relation to the physical thing," *General Motors*, 323 U.S. at 378, and that only in a "vulgar and untechnical sense" is property merely a physical thing, id. at 377. Contrary to the intent of the entire passage, the *Loretto* Court treated property as a thing rather than as a relation. See text accompanying notes 170-72 supra. Whether or not a decision against § 828 would have been warranted under *Andrus* and *General Motors*, the decision certainly would not have been predicated upon a per se rule, nor would it have called into question these two doctrinal pillars of the Court's modern takings jurisprudence.

The section 828 intrusion may be labelled "permanent" under two of the permanent/temporary distinction's four variants—the one distinguishing intrusions that encroach upon a real property interest from those that do not,[366] and the one describing the intrusion's physical nature.[367] The intrusion is permanent under both variants because, respectively, section 828 grants the cable company an affirmative easement in the landlord's fee, and the intrusion it authorizes is the continuing presence of cable equipment on that fee. The intrusion is "temporary," however, under the other two variants that connote duration[368] and scope of dominion.[369] Like the intrusions in *Prune-Yard* and other "temporary invasion" cases, it lasts only as long as the burdened land is devoted to the use targeted by the measure imposing the burden. Similarly, it authorizes cable companies to occupy only minimal space on the landlord's fee, not to exercise dominion over the entire fee.

From the perspective of precedent, the characterization of the section 828 intrusion as "permanent" under the first two variants does not establish that it is a taking, per se or otherwise. As to the first variant, it does not follow that because section 828 would take a real property interest in the nature of an affirmative easement *if* it were a taking, it therefore *is* a taking because the resource upon which it encroaches is real property. Missing from that reasoning, of course, is a step explaining why section 828's intrusion is a taking while countless other intrusions upon real property are not.[370] As to the second variant, reasoning that premises the *legal* consequence of a taking upon the *physical* fact of an intrusion's "permanence" alone is equally fallacious. Earlier discussion of the flooding[371] and telegraph cases[372] establishes that permanent intrusions—i.e., continuing trespasses by object—must significantly encroach upon a claimant's dominion or economic interest in order to constitute a taking. The *Loretto* Court's refusal to adhere to *Eaton*'s "real substance of the injury" standard is in opposition to the tenor, if not the actual content, of its prior case law, and therefore requires a justification. Such a justification is never advanced.

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[366] See text accompanying notes 322-29 supra.
[367] See text accompanying notes 330-38 supra.
[368] See text accompanying notes 339-45 supra.
[369] See text accompanying note 346 supra.
[370] See cases cited in notes 359-60 supra.
[371] See text accompanying notes 292-97, 330-38 supra.
[372] See note 355 and accompanying text supra.

The Court faltered in its use of the *Eaton* distinctions in *Loretto* because it began and ended its analysis at the wrong end of the problem. Viewed in the least flattering way, the opinion manipulated a set of increasingly dubious conceptions to achieve a predetermined result. The more defensible course would have been to look to the distinctions only for such assistance as they might provide in defining a context for an intelligible assessment of the variables which ought to have determined *Loretto*'s outcome.