

CASENOTE

New Per Se Taking Rule Short Circuits Cable Television Installations in New York: *Loretto v. Teleprompter Manhattan CATV Corporation*¹ — The fifth amendment provides in part that private property shall not be taken by government for public use without just compensation.² This proscription is applicable to the states through the fourteenth amendment.³ The government does, however, have the power to regulate private property, without compensation to the owner, to protect the health, safety or general welfare of the public.⁴ Today this power to regulate private property, known as the police power, often is challenged as violating the fifth and fourteenth amendments' prohibition against uncompensated taking of private property for public use.⁵ At some point a land use regulation may become so burdensome that it constitutes a taking of property.⁶ If it is determined that a regulation constitutes a taking, the government must exercise its power of eminent domain and compensate the landowner in order to pursue its program.⁷

The point at which permissible police power regulation ends and compensable taking begins, however, has never been clearly established or defined.⁸ Judicial attempts to determine the specific point have produced no set formulae or methods.⁹ Instead the Court had developed different and often conflicting theories without overruling old theories.¹⁰ Precedent still exists which holds that a mere regulation of land use, short of a physical appropriation, can never be a taking.¹¹ In more recent cases, however, the Court has held that excessive land use regulation alone may constitute a taking even absent any physical appropriation of private property.¹² Moreover, the Court still cites both lines of precedent.¹³

¹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

² U.S. CONST. amend. V, "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." *Id.*

³ *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 238-39 (1897).

⁴ See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 125-27 (1978).

⁵ See, e.g., *id.* (no taking found); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (no taking found); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958) (no taking found); *United States v. Caltex, Inc.*, 344 U.S. 149 (1952) (no taking found); *Miller v. Schoene*, 276 U.S. 272 (1928) (no taking found); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (taking found); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (no taking found).

⁶ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.*

⁷ *Id.* at 413.

⁸ See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1961).

⁹ See cases cited *supra* note 8.

¹⁰ Compare *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887) with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). In *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887) the Court held that a regulation which merely restricted the use of property could never be deemed a taking. *Id.* In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), however, the Court invalidated a regulation prohibiting the mining of coal. *Id.* While not explicitly overruling *Mugler*, the Court stated that the general rule was that regulation which goes "too far" will be deemed a taking. *Id.*

¹¹ *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924); *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887); *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878).

¹² See, e.g., *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

¹³ See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 126-28 (1978) (citing both

Nevertheless, the Supreme Court recently has been consistent in its approach to taking disputes. The Court has used an *ad hoc* balancing process in recent cases, holding that the circumstances of the particular case will determine whether a taking has occurred.¹⁴ While the Court has not articulated a set method of analysis, its inquiry has not been standardless.¹⁵ The Court weighs the public interest or benefit served by the regulation¹⁶ against such factors as the character of the government action,¹⁷ the economic impact of the regulation on the property owner,¹⁸ and the regulation's interference with the owner's reasonable investment-backing expectations.¹⁹ If the public interest is strong and is not outweighed by the impact of the regulation, the Court generally has upheld the regulation.²⁰

In employing this balancing process in recent cases, the Court did not distinguish between regulations which did or did not require a permanent physical invasion of private property.²¹ In the recent Supreme Court case of *Loretto v. Teleprompter Manhattan CATV Corp.*,²² however, the Court held that the balancing process did not apply to regulations which caused a permanent physical occupation of private property.²³ Rather the Court held that a regulation which required a permanent physical occupation of private property was a taking *per se*, without regard to other factors.²⁴ *Loretto* effectively limited the use of the multi-factor balancing process to taking disputes which involve temporary physical invasions of property or non-possessory use regulations, while affirming a *per se* rule for those disputes which require any type of permanent physical occupations.²⁵

Jean Loretto, the plaintiff in *Loretto*, was a New York City apartment building owner who discovered that Teleprompter Corporation and Teleprompter Manhattan CATV ("Teleprompter") had physically bolted cables and equipment to the roof of her build-

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) and *Mugler v. Kansas*, 123 U.S. 623 (1887)); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 593-94 (1962) (citing both *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and *Mugler v. Kansas*, 123 U.S. 623 (1887)); see also *Sax, Takings and the Police Power*, 74 YALE L.J. 36, 42-46 (1964) (noting that the Court still cites both Justices Harlan and Holmes authoritatively, although they espoused conflicting theories).

¹⁴ See *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82-83 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

¹⁵ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

¹⁶ See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124-27 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413-16 (1922).

¹⁷ *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

¹⁸ See cases cited *supra* note 17. See also *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("One fact for consideration . . . is the extent of the diminution.").

¹⁹ See cases cited *supra* note 17.

²⁰ See, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 134 (1978) (New York Landmarks Law upheld due to the public interest in the preservation of historic landmarks); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-96 (1962) (Town ordinance prohibiting excavation below the water table upheld as presumably valid safety measure in absence of evidence that ordinance had unreasonably harsh impact on claimant).

²¹ See cases cited *supra* note 17.

²² 458 U.S. 419 (1982).

²³ *Id.* at 426.

²⁴ *Id.*

²⁵ *Id.*

ing.²⁶ The installations consisted of approximately thirty feet of cable and several small metal directional taps.²⁷ The plaintiff did not discover the existence of Teleprompter's facilities until after her purchase of the building.²⁸ At that time, Teleprompter dropped a visible subcable down the front of her building to provide cable service to a first floor tenant.²⁹

The initial installation of cables and directional taps was made pursuant to an agreement between Loretto's predecessor in title and Teleprompter, and prior to Loretto's purchase of the building.³⁰ In making the subsequent cable installation, however, Teleprompter also relied on the authority of New York Executive Law Section 828.³¹ Section 828 barred landlords from interfering with the installation of cable television facilities on their property.³² The statute only required that the companying pay for the installation, maintenance and removal of the facilities, indemnify the owner for any damages caused by the equipment, and pay the owner a set fee for the use of his or her property.³³ The fee at the time of Teleprompter's installation of the subcable had been set by the Commission on Cable Television at a one-time one dollar payment.³⁴ Under the statute a landlord-owner was prohibited from denying the cable television company access to the property or from demanding any payment in excess of the set fee, from either the company or the subscribing tenants.³⁵

Upon discovery the subcable, the roof cables and equipment, Loretto initiated a class action suit³⁶ against Teleprompter for damages and injunctive relief.³⁷ She alleged that

²⁶ *Id.* at 421-25.

²⁷ *Id.* at 422 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 135, 440 N.Y.S.2d 843, 847, 423 N.E.2d 320, 324 (1981)).

²⁸ *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 135, 440 N.Y.S.2d 843, 847, 423 N.E.2d 320, 324 (1981).

²⁹ 458 U.S. at 422.

³⁰ *Id.* at 421.

³¹ See *infra* note 32.

³² N.Y. EXEC. LAW § 828 provides in pertinent part:

1. No landlord shall
 - a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require:
 - i. that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being 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; or
 - c. discriminate in rental charges, or otherwise, between tenants who receive cable television and those who do not.

Id.

³³ *Id.*

³⁴ 458 U.S. at 423-24.

³⁵ N.Y. EXEC. LAW § 828 (McKinney 1982). For the language of the statute, see *supra* note 32.

³⁶ 458 U.S. at 424. Class action status was granted for all owners of real property in the state on which Teleprompter had placed its equipment, with the exclusion of single family dwellings. *Id.* at 424 n.4. Notice to the class was postponed by stipulation. *Id.*

³⁷ *Id.* at 424.

the presence of Teleprompter's equipment on her property constituted a trespass, and insofar as Teleprompter relied on the authority of section 828, an unconstitutional taking of property without just compensation as proscribed by the fifth and fourteenth amendments.³⁸ Loretto sought a determination that the grant of a statutory license to permanently occupy private property under section 828 was an invalid exercise of state police power.³⁹ New York City, which had granted Teleprompter an exclusive franchise to provide cable television service within areas of Manhattan, intervened on behalf of Teleprompter.⁴⁰

The Supreme Court of New York, Special Term, upheld the constitutionality of Section 828 and granted summary judgment to Teleprompter and New York City.⁴¹ The Appellate Division affirmed without opinion.⁴² The New York Court of Appeals also upheld the statute⁴³ with only one justice dissenting.⁴⁴ The Court of Appeals rejected plaintiff's argument that a physical occupation of private property authorized by government was necessarily and automatically a taking.⁴⁵ Instead, the Court of Appeals analyzed the dispute by balancing the private and social interests involved to find that the statute was a valid exercise of the state's police power.⁴⁶ It determined that the public interest in the promotion and availability of an important educational and communications medium outweighed the negligible invasion of the plaintiff's private property.⁴⁷ The United States Supreme Court reversed the New York Court of Appeals, holding that the presence of Teleprompter's equipment on Loretto's building was a permanent physical occupation authorized by government, and therefore constituted a taking.⁴⁸

The *Loretto* decision is noteworthy for its introduction of an express *per se* rule in an area previously devoid of "rigid rules" or "set formulae."⁴⁹ Precedent and traditional ideas of property indicated to the *Loretto* Court that permanent physical occupations of property by government automatically constituted a taking without regard to factors of public interest or economic impact.⁵⁰

This casenote assesses the soundness and potential impact of *Loretto's* rule that all permanent physical occupations are takings regardless of public interest or economic impact. First, the history of takings clause jurisprudence is discussed briefly.⁵¹ This

³⁸ *Id.*

³⁹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 138, 440 N.Y.S.2d 843, 849, 423 N.E.2d 320, 326 (1981).

⁴⁰ 458 U.S. at 424.

⁴¹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 98 Misc. 2d 944, 415 N.Y.S.2d 180 (Sup. Ct., 1979).

⁴² *Loretto v. Teleprompter Manhattan CATV Corp.*, 73 A.D.2d 849, 222 N.Y.S.2d 550 (App. Div., 1979).

⁴³ *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 155, 440 N.Y.S.2d 843, 859, 423 N.E.2d 336 (1981).

⁴⁴ *Id.* at 156-63, 440 N.Y.S.2d at 859-64, 423 N.E.2d at 336-41 (Cooke, C.J., dissenting).

⁴⁵ *Id.* at 145-46, 440 N.Y.S.2d at 853, 423 N.E.2d at 330.

⁴⁶ *Id.* at 154-55, 440 N.Y.S.2d at 859, 423 N.E.2d at 336.

⁴⁷ *Id.*

⁴⁸ 458 U.S. at 438. "Teleprompter's cable installation on appellant's building constitutes a taking under the traditional test. The installation involved a direct physical attachment of plates, boxes, wires, bolts and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall." *Id.* (footnote omitted).

⁴⁹ See *supra* notes 8-20 and accompanying text.

⁵⁰ 438 U.S. at 434.

⁵¹ See *infra* notes 59-165 and accompanying text.

discussion includes an examination of the various tests developed and employed by the Supreme Court in takings decisions. Second, *Loretto's* rationale and justification for the *per se* rule is set forth in detail.⁵² Third, that rationale is analyzed in light of recent Supreme Court precedent and the purpose of the taking clause.⁵³ It is submitted that *Loretto's per se* rule is inconsistent with the modern trend toward the use of a balancing test for the resolution of all takings disputes.⁵⁴ The Court's contention that a permanent physical occupation of property is qualitatively more harmful to property rights, and that a *per se* rule is required to protect those rights, is also challenged.⁵⁵ Fourth, the potential impact of the *per se* rule is explored by examining its possible effect on subdivision exactions, specialized land use regulations which require uncompensated permanent physical occupations of private property by the public.⁵⁶ It is suggested that the *per se* rule may require the invalidation of these useful and important regulations.⁵⁷ In conclusion it is proposed that the *Loretto* Court should have avoided the affirmation of the *per se* rule and instead employed the multifactor balancing test.⁵⁸ Such an approach would not only have preserved the cable television regulation in *Loretto*, but also would have avoided the unnecessary creation of a rigid rule with far-reaching and detrimental potential.

1. TAKING CLAUSE JURISPRUDENCE

Taking clause jurisprudence has been called a "crazy-quilt pattern of Supreme Court doctrine."⁵⁹ In its struggle to differentiate compensable takings under the fifth and fourteenth amendments from valid and therefore noncompensable police power regulations, the Court has failed to establish any one test or rule.⁶⁰ Instead it developed and employed different rationales at different times, and sometimes several at once.⁶¹ There seem to be at least three general theories, however, which the Court has used most often and which it still uses to varying degrees. These theories are the physical invasion theory, the diminution in value theory and the multifactor balancing process.⁶²

A. Physical Invasion

Early decisions distinguished takings from non-takings on the basis of the presence or absence of a physical invasion of private property by government which caused an ouster of the owner.⁶³ The physical invasion, moreover, was usually a permanent invasion

⁵² See *infra* notes 166-252 and accompanying text.

⁵³ See *infra* notes 265-345 and accompanying text.

⁵⁴ See *infra* notes 266-307 and accompanying text.

⁵⁵ See *infra* notes 308-345 and accompanying text.

⁵⁶ See *infra* notes 346-405 and accompanying text.

⁵⁷ See *infra* notes 400-05 and accompanying text.

⁵⁸ See *infra* notes 406-14 and accompanying text.

⁵⁹ Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63.

⁶⁰ See *supra* notes 8-20 and accompanying text. For additional discussions of the Court's failure to establish a taking test, see Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *supra* note 13.

⁶¹ Sax, *supra* note 13, at 46. "A survey of the recent cases, . . . leaves the impression that the Court has settled upon no satisfactory rationale for the cases and operates somewhat haphazardly, using any or all of the available, often conflicting theories without developing any clear approach to the constitutional problem." *Id.*

⁶² See Michelman, *supra* note 60, and Sax, *supra* note 13.

⁶³ Compare, e.g., *United States v. Lynah*, 188 U.S. 445, 469 (1902) (taking found when govern-

such that the owner was effectively separated from his property and not merely temporarily prohibited from using it.⁶⁴ If the government's action merely damaged or impaired the use of private property it did not constitute a taking.⁶⁵ To constitute a taking, the government action had to be a permanent invasion of the land, amounting to an appropriation of the land and not merely an injury to the land.⁶⁶

The Court developed this physical invasion test in late-nineteenth-early-twentieth century flooding cases. In those cases, the government was typically sued when the construction of public dams, locks, or canals caused damage to private property.⁶⁷ The Court employed the physical invasion test to distinguish compensable from non-compensable losses.⁶⁸ Pursuant to this test, a taking was found when the construction caused some material such as water, dirt, or sand to be permanently placed on private property so that the owner's use of the property was effectively destroyed or impaired.⁶⁹ In contrast, there was no taking when the construction or structure merely limited accessibility or temporarily impaired the use of private property.⁷⁰ Such damages were deemed consequential and non-compensable since there was no physical invasion causing an ouster of possession.⁷¹

ment built dam subjected rice plantation to permanent flooding and rendered property an irreclaimable bog) and *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 181 (1871) (taking found when government-authorized dam permanently inundated claimant's land with water causing an ouster of his possession) with *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924) (no taking found when canal authorized by Congress intermittently overflowed, temporarily flooding private property but not ousting the claimant from his normal use) and *Transportation Co. v. Chicago*, 99 U.S. 635, 639-42 (1878) (no taking found when temporary city dam impaired claimant's access to and use of his docks).

⁶⁴ *United States v. Lynah*, 188 U.S. 445, 469 (1902); *Pumpelly v. Green Bay Co.* 80 U.S. (13 Wall.) 166, 181 (1871).

⁶⁵ See, e.g., *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 165-66 (1958) (no taking when government merely prohibited operation of non-essential gold mines in war time); *Mugler v. Kansas*, 123 U.S. 623, 654, 668-69 (1887) (no taking when state law merely prohibited use of land as brewery business); see also *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924) (temporary flooding held not a taking); *Transportation Co. v. Chicago*, 99 U.S. 635, 639-42 (1878) (temporary impairment of dock and access held not a taking).

⁶⁶ *United States v. Lynah*, 188 U.S. 445, 469-70 (1902); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 180-81 (1871).

⁶⁷ See, e.g., *Pumpelly v. Green Bay Co.* 80 U.S. (13 Wall.) 166, 167 (1871) (government-authorized dam caused permanent flooding of private property); *Sanguinetti v. United States*, 264 U.S. 146, 147 (1924) (canal authorized by Congress intermittently overflowed, flooding private property); *United States v. Cress*, 243 U.S. 316, 318 (1917) (government-built dam and lock raised level of river above its normal level subjecting land to frequent flooding).

⁶⁸ *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924) "[I]n order to create an enforceable liability against the Government, it is, at least, necessary that the (government action) . . . constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property." *Id.*; see also *United States v. Cress*, 243 U.S. 316, 327-38 (1917) (frequent flooding of land held a taking); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 181 (1871) (permanent flooding held a taking).

⁶⁹ See, e.g., *United States v. Cress*, 243 U.S. 316, 328 (1917); *United States v. Lynah*, 188 U.S. 445, 474 (1902); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 181 (1871).

⁷⁰ See, e.g., *Gibson v. United States*, 166 U.S. 269, 275-76 (1897) (no taking found when construction of dike interfered with plaintiff's access to her shipping docks); *Transportation Co. v. Chicago*, 99 U.S. 635, 639, 643 (1878) (no taking found when construction of dam temporarily interfered with plaintiff's use of his land).

⁷¹ *Gibson v. United States*, 166 U.S. 269, 275-76 (1897); *Transportation Co. v. Chicago*, 99 U.S. 635, 643-45 (1878).

The distinction between takings and non-takings based on the presence or absence of physical occupation of private property causing an ouster of possession is also apparent in another line of cases. These cases involved disputes over repeated rather than permanent interferences with private property.⁷² In *United States v. Causby*⁷³ and *Griggs v. Allegheny County*,⁷⁴ for example, the Court emphasized that the low-level military flights directly over the claimant's property were tantamount to a physical invasion of the property.⁷⁵ According to the Court, any damages caused by the flights resulted from a direct physical invasion of the claimant's domain.⁷⁶ The land was taken, in the Court's view, as completely as if it were appropriated for runways for the planes.⁷⁷

Given the historical distinction between takings and non-takings based on the presence or absence of a physical occupation, the Court consistently upheld mere land use regulations against takings challenges.⁷⁸ According to the Court, a regulation or prohibition of a certain use of land, especially a use deemed harmful to the public, was never a taking absent a physical invasion causing an ouster of possession.⁷⁹ Consequently, the Court upheld many use regulations that substantially destroyed or impaired the value and use of private property, but did not involve a physical invasion or "ouster." For instance, the Court upheld regulations which prevented the pursuit of certain businesses on private property even though the regulations rendered the property virtually worthless.⁸⁰ In such cases, the Court rejected the argument that to prohibit any valuable use of the property was, in essence, to "take" the property because there was no taking in the traditional sense of an ouster of possession.⁸¹ The Court reasoned that nothing was literally or physically taken from the owner; he was merely prevented from using his property in a certain way.⁸² In the Court's view, therefore, there was no taking.

⁷² See, e.g., *Griggs v. Allegheny County*, 369 U.S. 84, 88-89 (1962) (frequent overflights held a taking); *United States v. Causby*, 328 U.S. 256, 264-66 (1946) (repeated military flights directly over owner's land that destroyed his chicken farm held a taking); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329-30 (1922) (repeated firing of United States artillery guns over claimant's land could be deemed a taking); *United States v. Cress*, 243 U.S. 316, 328 (1917) (repeated flooding of land caused by government dam held a taking).

⁷³ 328 U.S. 256 (1946).

⁷⁴ 369 U.S. 84 (1962).

⁷⁵ 328 U.S. at 265-66; 369 U.S. at 88-89.

⁷⁶ 328 U.S. at 265-66.

⁷⁷ *Id.* at 262.

⁷⁸ See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 597-98 (1962) (safety ordinance prohibiting claimant from continuing a prior established sand and gravel mining business upheld); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 156-57 (1958) (government order closing gold mines to force shift of skilled miners to essential war-time mining work upheld); *Miller v. Schoene*, 276 U.S. 272, 281 (1928) (statute ordering the destruction of valuable cedar trees to prevent cedar rust from contaminating nearby apple orchards upheld); *Walls v. Midland Carbon Co.*, 254 U.S. 300, 324-25 (1920) (law prohibiting manufacture of carbon black upheld); *Hadacheck v. Sebastian*, 239 U.S. 394, 412-14 (1915) (law prohibiting operation of a brickyard upheld); *Reinman v. City of Little Rock*, 237 U.S. 171, 180 (1915) (law prohibiting operation of livery stable upheld); *Mugler v. Kansas*, 123 U.S. 623, 674 (1887) (law prohibiting operation of liquor business upheld).

⁷⁹ *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887).

⁸⁰ See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (claimant's tract was worth \$800,000 for brick making purposes, but its value decreased to no more than \$60,000 after enactment of a local law prohibiting operation of the brick yard); *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887) (claimant's distillery rendered virtually worthless after enactment of a local law prohibiting sale and manufacture of alcohol).

⁸¹ *Mugler v. Kansas*, 123 U.S. 623, 666-69 (1887).

⁸² *Id.*

In sum, the physical invasion requirement enabled the Court to uphold many governmental actions and regulations against taking challenges.⁸³ No matter how great the financial impact of a regulation on an individual, there was no compensable taking absent an accompanying physical occupation and ouster of possession. Although the Court has never expressly overruled the physical invasion test, subsequent and conflicting tests used by the Court make it unclear how much weight this test now carries. In the early twentieth century, for instance, the Court began to invalidate regulations even in the absence of a physical occupation of land if the regulation went "too far" and substantially diminished the value of the property.⁸⁴

B. *Diminution in Value*

Under their police power, the states have the authority to regulate property without compensating the owner to protect the health, safety and general welfare of the public.⁸⁵ These regulations usually take the form of a prohibition of a certain use of property.⁸⁶ Under the traditional taking, such police power regulations, without an accompanying physical occupation of land, were not takings.⁸⁷ In the landmark case of *Pennsylvania Coal Co. v. Mahon*,⁸⁸ however, Justice Holmes, writing for the Court, introduced the theory that regulation, if it went "too far," could become a taking, even absent a physical appropriation of the land by the government.⁸⁹

Pennsylvania Coal Co. involved a state law which made it commercially impracticable for a coal company to mine its coal.⁹⁰ The Court invalidated the law as an unconstitutional taking of property without compensation even though the coal was never physically taken or appropriated by the state.⁹¹ The Court reasoned that to make it impossible to mine the coal was as much a taking as if the state had appropriated the coal for its own use without payment.⁹² Justice Holmes suggested that the distinction between a valid police power regulation and a compensable taking was one of degree rather than form.⁹³ Thus, at some

⁸³ See cases cited *supra* note 78.

⁸⁴ See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

⁸⁵ *Berman v. Parker*, 348 U.S. 26, 32 (1954). There the Court stated:

An attempt to define [the police power's] reach or trace its outer limits is fruitless. . . . The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. . . . Public safety, public health, morality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs.

Id.

⁸⁶ See, e.g., cases cited *supra* note 78.

⁸⁷ See *supra* notes 63-84 and accompanying text.

⁸⁸ 260 U.S. 393 (1922).

⁸⁹ *Id.* at 415.

⁹⁰ *Id.* at 412-15. The Pennsylvania Coal Co. had sold property to home builders but retained the title and right to mine any coal located below the surface. *Id.* at 412-13. When the company proposed to exercise this right and necessarily cause the collapse of the houses built on the surface, the legislature passed an emergency measure prohibiting the mining of coal within so many feet of residential buildings. *Id.* It was this legislation that the Supreme Court struck down as an unconstitutional taking of private property. *Id.* at 414-15.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 416.

point, according to Holmes, a regulation could go "too far" and become a taking.⁹⁴ He suggested that the determination of the point at which a regulation became a taking depended upon an evaluation of the particular facts of each case.⁹⁵ In *Pennsylvania Coal Co.*, Holmes apparently evaluated the facts by weighing the public interest in the regulation against the extent of the "taking" caused by the regulation.⁹⁶ In so doing, he expressly identified the diminution in property value resulting from the regulation as one important fact in his evaluation.⁹⁷ Justice Holmes noted that when the financial loss caused by the regulation reached a certain magnitude the enforcement of the law required an exercise of eminent domain and compensation.⁹⁸ Accordingly, the Court in *Pennsylvania Coal Co.* invalidated the Pennsylvania law which did not appropriate, but did prohibit the mining of certain valuable coal.⁹⁹

Despite the apparent disparity between *Pennsylvania Coal Co.* and earlier precedent holding that mere land use regulation was never a taking absent a physical occupation and ouster,¹⁰⁰ *Pennsylvania Coal Co.* did not expressly overturn earlier precedent.¹⁰¹ In fact, the Court still cites both lines of precedent authoritatively, and often in the same case.¹⁰² Consequently, it is unclear how much weight the diminution in value test should be accorded, especially since still later precedent has indicated that diminution in property value alone is often insufficient to constitute a taking.¹⁰³ Nevertheless, the extent of a regulation's impact on property value is an important factor in the third test used by the Court, the modern balancing test.¹⁰⁴

C. Balancing Test

As in *Pennsylvania Coal Co.*, the Court in *Penn Central Transportation Company v. New York City*¹⁰⁵ acknowledged that a regulation of property could become so excessive as to constitute a taking.¹⁰⁶ The Court refused to find, however, that the designation of Grand Central Station as an historic landmark and the Landmark Preservation Committee's subsequent veto of a proposed addition to the terminal constituted a taking.¹⁰⁷ The *Penn Central* Court reiterated Holmes' statement in *Pennsylvania Coal Co.* that whether a taking was found would depend on the particular facts of the case.¹⁰⁸ The Court in *Pennsylvania*

⁹⁴ *Id.* at 415.

⁹⁵ *Id.* at 413.

⁹⁶ *Id.* at 413-14.

⁹⁷ *Id.* at 413.

⁹⁸ *Id.*

⁹⁹ *Id.* at 414.

¹⁰⁰ See *supra* notes 63-84 and accompanying text.

¹⁰¹ The Court merely stated: "We regard this as going beyond any of the cases decided by this Court." 260 U.S. at 416. For an additional discussion of *Pennsylvania Coal Co.*'s departure from the trend, see Sax, *supra* note 13, at 41.

¹⁰² See *supra* notes 11-13 and accompanying text.

¹⁰³ *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 131 (1981). There the Court stated that: "... decisions sustaining . . . land use regulations, which, . . . are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.'" *Id.* (citations omitted).

¹⁰⁴ See *infra* notes 112-15 and accompanying text.

¹⁰⁵ 438 U.S. 104 (1978).

¹⁰⁶ *Id.* at 127-28.

¹⁰⁷ *Id.* at 123.

¹⁰⁸ *Id.* at 124.

Coal Co. had identified only one factor of particular significance, namely the extent of regulation's impact on the value of the regulated property.¹⁰⁹ The Court in *Penn Central*, however, identified three factors of special importance in what it called an "ad hoc factual" taking inquiry.¹¹⁰ These three factors were: 1) the severity of the economic impact of the regulation on the claimant; 2) the regulation's interference with the claimant's distinct investment-backed expectations; and 3) the character of the government action.¹¹¹

In elaborating on the "economic impact" factor, the Court noted that many government regulations had been upheld in the past even though they adversely affected recognized private property interests.¹¹² The Court suggested that such regulations were often upheld because a state tribunal had reasonably concluded that the welfare of the public would be promoted by the regulation.¹¹³ The Court did note that a use regulation might constitute a "taking" if not reasonably necessary to promote a substantial public purpose, or if it had "an unduly harsh impact" on the owner's use of his property.¹¹⁴ A diminution in property value alone, caused by a regulation reasonably related to the public welfare, however, could not establish a taking.¹¹⁵ In those contexts, the Court focused not on the diminution in property value, but on the alternative uses the regulation still allowed.¹¹⁶

The second important factor considered by the *Penn Central* Court was the regulation's effect on the claimant's distinct investment backed expectations.¹¹⁷ The Court explained this factor with the example of *Pennsylvania Coal Co.* According to the *Penn Central* Court, *Pennsylvania Coal Co.* was the leading case standing for the proposition that a regulation, though it substantially furthered an important public purpose, might so frustrate an owner's expected return on his investment in property, that it constituted a taking.¹¹⁸ In *Pennsylvania Coal Co.*, for instance, a coal company had sold its property but specifically reserved title and mining rights to the underlying coal.¹¹⁹ A subsequent state law prevented the coal company from exercising these rights and effectively denied the company access to its coal.¹²⁰ According to the *Penn Central* Court, that law constituted a taking because it interfered with the owner's distinct investment-backed expectations in its property.¹²¹ The company had expressly reserved title to the coal with the expectation that it would be able to exercise its property rights and remove the coal at a future date.¹²² According to the Court in both *Pennsylvania Coal Co.* and *Penn Central*, to make it commercially impracticable to mine coal had nearly the same effect as the complete destruction of property rights and therefore constituted a taking.¹²³

In determining when a regulation constituted a taking, the *Penn Central* Court examined a third factor, the character of the government action.¹²⁴ The Court stated that

¹⁰⁹ *Pennsylvania Coal Co.*, 260 U.S. at 413.

¹¹⁰ *Penn Central*, 438 U.S. at 124.

¹¹¹ *Id.*

¹¹² *Id.* at 124-25.

¹¹³ *Id.* at 125.

¹¹⁴ *Id.* at 127.

¹¹⁵ *Id.* at 131.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 127-28.

¹¹⁸ *Id.* at 127.

¹¹⁹ *Pennsylvania Coal Co.*, 260 U.S. at 412.

¹²⁰ *Id.* at 412-13.

¹²¹ *Penn Central*, 438 U.S. at 127.

¹²² *Pennsylvania Coal Co.*, 260 U.S. at 412-13.

¹²³ *Penn Central*, 438 U.S. at 127; *Pennsylvania Coal Co.*, 260 U.S. at 414.

¹²⁴ 438 U.S. at 124, 128.

it was more apt to find a taking when the action could be characterized as a physical invasion by government rather than as a government program to adjust the benefits and burdens of economic life to promote the common good.¹²⁵ The Court implied that the distinction between the two was that in the first instance, the government was acting in its "enterprise" capacity to acquire land for a specific government function, such as government military air flights.¹²⁶ In the second situation, however, the government was merely adjusting private interests through programs like zoning laws, such that the common good was promoted.¹²⁷ It was not appropriating property for a government enterprise; thus, there was no taking according to the Court in *Penn Central*.¹²⁸

The Court employed the multifactor balancing test to analyze the challenged law in *Penn Central*.¹²⁹ The case involved a dispute over the addition of an office tower to New York's Grand Central Terminal.¹³⁰ Since Grand Central had been declared an historic landmark under New York City's Landmarks Preservation Law ("Landmarks Law"),¹³¹ the New York City Landmarks Preservation Commission had authority to veto any proposed structural changes to the building.¹³² Pursuant to this authority, the Commission had rejected the proposed addition to the terminal. The owner, Penn Central, then contested the Landmarks Law as constituting a taking of its property without compensation.¹³³

In applying the balancing test, the Court weighed the public interest in the preservation of historic and aesthetic buildings against the character of the government action, the economic impact of the regulation on Penn Central, and its interference with Penn Central's investment-backed expectation in Grand Central Station.¹³⁴ First, the Court characterized the government action in *Penn Central* as a program to adjust the benefits and burdens of economic life such that the common good was promoted.¹³⁵ The government, according to the New York City Council, was attempting to preserve historic buildings for the benefit of all New Yorkers.¹³⁶ It was not attempting to appropriate the space above the claimant's property for its own use as in *United States v. Causby*.¹³⁷ Thus, in the Court's view, the Landmarks Law was more like a zoning law designed to promote the

¹²⁵ *Id.* at 124.

¹²⁶ *Id.* at 135 (citing *United States v. Causby*, 328 U.S. 256 (1946), as an example of government acting in its enterprise capacity).

¹²⁷ *Id.* at 124, 135.

¹²⁸ *Id.* at 135. The Court was apparently adopting a test described in Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964), in which the author suggested that a taking depended on whether the government was acting in its enterprise capacity, acquiring resources for its own account; or whether it was acting as an arbiter, mediating conflicts between competing private economic claims. *Id.* at 62-63. According to the author, any losses visited upon the individual due to government action of the first type resulted in a direct benefit to the government and therefore should be a taking. *Id.* at 63. Losses arising from the government's mediation of private claims produced no benefit to any governmental enterprise but merely promoted the common good and therefore should not be a taking. *Id.* at 62-63.

¹²⁹ 438 U.S. at 123-38.

¹³⁰ *Id.* at 115.

¹³¹ *Id.* at 115-16.

¹³² *Id.* at 110-12.

¹³³ *Id.* at 116-22.

¹³⁴ *Id.* at 128-38.

¹³⁵ *Id.* at 131-35.

¹³⁶ *Id.* at 134.

¹³⁷ *Id.* at 135. For a discussion of *Causby*, see *supra* notes 73-77 and accompanying text.

general welfare than an appropriation of private property for a government purpose.¹³⁸ The New York law, according to the Court, merely prevented the owner or anyone else from occupying certain airspace above its property.¹³⁹ The government did not thereby appropriate the airspace and destroy the use of the property below as in *United States v. Causby*.¹⁴⁰

Secondly, the Court found that the economic impact of the law on the claimant was not determinative of a taking. Since a diminution in property value alone did not establish a taking, the Court focused on the uses that the regulation still permitted.¹⁴¹ The Court found that the New York City law did not interfere with the claimant's present use of his building.¹⁴² In fact, the law contemplated that the building would continue to be used as it had been for the past sixty-five years.¹⁴³ Moreover, with respect to the third factor, namely the interference with investment-backed expectations, the Court noted that the law did not prohibit Penn Central's primary expectation that its property would be used as a train terminal.¹⁴⁴ Neither did it prohibit absolutely all additions to the terminal, but only additions not approved by the Commission.¹⁴⁵ According to the Court, the claimant might reformulate its plan and seek approval for a smaller structure more in harmony with the Commission's ideas.¹⁴⁶ The Court concluded that the Landmarks Law did not constitute a taking.¹⁴⁷ The restrictions imposed on the claimant's property rights were substantially related to the promotion of the general welfare in the Court's view, and were not so severe that they prohibited all reasonable use of the property.¹⁴⁸

The *ad hoc* balancing process of *Penn Central* has been employed by the Court in subsequent cases.¹⁴⁹ In one case, *PruneYard Shopping Center v. Robins*,¹⁵⁰ the Court found that a physical invasion of a private shopping mall by solicitors exercising state constitutional rights of free speech and petition did not constitute a taking.¹⁵¹ Absent evidence of a concomitant adverse economic impact, the Court regarded the physical invasion of the property as not itself determinative of a taking.¹⁵² In a second case, *Kaiser Aetna v. United States*,¹⁵³ the Court found that a governmental attempt to secure a public right of passage in a navigable channel dredged and owned by a private party did constitute a taking.¹⁵⁴ According to the Court, the government's action seriously interfered with the claimant's distinct investment-backed expectations.¹⁵⁵ The action went far beyond ordinary regula-

¹³⁸ 438 U.S. at 135.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 131.

¹⁴² *Id.* at 136-37.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 136.

¹⁴⁵ *Id.* at 136-37.

¹⁴⁶ *Id.* at 137.

¹⁴⁷ *Id.* at 138.

¹⁴⁸ *Id.*

¹⁴⁹ See, e.g., *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83-84 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 174-75 (1979).

¹⁵⁰ 447 U.S. 74 (1980).

¹⁵¹ *Id.* at 83-84.

¹⁵² *Id.*

¹⁵³ 444 U.S. 164 (1979).

¹⁵⁴ *Id.* at 180.

¹⁵⁵ *Id.* at 179.

tion¹⁵⁶ and amounted to a substantial devaluation of private property.¹⁵⁷ The Court stated that the claimant's expectation that he would be able to exclude non-paying users from the channel was a property interest.¹⁵⁸ In the Court's view, the government could not take that property without providing compensation.¹⁵⁹

In sum, the Court has often recognized that there are no set formulae of rigid rules in a taking analysis.¹⁶⁰ Rather, *Penn Central* and its progeny have shown a trend towards the use of a balancing inquiry in which the Court examines the public interest in the regulation, the type of regulation and the severity of the regulation's impact.¹⁶¹ Although the Court has observed that a regulation may curtail some use or economic benefit of private property, the Court has stated that a regulation may not survive a taking challenge if it serves no reasonable public interest, or if it has an unduly harsh impact on the claimant.¹⁶² The Court has also observed, however, that government could not go on if it were forced to pay for every new law which affected private property.¹⁶³ In the final analysis, therefore, the resolution of a taking dispute depends ultimately on an exercise of judgment and an application of logic that promotes justice and fairness.¹⁶⁴ Until *Loretto*, it appeared that the recent trend of the Court was to base its judgment on an assessment

[W]hat petitioners now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government. . . . The consent of individual officials representing the United States . . . can lead to the fruition of a number of expectancies embodied in the concept of 'property' — expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property.

Id.

See also *PruneYard*, 447 U.S. at 84, which characterizes the attempt in *Kaiser Aetna* to create a public right of access to plaintiffs' improved pond as an interference with plaintiffs' "reasonable investment backed expectations." *Id.*

¹⁵⁶ *Kaiser Aetna*, 444 U.S. at 178. "Here, the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking under the logic of *Pennsylvania Coal Co. v. Mahon*." *Id.*

¹⁵⁷ *Id.* at 180.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 179-80.

¹⁶⁰ *Prune Yard Shopping Center v. Robins*, 447 U.S. at 75; *Kaiser Aetna v. United States*, 444 U.S. at 175; *Andrus v. Allard*, 444 U.S. 51, 65 (1979) ("There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate."); *Penn Central Transp. Co. v. City of New York*, 438 U.S. at 124; *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413 ("the question depends upon the particular facts.").

¹⁶¹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 442 (1982) (Blackmun, J., dissenting). "In sum, history teaches that takings claims are properly evaluated under a multifactor balancing test." *Id.*

¹⁶² *Penn Central Transp. Co. v. New York City*, 438 U.S. at 127.

¹⁶³ *Id.*

Suffice it to say that government regulation — by definition — involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."

Id. (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

¹⁶⁴ *Andrus v. Allard*, 444 U.S. 51, 65 (1979).

and balancing of all the factors involved in a taking dispute, and not merely on whether the regulation caused a permanent physical occupation.¹⁶⁵

II. RATIONALE OF *LORETTO V. TELEPROMPTER MANHATTAN CATV CORP.*

A. The Majority Opinion

In *Loretto v. Teleprompter Manhattan CATV Corp.*,¹⁶⁶ Justice Marshall, writing for the Court, affirmed a *per se* rule that any permanent physical occupation of private property by government was automatically a taking without regard to other factors such as the regulation's economic impact or the public interest in the regulation.¹⁶⁷ Thus, in *Loretto* the Court found that a New York State law authorizing the installation of cable television equipment on a privately owned apartment building constituted a taking.¹⁶⁸

The Court began its examination of the claim that the action authorized by the statute constituted a taking by setting forth broad principles governing takings clause analysis. The Court acknowledged that no set formula or rigid rule existed to determine when a governmental action or regulation constituted a taking.¹⁶⁹ It observed that ordinarily the Court engaged in an *ad hoc* factual inquiry, examining the factors identified in *Penn Central*, namely, the economic impact of the regulation, its interference with investment-backed expectations and the character of the government action.¹⁷⁰ The Court also recognized that prior decisions had upheld substantial regulation of private property against taking challenges if the regulation was deemed to be reasonably related to the promotion of a substantial public interest.¹⁷¹ The *Loretto* Court, however, regarded physical intrusion as a property restriction of an unusually serious character. When the physical intrusion reached the extreme form of a permanent physical occupation, a taking automatically occurred, according to the Court.¹⁷² The Court regarded a permanent physical occupation not just as an important factor in a taking analysis, but as the determinative one.¹⁷³

After establishing that a permanent physical occupation constituted a taking, the Court turned to a discussion of the reasons underlying this rule. First, the Court surveyed previous cases involving the question of when government action constituted a taking.¹⁷⁴ Implicit in these cases, in the Court's view, was a distinction between government actions involving a permanent physical occupation of property and those involving either

¹⁶⁵ *Loretto*, 458 U.S. at 447 (Blackmun, J., dissenting). "Precisely because the extent to which the government may injure private interests now depends so little on whether or not it has authorized a 'physical contact,' the Court has avoided *per se* takings rules resting on outmoded distinctions between physical and non-physical intrusions." *Id.*

¹⁶⁶ 458 U.S. 419 (1982).

¹⁶⁷ *Id.* at 426.

¹⁶⁸ *Id.* at 425.

¹⁶⁹ *Id.* at 426.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* The court stated: "Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, the character of the 'government action' not only is an important factor in resolving whether the action works a taking but is determinative." *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 426-36.

a temporary invasion or damage with no accompanying occupation.¹⁷⁵ According to the Court, previous cases established that a taking automatically occurred in the former situation. The public interest in such a regulation or its minimal economic impact was irrelevant.¹⁷⁶ The majority stated that the Court had never failed to find a taking when presented with a permanent physical occupation of property.¹⁷⁷ The distinction between permanent physical occupations and temporary invasions, the majority observed, was present in the nineteenth century flooding cases.¹⁷⁸ It noted that a taking was found in these cases only when property was permanently inundated with water or other material so as to permanently destroy or impair the land's usefulness.¹⁷⁹ If the impairment was temporary or if it was the consequence of some action carried on by the government outside the property, a taking was never found according to the *Loretto* Court.¹⁸⁰ The Court also noted that later cases clearly established that the permanent occupation of land by such installations as telephone lines, telegraph wires and underground pipes were takings regardless of the insubstantial space occupied or the lack of interference with the owner's use of his land.¹⁸¹

Continuing its analysis of precedent, the *Loretto* Court found that recent precedent recognized the traditional distinction between permanent physical occupations, physical invasion short of an occupation, and mere regulation of land use.¹⁸² The Court conceded that the most recent cases stated or implied that a physical invasion was subject to a "balancing process."¹⁸³ In the Court's view, however, these cases did not imply that a permanent physical occupation was ever subject to such a balancing process.¹⁸⁴ The Court pointed out that the most recent cases had not dealt with a regulation which involved a permanent physical occupation.¹⁸⁵ Thus, in *Loretto*, the Court determined that recent precedent applied only to cases involving physical invasions short of a permanent physical occupation, or to non-possessory regulations of land use.¹⁸⁶ According to the Court,

¹⁷⁵ *Id.* at 430. "[R]ecent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property." *Id.*

¹⁷⁶ *Id.* at 434-35.

In short, when the "character of the governmental action" *Penn Central*, 438 U.S. at 124, 98 S. Ct. at 2659, is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.

458 U.S. at 434-35.

¹⁷⁷ 458 U.S. at 427. "When faced with a constitutional challenge to a permanent physical occupation of real property, the Court has invariably found a taking." *Id.*

¹⁷⁸ *Id.* at 427-28.

¹⁷⁹ *Id.* at 428.

¹⁸⁰ *Id.* The court said:

Since these early cases, this Court has consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property, that causes consequential damages within, on the other. A taking has always been found only in the former situation.

Id. (citations omitted).

¹⁸¹ *Id.* at 429-30.

¹⁸² *Id.* at 430.

¹⁸³ *Id.* at 430-32.

¹⁸⁴ *Id.* at 432.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 430-34.

recent precedent did not affect the traditional rule that a permanent physical occupation was a taking *per se*.¹⁸⁷ On the contrary, in the Court's opinion, recent cases emphasized that physical invasion cases were special.¹⁸⁸ For example, the *Loretto* majority indicated that the Court's most recent "complete discussion" of the takings clause in *Penn Central Transportation Co. v. New York City*, did not repudiate the rule that a permanent physical occupation of property was a taking *per se*.¹⁸⁹ Moreover, *Kaiser Aetna v. United States*, while not addressing a permanent physical occupation, did indicate, in the *Loretto* Court's view, that physical invasion by government was a particularly serious type of property regulation.¹⁹⁰ The Court also detected the distinction between permanent occupations and temporary invasions in *PruneYard Shopping Center v. Robins*, and used it to distinguish *PruneYard* from the facts in *Loretto*.¹⁹¹ The *Loretto* Court pointed out that the physical invasion in *PruneYard* had not been determinative of a taking because it was temporary in nature. The property owner, moreover, was able to regulate the time, place and manner of the invasion so as to minimize interference with his business.¹⁹² Unlike *Loretto*, *PruneYard* did not involve a permanent physical occupation and therefore did not affect the traditional rule embraced by the majority, that a permanent physical occupation was always a taking.¹⁹³

Upon concluding its analysis of precedent, the Court examined a second reason supporting its decision, the purpose of the taking clause. According to the *Loretto* Court, the taking clause was designed to protect property interests.¹⁹⁴ The Court emphasized that an owner's ability to possess, use, and dispose of his property were the most treasured strands of the traditional bundle of private property rights.¹⁹⁵ In the Court's view, a permanent physical occupation by a stranger was the most serious, and qualitatively, the most severe interference with each of those rights.¹⁹⁶ Those protected rights, moreover, extended to as much space above the ground as the owner could use or occupy.¹⁹⁷ Thus, it

¹⁸⁷ *Id.* at 432.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* "[*Penn Central*] does not repudiate the rule that a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Id.* (footnote omitted). For a discussion of *Penn Central*, see *supra* notes 105-48 and accompanying text.

¹⁹⁰ 458 U.S. at 433. For a discussion of *Kaiser Aetna* see *supra* notes 153-59 and accompanying text.

¹⁹¹ 458 U.S. at 433. The court declared that *PruneYard* "underscores the constitutional distinction between a permanent occupation and a temporary physical invasion." *Id.* For a discussion of *PruneYard* see *supra* notes 150-52 and accompanying text.

¹⁹² 458 U.S. at 434.

¹⁹³ *Id.* at 432, 434.

¹⁹⁴ *Id.* at 435.

¹⁹⁵ *Id.* at 435-36.

¹⁹⁶ *Id.* at 435. The Court explained its view as follows:

To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. . . . Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; . . . Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value

Id. (citations omitted).

¹⁹⁷ *Id.* at 438 n.16 (quoting *United States v. Causby*, 328 U.S. 256, 264 (1946)).

was irrelevant to the *Loretto* Court that the amount of space occupied was minimal¹⁹⁸ and that the plaintiff had not previously used that space.¹⁹⁹ In the Court's view the relevant factor was the existence of any permanent physical invasion, no matter how inconsequential.²⁰⁰

Finally, in addition to its consistency with the purpose of the taking clause, the Court also suggested that the *per se* rule avoided difficult line-drawing problems.²⁰¹ By deeming every permanent physical occupation of property a taking, the Court would not have to engage in disputes over whether an occupation was significant enough to constitute a taking.²⁰² The rule, moreover, presented few problems of proof in the Court's view.²⁰³ A permanent physical occupation was easily identified.²⁰⁴ While the *extent* of the occupation was a relevant factor in determining the amount of compensation due, it was not important in determining whether a taking had occurred.²⁰⁵ A claimant need only show that the placement of a fixed structure on land had occurred. According to the Court, such a fact was rarely subject to dispute.²⁰⁶

After establishing that a *per se* rule would apply to permanent physical occupations of property, the Court rejected Teleprompter's attempt to justify section 828 as a permissible regulation of the use of rental property.²⁰⁷ The Court rejected Teleprompter's argument that the New York law prohibiting landlords from interfering with the installation of cable television equipment was similar to other rental property regulations which had survived takings challenges.²⁰⁸ The distinction, according to the Court, was that section 828 authorized a third party, a stranger, to occupy space on the owner's building.²⁰⁹ The Court had already emphasized that an invasion by a stranger was qualitatively more severe than that caused by other regulations.²¹⁰ Thus, in the *Loretto* majority's view, section 828 was not analogous to rental property regulations which allowed a landlord to retain control and possession of the installations and the space they occupied.²¹¹ Valid regulations did not require the landlord to tolerate a physical occupation of his property by a third party.²¹² Consequently, in the Court's view, rental property regulations and section 828 were distinguishable. While the first were appropriately analyzed under the multifactor balancing test, section 828 was subject to a *per se* rule since it authorized a permanent physical occupation of property by a third party.²¹³

In summary the Court held that a permanent physical occupation was a taking because the owner entertained an historically rooted expectation of compensation. In

¹⁹⁸ 458 U.S. at 438 n.16. "[W]hether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a bread box." *Id.* See also *id.* at 437 & n.13.

¹⁹⁹ *Id.* at 437.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 436-37.

²⁰² *Id.*

²⁰³ *Id.* at 437.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 437-38.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 438-39. The Court stated: "We fail to see, however, why a physical occupation of one type of property but not another is any less a physical occupation." *Id.* at 439.

²⁰⁸ *Id.* at 440. For specific examples of valid regulations which require landlords to make physical attachments to rental property see *id.* at 437 n.7 (Blackmun, J., dissenting).

²⁰⁹ *Id.* at 440.

²¹⁰ *Id.* at 436.

²¹¹ *Id.* at 436, 440 n.19.

²¹² *Id.* at 440.

²¹³ *Id.*

addition, the character of the invasion caused by a permanent occupation was qualitatively more severe than other categories of property regulation.²¹⁴ The Court expressly stated that its decision did not question a state's broad power to impose *use* restrictions on private property.²¹⁵

B. *The Dissenting Opinion in Loretto*

Justice Blackmun, joined by Justices Brennan and White, wrote the dissenting opinion.²¹⁶ Justice Blackmun called the majority opinion a "curiously anachronistic decision."²¹⁷ The dissent rejected the Court's conclusion that the *per se* rule was strongly grounded in precedent.²¹⁸ In the dissent's view, the early precedent cited by the Court lacked any vitality outside the agrarian context in which it was decided and stood for a constitutional rule that was unsuited to a modern urban age.²¹⁹ In contrast, the dissent asserted, history indicated that takings claims were properly evaluated under a multifactor balancing test.²²⁰ Recent precedent, the dissent maintained, expressly held that a minor physical intrusion was not determinative of a taking.²²¹ Consequently, the dissent agreed with the New York Court of Appeals' straightforward application of the balancing test, and its finding that section 828 was a valid police power regulation designed to protect the interests of both landlords and tenants, while promoting the development of cable television.²²² The dissent observed that the economic impact of the physical occupation in *Loretto* was minimal. Teleprompter's cables did not affect the value of the property, nor did they interfere with the plaintiff's investment-backed expectations since she was unaware of their existence when she invested in the building.²²³ In the dissent's view, therefore, such a minor physical intrusion did not constitute a taking under the balancing test.²²⁴

In addition to finding the *per se* rule inconsistent with precedent, the dissent also implied that the rule's capacity to distinguish between significant and insignificant losses was minimal.²²⁵ According to the dissent, recent applicable precedent indicated that non-physical intrusions such as those caused by zoning laws, were the rule rather than the exception.²²⁶ The dissent emphasized that such modern non-physical intrusions were capable of imposing a far greater adverse economic impact on a property owner than that inflicted by minor physical touchings.²²⁷ *Per se* rules, the dissent suggested, had been avoided precisely because the amount of loss suffered by a property owner depended so little on whether or not the intrusion was a physical one.²²⁸

²¹⁴ *Id.* at 441.

²¹⁵ *Id.*

²¹⁶ *Id.* at 442-56 (Blackmun, J., dissenting).

²¹⁷ *Id.* at 442 (Blackmun, J., dissenting).

²¹⁸ *Id.* at 446-47 (Blackmun, J., dissenting).

²¹⁹ *Id.*

²²⁰ *Id.* at 451 (Blackmun, J., dissenting).

²²¹ *Id.* at 445 (citing *PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980)). The dissent was essentially adopting and reiterating the reasoning and language of the New York Court of Appeals' decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 440 N.Y.S.2d 843, 423 N.E.2d 320 (1981).

²²² 458 U.S. at 451 (Blackmun, J., dissenting).

²²³ *Id.* at 445 (Blackmun, J., dissenting).

²²⁴ *Id.*

²²⁵ *Id.* at 447 (Blackmun J., dissenting).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

The dissent also rejected the Court's distinction between permanent physical occupations and temporary physical invasions.²²⁹ The minority suggested that the distinction was strained and untenable, and had been erected merely to distinguish *Loretto* from recent precedent.²³⁰ Precedent, the dissent asserted, no longer recognized a distinction between physical and nonphysical interferences with property.²³¹ Thus, for the majority to draw an even finer distinction between permanent and temporary physical invasions was untenable in the dissent's view.²³² The dissent insisted the distinction was without substance, ambiguous and subject to manipulation by litigants.²³³ The minority opinion also pointed out that an invasion's "permanence" was subject to dispute.²³⁴ Even the occupation in *Loretto* was arguably temporary since it lasted only so long as the building was maintained as rental property, and not forever.²³⁵ Thus, the dissent feared that the creation of the distinction would merely encourage litigants to mold otherwise insubstantial claims into the set formula of the *per se* rule²³⁶ and reduce taking analyses into metaphysical disputes over what was physical and what was temporary.²³⁷

Lastly, the dissent rejected the Court's assertion that section 828 was subject to a *per se* rule merely because it substantially interfered with property rights.²³⁸ In the dissent's opinion, section 828 differed very little from other New York rental property regulations which had been upheld against takings challenges.²³⁹ Many of those regulations interfered with a landlord's property rights as much, if not more than, section 828.²⁴⁰ For example, the dissent noted that landlords were required to install mailboxes which occupied more than five times the space that Teleprompter's cables did.²⁴¹ A landlord's ability to use, occupy, or sell his property was affected no more adversely by section 828 than by these other rental property regulations.²⁴² Nor was their impact any less severe, in the dissent's view, because they allowed the landlord and not a third party to make and maintain the installation.²⁴³ The dissent emphasized, moreover, that the appellant had admitted that she actually had no other use for the cable occupied space.²⁴⁴ In the dissent's view, the Court's inquiry should be focused on the extent of the invasion's interference with the owner's property use and not solely on whether an invasion had occurred.²⁴⁵ Thus, since the interference authorized by section 828 was similar, and in some cases less severe, than that authorized by other valid rental property regulations,²⁴⁶ the dissent saw no reason to differentiate the two merely because under section 828 a

²²⁹ *Id.* at 447-48 (Blackmun, J., dissenting).

²³⁰ *Id.* at 442 (Blackmun, J., dissenting).

²³¹ *Id.* at 447-48.

²³² *Id.*

²³³ *Id.* at 447-50.

²³⁴ *Id.* at 448.

²³⁵ *Id.*

²³⁶ *Id.* at 451.

²³⁷ *Id.* at 450.

²³⁸ *Id.* at 452-53.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 453.

²⁴² *Id.* at 451-53.

²⁴³ *Id.* at 449-50.

²⁴⁴ *Id.* at 453-54.

²⁴⁵ *Id.* at 453.

²⁴⁶ *Id.* at 451-52.

third party was the authorized occupant.²⁴⁷ Indeed, in the dissent's view, a landlord was almost better off under section 828 because the cable television company and not the owner, was obligated to pay all expenses of installation, maintenance and removal.²⁴⁸

In sum, the dissent viewed the affirmation of the *per se* rule by the Court as an unnecessary and potentially dangerous undermining of well-planned legislation.²⁴⁹ It viewed section 828 as a careful response to a modern social problem and a new way of living.²⁵⁰ To the dissent, the *per se* rule was antiquated and unsuited to the solution of problems precipitated by new technological advances such as cable television.²⁵¹ The dissent would have analyzed *Loretto* under the multifactor balancing test in accordance with the New York Court of Appeals.²⁵²

III. ANALYSIS OF *LORETTO V. TELEPROMPTER MANHATTAN CATV CORP.*

In *Loretto* the Supreme Court affirmed the rule that all regulations authorizing any permanent occupation of private property by government were takings without regard to the public interest served by the regulation or its negligible economic impact on the regulated property owner.²⁵³ The Court based its rule on what it called a long line of precedent and on its concern for the protection of traditional property rights.²⁵⁴ The next section analyzes the Court's reasoning in *Loretto*. First, recent taking clause decisions are examined.²⁵⁵ The *Loretto* majority's conclusion that precedent supports the *per se* rule is evaluated.²⁵⁶ It is suggested that *Loretto* is actually inconsistent with the recent trend towards the use of a multifactor balancing test in all takings disputes regardless of the presence or absence of a permanent physical occupation.²⁵⁷ Recent decisions have indicated that non-possessory regulations are so prevalent in our modern society that a test based solely on the presence of a permanent physical occupation would be inadequate and perhaps even inequitable.²⁵⁸ Second, the Court's contention that the protection of traditional property rights is served by the *per se* rule is examined.²⁵⁹ It is demonstrated that non-possessory regulations may be just as harmful to property rights as regulations authorizing permanent physical occupations.²⁶⁰ The distinction between takings and non-takings should thus be based on the extent of the interference with property rights and not simply whether there has been a partial eviction.²⁶¹ Finally, it is suggested that the *per se* rule may have a disastrous impact on some well-reasoned and useful regulations.²⁶² In particular, the rule may mandate the invalidation of subdivision exactions, a specialized regulation requiring the occupation of subdivision development property by such

²⁴⁷ *Id.* at 449-50.

²⁴⁸ *Id.* at 453.

²⁴⁹ *Id.* at 455-56.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.* at 456.

²⁵³ See *supra* notes 166-215 and accompanying text.

²⁵⁴ See *supra* notes 174-206 and accompanying text.

²⁵⁵ See *infra* notes 265-307 and accompanying text.

²⁵⁶ See *infra* notes 265-307 and accompanying text.

²⁵⁷ See *infra* notes 274-307 and accompanying text.

²⁵⁸ See *infra* notes 297-302 and accompanying text.

²⁵⁹ See *infra* notes 308-45 and accompanying text.

²⁶⁰ See *infra* notes 308-22 and accompanying text.

²⁶¹ See *infra* notes 323-45 and accompanying text.

²⁶² See *infra* notes 346-414 and accompanying text.

facilities as sidewalks, roads, and parks.²⁶³ In conclusion, it is suggested that the *Loretto* Court should have avoided the affirmation of the *per se* rule and analyzed the dispute under the multifactor balancing test, or even under the rationale used by the lower courts to uphold subdivision exactions.²⁶⁴

A. *The Per Se Rule's Inconsistency with Recent Taking Doctrine*

The *Loretto* majority maintained that its *per se* rule and its distinction between permanent occupations and temporary invasions had been established in earlier cases. Precedent does not, however, actually define a distinction between permanent occupations and temporary invasions. A *per se* rule moreover is inconsistent with recent taking doctrine and with the implicit policy underlying modern taking analysis.

The distinction between permanent physical occupations and temporary physical invasions, upon which *Loretto's* *per se* rule is based, may have had some merit at one time. For instance, in the nineteenth century flooding cases cited in *Loretto*,²⁶⁵ a taking occurred only when the government's physical invasion of private property amounted to a permanent ouster of possession.²⁶⁶ Government actions or regulations which merely impaired or prohibited the use of property were usually not so extreme as to cause an ouster of possession. Consequently, the Court never invalidated non-possessory government regulations as takings, regardless of their economic impact, under the old test.²⁶⁷ Rather, in order to establish a compensable taking, a claimant had to prove that the government regulation or action caused some physical occupation of a permanent nature, much like those occasioned when the government pursued formal eminent domain proceedings.²⁶⁸ For example, the Court found no taking when a temporary dam cut off an owner's access to his shipping docks.²⁶⁹ The Court did find a taking, however, when a permanent dam caused a back-up of flood waters which permanently inundated the claimant's land and ousted him from possession.²⁷⁰ In the first instance there was no taking because there was no permanent separation of the owner from his property.²⁷¹ His access to it, and his use of it were merely impaired.²⁷² In the second instance, however, there was a taking because the government action had risen to the extreme form of a permanent physical invasion of property, almost as if the government had formally condemned and appropriated the land under an eminent domain proceeding.²⁷³ While mere regulations or temporary impairments were never takings under the old rule regardless of their economic impact, permanent physical ousters were considered such extreme interferences with property rights that they rose to the level of a taking. Consequently, the distinction between temporary invasions and permanent occupations could mean the difference between a taking and a non-taking under the old rule.

²⁶³ See *infra* notes 346-414 and accompanying text.

²⁶⁴ See *infra* note 414 and accompanying text.

²⁶⁵ 458 U.S. at 427-28.

²⁶⁶ See *supra* notes 67-71 and accompanying text.

²⁶⁷ See *supra* notes 63-84 and accompanying text.

²⁶⁸ See *supra* notes 63-84 and accompanying text.

²⁶⁹ *Transportation Co. v. Chicago*, 99 U.S. 635, 642-43 (1878).

²⁷⁰ *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177-81 (1871).

²⁷¹ *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878).

²⁷² *Id.*

²⁷³ *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177-78 (1871).

In an agrarian society where land was synonymous with wealth, a rule based solely on the presence or absence of a permanent physical loss of land may have been appropriate.²⁷⁴ At that time land use regulations were rare and a simple rule was probably sufficient to compensate many of the worst harms. With the turn of the century, however, increased urban populations required the development of additional restrictions on the use and occupation of private lands in urban communities.²⁷⁵ The old rule that a taking required a showing of a permanent physical ouster became inadequate in a new era where significant harm was increasingly caused by non-possessory regulations. Consequently, logic demanded a departure from the distinction between permanent occupations and temporary invasions, upon which the old rule was based. Indeed a new approach to taking analyses was introduced in *Pennsylvania Coal Co. v. Mahon*.²⁷⁶

Justice Holmes, writing for the Court in *Pennsylvania Coal Co.*, introduced the idea that the difference between valid police power regulations and unconstitutional takings was one of degree, not form.²⁷⁷ If a regulation went "too far," according to Holmes, and if it diminished the value of the regulated property beyond a certain magnitude, it became a taking.²⁷⁸ This approach freed the Court from a literal interpretation of the taking clause.²⁷⁹ The term "property" increasingly was perceived as more than just the physical, tangible piece of real estate.²⁸⁰ Instead, "property" began to be interpreted as the group of rights inhering in the citizen's relation to the physical thing.²⁸¹ A person's right to possess, use, and dispose of his land was his "property."²⁸² After *Pennsylvania Coal Co.*, therefore, the complete destruction of those rights, even absent a permanent physical occupation, was often recognized as a taking of "property."²⁸³

Indeed, subsequent case law which elaborated on Holmes' suggestion that takings disputes should be analyzed on an *ad hoc* basis implied that physical and non-physical interferences with property would be analyzed in the same manner. In *Penn Central*, for example, the Court expressly noted that set formulae and rigid rules did not exist in

²⁷⁴ *Loretto*, 458 U.S. at 447 (Blackmun, J., dissenting).

²⁷⁵ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926).

²⁷⁶ 260 U.S. 393 (1922).

²⁷⁷ *Id.* at 416.

²⁷⁸ *Id.* at 415.

²⁷⁹ *Kratovil and Harrison, Eminent Domain — Policy and Concept*, 42 CALIF. L. REV. 596, 599 (1954).

One of the earliest controversies to emerge in the law of eminent domain centered around the meaning to be read into the phrase "taking of property." The Supreme Court, and many state courts, originally thought of "property" as land itself or some other tangible object of ownership. This physical approach also extended to the word "taking." Owing largely, no doubt, to the connotation of the word itself, "taking" was thought to mean a *taking over*, an appropriation of the property by the taker for the latter's own use.

Id. (footnotes omitted).

²⁸⁰ *Penn Central*, 438 U.S. at 142 (Rehnquist, J., dissenting). "The term [property as used in the Takings Clause] is not used in the 'vulgar and untechnical sense of the physical thing. . . .'" *Id.* (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945)).

²⁸¹ 438 U.S. at 142-43.

²⁸² *Id.*

²⁸³ *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). "Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." *Id.* (footnote omitted). See also *Armstrong v. United States*, 364 U.S. 40, 48-49 (1960) (where the total destruction by the government of all value of materialmen's liens was held a taking).

taking analyses.²⁸⁴ On the contrary, according to *Penn Central*, the Court should engage in an *ad hoc* factual inquiry into such factors as the regulation's impact on the owner, its interference with investment-backed expectations, and the character of the government action.²⁸⁵ In *Penn Central* the Court noted that if the government action could be characterized as a physical invasion, it was more likely that a taking would be found, but not that it must be found.²⁸⁶ *Penn Central* therefore implied that a physical invasion alone did not constitute a taking. Factors such as the economic impact of the regulation and the public interest it served were also relevant.²⁸⁷

Furthermore, in *PruneYard Shopping Center v. Robins*,²⁸⁸ the Court expressly refused to find that a physical invasion of private property pursuant to a state constitutional right was determinative of a taking.²⁸⁹ In *PruneYard*, because there was no proof that a physical invasion of a privately owned shopping mall by solicitors also caused an adverse economic impact on the owner, the Court found that a taking had not been established.²⁹⁰ Thus, *Penn Central*, *PruneYard* and other recent cases²⁹¹ indicate that a physical invasion is one of the factors of a taking analysis, but not necessarily the determinative one. In fact, in citing *PruneYard*, the *Loretto* majority acknowledged that physical invasions alone were not always determinative of a taking.²⁹² The Court distinguished the activity in *PruneYard*, however, by characterizing it as a temporary physical invasion subject to the balancing test, rather than a permanent physical occupation which would have been a taking *per se*.²⁹³

The Court in *Loretto* was able to avoid the balancing test dictated by *PruneYard* only by erecting this distinction between permanent and temporary invasions.²⁹⁴ This distinction, however, is not supported by recent precedent. On the contrary, as *Loretto* tacitly acknowledged, recent precedent indicated that distinctions between physical and non-physical intrusions were no longer the sole criterion in resolving takings disputes. Accordingly, an even finer distinction between temporary and permanent physical occupations alone is even less helpful in identifying compensable takings.²⁹⁵ Consequently, *Loretto*'s establishment of a modern distinction between types of physical invasions as well as its

²⁸⁴ 438 U.S. at 124.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 124. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government." *Id.* (emphasis added).

²⁸⁷ *Id.*

²⁸⁸ 447 U.S. 74 (1980).

²⁸⁹ *Id.* at 83-84.

²⁹⁰ *Id.*

²⁹¹ See *Kaiser Aetna v. United States*, 444 U.S. 166, 174-80 (1979) (although this case involved a physical invasion of property, the Court did not base its finding of a taking on that factor alone; rather the Court also looked to other factors such as public interest, economic impact, and interference with reasonable investment backed expectations); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

²⁹² 458 U.S. at 434.

²⁹³ *Id.*

²⁹⁴ *Id.* at 442 (Blackmun, J., dissenting).

²⁹⁵ *Id.* at 447-48 (Blackmun, J., dissenting). As the dissent stated:

[T]he Court draws an even finer distinction today — between "temporary physical invasions" and "permanent physical occupations" . . . an examination of each of the three words in the Court's "permanent physical occupation" formula illustrates that the newly-created distinction is even less substantial than the distinction between physical and non-physical intrusions that the Court already has rejected.

Id.

establishment of a modern *per se* rule seem inconsistent with the trend toward the use of the balancing test in all recent takings disputes.²⁹⁶

In developing the balancing test, the Court implicitly recognized that a rule based solely on the presence or absence of a permanent physical invasion was inequitable. Such a rule would compensate only the few landowners who suffered a permanent physical invasion of their property, but would leave a great number of landowners who had suffered real economic harm uncompensated merely because the particular regulation did not require a permanent physical invasion. The creation of the multifactor balancing test indicated that public and private interests should be balanced to determine whether a regulation's interference with property rights is so excessive as to constitute a taking. According to *Loretto*, however, if a regulation requires or authorizes a permanent physical occupation a taking has occurred and the Court need not examine such factors as the public interest served by the regulation or its minimal interference with private interests.²⁹⁷ The presence of a permanent physical occupation alone is enough to invalidate a regulation as a taking.²⁹⁸ In contrast, the individual whose property is subjected to a regulation which prohibits a certain use, or causes a temporary physical invasion, is not entitled to such automatic satisfaction according to *Loretto*.²⁹⁹ Rather, in the absence of a permanent occupation, all other challenged regulations remain subject to the more complex multifactor balancing test in which the public interest and the extent of the regulation's economic impact are relevant factors. Recent case law indicates, moreover, that the claimant must show either that the economic impact of a challenged regulation was unduly harsh³⁰⁰ or that it served no reasonable public interest.³⁰¹ In most instances the legislative judgment as to what constitutes an important public interest will be respected by the Court, making it difficult for a claimant to prove otherwise.³⁰²

The *per se* rule announced in *Loretto* promotes the inequity of automatically compensating some landowners for a minor physical occupation while forcing others to shoulder the financial burden of public programs which do not cause a physical occupation. The oft-stated purpose of the fifth amendment's taking clause is to insure that some people alone do not bear public burdens which in all fairness and justice should be borne by the public as a whole.³⁰³ The disparity of rewarding some landowners such as *Loretto*, for negligible invasions of their property while forcing others to bear sizable economic losses, is unfair and unjust. It has been suggested that the distinction between valid police power regulations and unconstitutional taking should depend on the extent and economic impact of the action and not on whether a partial eviction has occurred.³⁰⁴ Otherwise, to enforce the *per se* rule is to establish a rule which requires compensation in many cases when the loss is insignificant in return for a bright line rule that identifies some, but by no

²⁹⁶ *Id.* at 442 (Blackmun, J., dissenting). As Justice Blackmun noted in dissent, *Loretto* is "a curiously anachronistic decision." *Id.*

²⁹⁷ *Id.* at 434-35.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 426. "Ordinarily, the Court must engage in 'essentially *ad hoc*, factual inquiries.'" *Id.* (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

³⁰⁰ *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978).

³⁰¹ *Id.*

³⁰² *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

³⁰³ *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978) (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

³⁰⁴ Michelman, *supra* note 60, at 1229. See also *Loretto*, 458 U.S. at 453 (Blackmun, J., dissenting) ("Any intelligible takings inquiry must . . . ask whether the extent of the State's interference is so severe as to constitute a compensable taking . . .").

means all, compensable takings.³⁰⁵ The allegedly superior protection of treasured property rights afforded by the *per se* rule³⁰⁶ as well as the advantage of easy administration,³⁰⁷ do not justify the disparity and inequity promoted by the *per se* rule.

B. Traditional Property Rights

In addition to precedent, the Court in *Loretto* based its decision on the purpose behind the takings clause to protect the traditional property rights of possession, use and disposition.³⁰⁸ In its view, a permanent physical occupation effectively destroyed each of these rights.³⁰⁹ Accordingly, a *per se* rule was necessary to protect them.³¹⁰ Although these traditional property rights are the basis of any taking analysis, it is not clear that a permanent physical occupation necessarily interferes with them to a greater extent than other types of invasions or use regulations, or that a *per se* rule will more effectively protect them. On the contrary, the *per se* rule may not further their protection so much as it may reduce taking disputes to formalistic quibbles over the distinction between a permanent physical occupation and a temporary physical invasion.³¹¹ In addition, the *per se* rule may cause the automatic invalidation of carefully planned legislation designed to promote the common good.

Many non-possessory regulations or temporary invasions can effectively destroy or impair property rights such that an owner sustains a real economic loss.³¹² Yet such regulations have been upheld as valid police power measures to insure the public welfare.³¹³ For instance, the Court has upheld regulations which prohibited the most valuable use of property, sometimes decreasing the market value of the property up to almost 88%.³¹⁴ It has even upheld a regulation which prohibited the sale of private property entirely.³¹⁵ The Court has also upheld a government authorized physical invasion of private property.³¹⁶ In *Loretto*, moreover, the dissent noted that many rental property regulations which required the installation of such facilities as mailboxes and smoke detectors often interfered with the landlord's ability to use, occupy and control the space so occupied.³¹⁷ Yet those regulations had been upheld as constitutionally valid despite the

³⁰⁵ Michelman, *supra* note 60, at 1228.

³⁰⁶ *Loretto*, 458 U.S. at 435.

³⁰⁷ *Id.* at 436. "The traditional rule also avoids otherwise difficult line-drawing problems . . . [and] presents relatively few problems of proof." *Id.*

³⁰⁸ *Id.* at 435-36.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.* at 442-43 (Blackmun, J., dissenting).

³¹² See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (75% diminution in value caused by zoning law); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (87½% diminution in value).

³¹³ See cases cited *supra* note 300. See also *Penn Central*, 438 U.S. at 125, where the Court stated: " . . . in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land use regulations that destroyed or adversely affected recognized real property interests." *Id.* (citing *Gorieb v. Fox*, 274 U.S. 603, 608 (1972); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

³¹⁴ *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915).

³¹⁵ *Andrus v. Allard*, 444 U.S. 51, 52-5 (1979) (Eagle Protection Act and Migratory Bird Treaty prohibiting the sale of lawfully obtained eagle feathers upheld against a takings challenge).

³¹⁶ *PruneYard Shopping Center v. Robbins*, 447 U.S. 74, 88 (1982).

³¹⁷ 458 U.S. at 453 (Blackmun, J., dissenting).

fact that they required sometimes larger portions of common space, and were just as permanent as the cable television installation authorized by section 828.³¹⁸ It is conceivable that the space occupied by the mailboxes could be more useful to the landlord than admittedly otherwise useless space on his roof occupied by cables.³¹⁹ The mailboxes, furthermore, are as temporary as the cables. Only as long as the owner uses his or her property as rental property is he required to maintain mailboxes and, under section 828, cable television equipment.³²⁰ Finally, unlike section 828, other rental property regulations require a landlord to make the installations at his own expense.³²¹ Under section 828, however, the landlord not only controlled the installation of cable facilities through the imposition of reasonable conditions, but also paid nothing for the service. The cable television company was required to pay the costs of installation, maintenance and removal, while indemnifying the landlord for any damages caused by the equipment.³²² Thus, it is clear that section 828 was similar to other rental property regulations in many respects, and even more protective of the landlord's interests in others.

The *Loretto* Court determined, however, that the interference with property rights occasioned by section 828 required a *per se* rule to protect those rights.³²³ Yet use regulations and rental property regulations were as capable of adversely affecting those rights as section 828. Prior to *Loretto* the Court never invoked a *per se* rule to protect property rights from their interference. Indeed, as the dissent asserted, *per se* rules were avoided precisely because the extent to which property interests could be injured depended so little on whether a physical touching occurred.³²⁴ Thus, the Court's contention that section 828 was justly invalidated under the *per se* rule because it interfered with property rights is "logically untenable."³²⁵

The qualifying distinction, according to the *Loretto* Court, between section 828 and other regulations, especially rental property regulations, was that section 828 authorized a third party to make the permanent physical occupation.³²⁶ While other regulations required the installation of facilities, they did not require the owner to sacrifice his dominion and control over that space to a stranger.³²⁷ In the Court's view, the intrusion of a stranger was qualitatively more severe than that caused by any other regulation.³²⁸ The Court never demonstrated, however, how the intrusion by a third party was qualitatively

³¹⁸ *Id.*

New York landlords are required by law to provide and pay for mail boxes that occupy more than five times the volume that Teleprompter's cable occupies on appellant's building If the state constitutionally can insist that appellant make this sacrifice so that her tenants may receive mail, it is hard to understand why the state may not require her to surrender less space, *filled at another's expense*, so that those same tenants can receive television signals.

Id. (citation omitted).

³¹⁹ *Id.* at 453-54.

³²⁰ N.Y. EXEC. LAW § 828 (McKinney 1982). For the language of the statute, see *supra* note 32.

³²¹ 458 U.S. at 435 (Blackmun, J., dissenting).

³²² N.Y. EXEC. LAW, § 828 (McKinney 1982). For the language of the statute, see *supra* note 32.

³²³ 458 U.S. at 435-36.

³²⁴ *Id.* at 447 (Blackmun, J., dissenting).

³²⁵ *Id.*

³²⁶ *Id.* at 436.

³²⁷ *Id.*

³²⁸ *Id.* ("an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property").

more severe than other rental regulations.³²⁹ Just as a landlord was unable to use, occupy or exploit the space occupied by mailboxes and fire escapes, Loretto admitted she could not use, occupy or exploit the space occupied by Teleprompter's cables.³³⁰ Under section 828, moreover, the landlord did have control over his property since Teleprompter was subject to all reasonable conditions that a landlord might impose on the installation of the equipment.³³¹ Thus, if anything, section 828 provided greater protection of landlords' rights than other rental regulation. Lastly, if the landlord decided to sell his apartment building, the cable service would probably enhance the building's market value rather than interfere with the traditional property right of disposition.³³²

The dissent's characterization of section 828 as a rental property regulation, moreover, underscores the ambiguity of the *per se* rule. In *Loretto*, for example, it is arguable that the presence of the cables on Loretto's building was temporary rather than permanent. The dissent characterized section 828 simply as a condition of rental property use that was imposed, not forever, but only for as long as the subject property was used as rental property.³³³ The dissent asserted that Loretto could have ended the "permanent" occupation by Teleprompter's equipment by converting her apartment building into a warehouse.³³⁴ Since section 828 applied to rental property only, Loretto could then force Teleprompter to remove its equipment and thereby convert its permanent occupation into a temporary invasion.³³⁵ Thus, the *per se* rule is ambiguous because of the potential difficulty in distinguishing permanent occupations from temporary invasions. Such ambiguity may encourage property owners to mold their facts to fit the set formula of the *per se* rule and engage the Court in endless debates in semantics.³³⁶ Such ambiguity and inability to identify all regulations which constitute takings may undercut carefully planned legislation in the public interest more than it will afford greater protection for traditional property rights.

The balancing test, on the other hand, allows the Court to protect traditional property rights without introducing rigidity. Instead of focusing on whether or not the invasion is permanent or temporary, the Court focuses on the extent and impact of the invasion.³³⁷ Moreover, under the balancing test, the Court has expressly held that if the subject regulation can be characterized as a physical invasion it is more likely, but not necessary, that a taking will be found.³³⁸ This flexibility and balanced approach is more in line with the common recognition that property rights may be interfered with to a certain extent to insure the public welfare.³³⁹ Accordingly, the question should not be whether property rights have been impaired, but to what extent. For instance, the New York Court of

³²⁹ *Id.* at 452 (Blackmun, J., dissenting).

³³⁰ *Id.* at 452-53 (Blackmun, J., dissenting).

³³¹ *See supra* note 32.

³³² 458 U.S. at 452 (Blackmun, J., dissenting).

³³³ *Id.* at 447 (Blackmun, J., dissenting).

³³⁴ *Id.* at 448. "If appellant occupies her own building, or converts it into a commercial property, she becomes perfectly free to exclude Teleprompter from her one-eighth cubic foot of roof space."
Id.

³³⁵ *Id.*

³³⁶ *Id.* at 442-43, 451 (Blackmun, J., dissenting).

³³⁷ *See supra* notes 105-65 and accompanying text.

³³⁸ *See supra* note 125 and accompanying text.

³³⁹ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.*

Appeals applied the balancing test in *Loretto*.³⁴⁰ It found that section 828 was a well planned legislative program to balance private interests while promoting the public interest in the increased communication and education available through cable television.³⁴¹ The lower court found, moreover, that section 828's interference with the plaintiff's property rights was minimal due to the insignificant amount of space occupied by the equipment.³⁴² Accordingly, the lower court refused to find the physical invasion authorized by section 828 determinative of a taking.³⁴³

The balancing process used by the Supreme Court prior to *Loretto*, and by the New York Court of Appeals in *Loretto*, provides sufficient protection for the property rights with which the *Loretto* Court was so concerned. A permanent physical invasion is certainly a factor of major significance, and can be given great weight under the balancing test.³⁴⁴ It does not necessarily follow, however, that it should be a conclusive factor, since a permanent physical occupation may in some cases cause less interference with property rights than that caused by non-physical or temporary invasions.³⁴⁵ Moreover, the balancing test gives the Court the flexibility to uphold regulations which cause permanent physical occupations, yet which serve such an important public interest as to outweigh the interference with the owner's property rights. An example of regulations which arguably cause permanent physical occupations of private land for public use, but which have been upheld as serving an important public interest, are subdivision property regulations. The impact of the *Loretto* case, specifically, its effect on the validity of subdivision exactions, must be considered.

C. The Implications of *Loretto* for Subdivision Exactions

Some subdivision development regulations, known as subdivision exactions, require a subdivision developer to denote specified portions of his land for such public uses as sidewalks,³⁴⁶ roads,³⁴⁷ sewers,³⁴⁸ parks,³⁴⁹ and even schools.³⁵⁰ The donation is generally a prerequisite to the approval of the developer's subdivision plan, without which he cannot legally subdivide.³⁵¹ An exaction is not just a regulation requiring the subdivider to use his property as a sidewalk, road, or park. Rather, an exaction requires a permanent conveyance of the developer's title to the designated land to the township or municipality

³⁴⁰ *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 144-5, 440 N.Y.S.2d 843, 853, 423 N.E.2d 320, 330 (1980).

³⁴¹ *Id.* at 143-44, 440 N.Y.S.2d at 852, 423 N.E.2d at 329.

³⁴² *Id.* at 154-55, 440 N.Y.S.2d at 859, 423 N.E.2d at 336.

³⁴³ *Id.*

³⁴⁴ See *supra* note 286 and accompanying text.

³⁴⁵ See *supra* notes 297-307 and accompanying text.

³⁴⁶ See, e.g., *Allen v. Stockwell*, 210 Mich. 488, 489, 178 N.W. 27, 28 (1920).

³⁴⁷ See, e.g., *Ayres v. City Council of Los Angeles*, 34 Cal. 2d 31, 33-4, 207 P.2d 1, 3 (1949).

³⁴⁸ See, e.g., *Mefford v. City of Tulare*, 102 Cal. App. 2d 919, 921, 228 P.2d 847, 850 (Dist. Ct. App. 1951).

³⁴⁹ See e.g., *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 635, 94 Cal. Rptr. 630, 631, 484 P.2d 606, 608 (1971); *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 82, 271 N.Y.S.2d 955, 956, 218 N.E.2d 673, 674 (1966); *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 610, 137 N.W.2d 442, 443-44 (1965).

³⁵⁰ See e.g., *Rosen v. Village of Downers Grove*, 19 Ill. 2d 448, 451, 167 N.E.2d 230, 232-33 (1960).

³⁵¹ 4 R. ANDERSON, *AMERICAN LAW OF ZONING* § 23.24 at 105-6 (2d ed. 1976).

in which the development is located.³⁵² By virtue of the exaction, the developer loses dominion, control and possession of the designated property.³⁵³ Land that otherwise would have been available to him for development and sale becomes permanently occupied by such public facilities as sewers, roads, parks and schools.³⁵⁴ In return for this permanent physical occupation by the public, the subdivider receives no compensation.³⁵⁵ If he refuses to make the donation, with its concomitant loss, however, his subdivision plans will not be approved and any subdivision development activity would be illegal.³⁵⁶

Subdivision exactions are not unlike rental property regulations such as the regulation challenged in *Loretto*.³⁵⁷ Both the subdivider and a New York owner of rental property must generally comply with all applicable exactions or regulations in order legally to use their respective property as either a subdivision development³⁵⁸ or an apartment building.³⁵⁹ A subdivider, for instance, is required to allow a permanent physical occupation of his property by such public facilities as sidewalks, roads and parks.³⁶⁰ Similarly, under section 828 of the New York Executive Laws, a New York apartment building owner was required to allow the permanent physical occupation of his property by cable television facilities in the interest of better public communication and education.³⁶¹

Loretto made it clear, however, that rental property regulations which authorized a permanent physical occupation of property were invalid as unconstitutional takings.³⁶² Subdivision exactions have been similarly challenged as unconstitutional takings of property.³⁶³ Yet the lower courts have almost uniformly upheld them even though they require a permanent physical occupation of property of a far greater magnitude than that required in *Loretto*.³⁶⁴ Only a very few lower courts have invalidated subdivision exactions. In

³⁵² *Id.* § 23.25 at 106.

³⁵³ See, e.g., *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 635, 94 Cal. Rptr. 630, 631, 484 P.2d 606, 608 (1971) (subdivider required to dedicate 2-1/2 acres of park land for each 1000 new residents); *Collis v. City of Bloomington*, 310 Minn. 5, 8, 246 N.W.2d 19, 20-1 (1976) (subdivider required to dedicate 10% of his undeveloped land to public purpose); *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 28-9, 394 P.2d 182, 184-85 (1964) (subdivider required to dedicate 1/9 to 1/12 of land shown on subdivision plot).

³⁵⁴ Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 CORNELL L.Q. 871, 873 (1967). "From a . . . developer's standpoint, imposition of any of these devices by a municipality can adversely affect the profitability of his enterprise." *Id.*

³⁵⁵ ANDERSON, *supra* note 351, § 23.24 at 106.

³⁵⁶ *Id.* § 23.17 at 80.

³⁵⁷ For the text of the regulation involved in *Loretto*, see *supra* note 32.

³⁵⁸ See, e.g., *Collis v. City of Bloomington*, 310 Minn. 5, 248 N.W.2d 19 (1976). *Collis* upheld MINN. STAT. § 462.358 (Supp. 1971), which authorized Minnesota municipalities to require subdividers to donate reasonable portions of their proposed subdivision developments to the public for public use as parks and playgrounds, or in the alternative contribute a fee in lieu thereof. *Collis v. City of Bloomington*, 310 Minn. 5, 7-8, 248 N.W.2d 19, 20-21 (1976).

³⁵⁹ See, e.g., N.Y. MULT. DWELL. LAW §§ 35 (McKinney 1974) (requiring entrance doors and lights); 36 (McKinney 1974) (windows and skylights for public halls), 53 (Supp. 1982) (fire escapes), 57 (Supp. 1982) (halls and mail receptacles), 62 (Supp. 1982) (parapet walls and guardrails on roofs).

³⁶⁰ See cases cited *supra* notes 333-36.

³⁶¹ See *supra* note 32.

³⁶² 458 U.S. at 441.

³⁶³ See, e.g., cases cited *supra* notes 346-49.

³⁶⁴ See, e.g., cases cited *supra* notes 346-49. In upholding the constitutionality of a subdivision exaction statute, the California Supreme Court stated: "The clear weight of authority upholds the constitutionality of statutes similar to section 11546." *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 644; 94 Cal. Rptr. 630, 640, 484 P.2d 606, 615 (1971).

Berg Development Co. v. City of Missouri City,³⁶⁵ for example, a Texas court invalidated a park dedication requirement.³⁶⁶ The Texas court held that such exactions were appropriations of realty without compensation and not merely regulations of property use.³⁶⁷ It asserted, moreover, that to allow exactions to encroach on private property rights under the guise of protecting the public's welfare, was to make a mockery of the Constitution.³⁶⁸

The majority of the lower courts, however, have upheld exactions, characterizing them either as voluntary donations,³⁶⁹ valid conditions of subdivision approval³⁷⁰ or valid police power regulations to protect the public health, safety, and welfare.³⁷¹ Under the first of these theories, some courts have suggested that since the developer is not being forced to subdivide his land, any donation of land he makes for a public purpose is voluntary.³⁷² Under this theory, because the subdivider's decision to subdivide is voluntary, any permanent physical occupation that occurs as a result of subdivision, is also voluntary and not a taking.³⁷³ If the developer wants to avoid the donation, he may simply refrain from subdividing and hold or sell his property as one large undivided lot.³⁷⁴

Other courts have reasoned that the ability to subdivide is a privilege conferred by the government and which the government may condition as it wishes.³⁷⁵ This theory is similar to the voluntary theory. According to the courts, the government is not forcing the developer to dedicate his land.³⁷⁶ On the contrary, it is merely imposing conditions on its approval of the proposed subdivision.³⁷⁷ As the courts note, the act of subdivision allows a

³⁶⁵ 603 S.W.2d 273 (Tex. Civ. App. 1980).

³⁶⁶ *Id.* at 275.

³⁶⁷ *Id.* "Clearly, with this provision, there is no room for the contention that appellee is merely regulating the use of appellant's realty. Appellant's realty is no longer involved once the city exercises this option." *Id.*

³⁶⁸ *Id.*

³⁶⁹ See *infra* notes 372-73 and accompanying text.

³⁷⁰ See *infra* notes 374-80 and accompanying text.

³⁷¹ See *infra* notes 381-86 and accompanying text.

³⁷² See, e.g., *Ridgefield Land Co. v. City of Detroit*, 241 Mich. 468, 472, 217 N.W. 58, 59 (1928). "[T]he city is not trying to compel a dedication. It cannot compel the plaintiff to subdivide its property or to dedicate any part of it. . . . In theory at least, the owner of a subdivision voluntarily dedicates sufficient land for streets." *Id.* For an additional discussion of the voluntary theory, see *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 32-33, 394 P.2d 182, 186-87 (1964); *Johnston*, *supra* note 341, at 876-81.

³⁷³ *Ridgefield Land Co. v. City of Detroit*, 241 Mich. 468, 472, 217 N.W. 58, 59 (1928).

³⁷⁴ See *supra* note 372.

³⁷⁵ See, e.g., *In re Brous v. Smith*, 304 N.Y. 164, 170, 106 N.E.2d 503, 506-07 (1952). The privilege-condition theory is also discussed in *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 619-20, 137 N.W.2d 442, 448 (1965); *Johnston*, *supra* note 354, at 881-85. One such court reasoned:

[T]he town here . . . does not seek to condemn land owned by the petitioner. It is petitioner who wishes to construct dwellings on his property, and the town merely conditions its approval with reasonable conditions designed for the protection both of the ultimate purchasers of the home and of the public.

Id.

³⁷⁶ See *supra* note 375.

³⁷⁷ See, e.g., *Ayres v. City Council of Los Angeles*, 34 Cal. 2d 31, 42, 207 P.2d 1, 7 (1949).

It is the petitioner who is seeking to acquire the advantages of lot subdivision and upon him rests the duty of compliance with reasonable conditions for design, dedication, improvement and restrictive use of the land so as to conform to the safety and general welfare of the lot owners in the subdivision and of the public.

Id.

developer to sell his property in a more profitable manner.³⁷⁸ For this privilege, it is not unreasonable, in the view of some courts, to require a subdivider to comply with certain conditions such as the permanent donation of land for public use.³⁷⁹ As long as the exactions or conditions are not arbitrary and are necessitated by the developer's activity, many lower courts have upheld them against takings challenges.³⁸⁰

These two theories, the voluntary theory and the condition-privilege theory are still used by some courts. A third theory, however, the police power theory, is the most widely used basis for upholding subdivision exactions.³⁸¹ According to this theory, a subdivision attracts to an area new people who would not otherwise be a local concern.³⁸² The influx of new people requires the installation of new services such as sewers, roads, sidewalks and schools. A subdivision without these facilities, without proper sanitation, access for emergency vehicles, and recreation areas, endangers the public health, safety and welfare.³⁸³ Since it is decidedly within the states' police power to protect the public, the states may, in the courts' view, exact land from developers to insure that the development will not so endanger the public.³⁸⁴ If the exactions are within the enabling legislation, if they are not arbitrary and are reasonably necessary to promote the public welfare, and if it is the developer's subdivision activity which necessitates the exactions, many courts will uphold the exactions as valid police power regulations.³⁸⁵ It is implicit in the courts' reasoning that the public interest in a clear, safe community outweighs any loss imposed on the developers by the exactions.³⁸⁶

³⁷⁸ See, e.g., *Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 644-65, 94 Cal. Rptr. 630, 640-43, 484 P.2d 606, 615 (1971); *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 619-20, 137 N.W.2d 442, 448 (1965).

³⁷⁹ See, e.g., cases cited *supra* note 378.

³⁸⁰ See, e.g., *Home Builders Ass'n of Greater Kansas City v. City of Kansas City*, 55 S.W.2d 832, 835 (Mo. 1977). "If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is *reasonably* attributable to his activity, then the requirement is permissible. . . ." *Id.* For additional cases employing the condition-privilege theory, see *Collis v. City of Bloomington*, 310 Minn. 5, 11-20, 246 N.W.2d 19, 22-27 (1976); *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 617-18, 137 N.W.2d 442, 447-48 (1965).

³⁸¹ See, e.g., *Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 644-45, 94 Cal. 630, 640-43, 484 P.2d 606, 615 (1971) ("The rationale of the cases affirming constitutionality indicate the dedication statutes are valid under the state's police power."). *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 619-20, 137 N.W.2d 442, 448-49 (1965) ("We conclude that a required dedication of land for school, park or recreational sites as a condition for approval of the subdivider's plot should be upheld as a valid exercise of police power . . ."); *Ayres v. City Council of Los Angeles*, 34 Cal. 2d 31, 42, 207 P.2d 1, 7-8 (1949); *Jenad Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 85, 271 N.Y.S. 955, 958-59, 218 N.E.2d 673, 676 (1966).

³⁸² See, e.g., *Wald Corp. v. Metropolitan Dade County*, 338 So.2d 863, 867 (Fla. Dist. Ct. App. 1976); *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 619-20, 137 N.W.2d 442, 448 (1965).

³⁸³ *Johnston supra* note 354 at 923. "[A]ll subdivision control exactions are grounded upon a judgment that subdivisions which do not provide adequate space for streets, utilities, parks and other public uses are defective."

³⁸⁴ See e.g., *In re Brous v. Smith*, 304 N.Y. 164, 170, 160 N.E.2d 503, 506-07 (1952); *Ayres v. City Council of Los Angeles*, 34 Cal. 2d 31, 38-41, 207 P.2d 1, 5-7 (1949); *Collis v. City of Bloomington*, 310 Minn. 5, 15-16, 246 N.W.2d 19, 25 (1976).

³⁸⁵ *Id.*

³⁸⁶ See, e.g., *Mansfield & Swett, Inc. v. Town of West Orange*, 120 N.J. 145, 150, 198 A. 225, 229 (1938) (upholding a board's authority to impose reasonable restrictions on subdivision developments). There the court stated:

The state possesses the inherent authority — it antedates the Constitution — to

Regardless of which theory is used, the lower courts have been circumspect in their treatment of subdivision exactions. Instead of detailing exactly why the exactions do not constitute takings, the decisions tend to uphold them in a conclusory fashion, simply calling them voluntary donations, valid conditions, or permissible police power regulations.³⁸⁷ There are indications, however, that the courts have actually engaged in a type of balancing process in upholding subdivision exactions.³⁸⁸ In the process, the courts seem to be weighing the public interest in the orderly growth of their community and the subdivider's ability to reap a profit against the invasion of the subdivider's property rights occasioned by the required donations of land.³⁸⁹ The courts have characterized the subdivider as a businessman. As such, he is not protecting his hearth and home from invasion but rather exploiting his property as a profit-making business.³⁹⁰ Consequently, according to this rationale, although it would be constitutionally impermissible to require a residential lot owner to donate part of his property for a municipal park, it is reasonable and permissible to require the developer to make the same donation.³⁹¹ As long as he is allowed to make a reasonable profit, it is irrelevant that some of his land must be donated for public facilities.

resort, in the building and expansion of its community life, to such measures as may be necessary to secure the essential common material and moral needs. The public welfare is of prime importance; and the correlative restrictions upon undivided rights — either of person or of property — are incidents of the social order, considered a negligible loss compares with the resultant advantages to the community as a whole.

Id.

³⁸⁷ Johnston, *supra* note 354, at 893. As Johnston noted:

When developers have challenged the validity of [subdivision exactions], the sharp contrast presented between public needs and private interests has caused the American judiciary to respond to discordant tones. Perhaps more disappointing, however, is the tendency of the courts to elaborate upon the conclusions reached rather than to discuss the factors which actually influenced each decision

Id.

³⁸⁸ See Johnston, *supra* note 354, at 874, 892, 917, 923. See also *Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 648, 94 Cal. Rptr. 630, 645, 484 P.2d 606, 618 (1971) ("The desirability of . . . low cost housing cannot be denied and unreasonable exactions could defeat this object, but these considerations must be *balanced* against the phenomenon of the appallingly rapid disappearance of open areas in and around our cities") (emphasis added); *Wald Corp. v. Metropolitan Dade County*, 338 So.2d 863, 868 (Fla. Dist. Ct. App. 1976) (an analysis of a subdivision exaction challenge "requires a *balancing* of the prospective needs of the community and the property rights of the developer") (emphasis added).

³⁸⁹ See *supra* note 388.

³⁹⁰ See *supra* note 388. As Johnston noted:

The subdivider is a manufacturer, processor, and marketer of a product; land is but one of his raw materials. In subdivision control disputes, the developer is not defending hearth and home against the king's intrusion, but simply attempting to maximize his profits from the sale of a finished product. As applied to him, subdivision control exactions are actually business regulations.

Johnston, *supra* note 354, at 923.

³⁹¹ See, e.g., *Wald Corp. v. Dade County*, 338 So.2d 863, 867 (Fla. Dist. Ct. App. 1976).

Unlike one who merely reserves his property for personal use or sale as a single tract, the subdivider profits from the sale of lots within the subdivision to prospective home builders. The local government, in turn, must consider the welfare of the families who will be filling the development. It is eminently reasonable, therefore, to allow the municipality to impose certain conditions upon the developer so that it may provide for the needs of persons who would not otherwise have been a local concern.

Id.

Presumably, a subdivision exaction would only be struck down if it was so excessive as to substantially eliminate the developer's profit, or if the exaction was not reasonably related to the public welfare or the developer's activity.³⁹² In *Ayers v. City Council of Los Angeles*,³⁹³ for example, the Supreme Court of California upheld an exaction which required a developer to dedicate a ten-foot strip of land for widening a boulevard which abutted his subdivision and an additional ten-foot strip for planting of trees and shrubbery.³⁹⁴ The court rejected the developer's argument that the exaction constituted an uncompensated taking, finding instead, that the required widening was reasonably related to the potential traffic needs generated by the subdivision, and that the required design imposed no undue burden upon the subdivider.³⁹⁵ Apparently, the court balanced the developer's profit potential and the public interest in orderly traffic patterns against the exaction's interference with the developer's property rights to find that the exactions were reasonable conditions to protect the public and not unconstitutional takings.³⁹⁶

Many subsequent cases followed *Ayres'* lead, reasoning that a subdivider realizes a profit from governmental approval of a subdivision since his land is rendered more valuable by virtue of subdivision.³⁹⁷ In return for this benefit, it has been held that the city may require him to dedicate a portion of his land for specified purposes whenever the influx of new residents caused by the subdivision increases the demand for those services.³⁹⁸ Thus, although not expressly stated in any subdivision exaction case, it does appear that the courts are actually balancing the subdivider's profit and the public interest against the exaction's interference with his property rights. The characterization of the developer as a profit-making businessman would explain why subdivision exactions do not constitute takings when applied to developers, where they would if applied to single family lot owners.³⁹⁹

One important factor in this balancing process, however, is the permanent taking over of part of the subdivider's property without compensation.⁴⁰⁰ The strict enforcement of *Loretto's per se* rule in subdivision exaction cases would prohibit the courts from

³⁹² See *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 619-20, 137 N.W.2d 442, 448 (1965):

The basis for upholding a compulsory land-dedication requirement in a plotting ordinance . . . is this: The municipality by approval of a proposed subdivision plot enables the subdivider to profit financially by selling the subdivision lots as home-building sites and thus realizing a greater price than could have been obtained if he had sold his property as unplotted lands. In return for this benefit the municipality may require him to dedicate part of his plotted land to meet a demand to which the municipality would not have been put but for the influx of people into the community to occupy the subdivision lots.

Id. See also *supra* note 380 and accompanying text (exactions upheld if not arbitrary and necessitated by developers' activity).

³⁹³ 34 Cal. 2d 31, 207 P.2d 1 (1949).

³⁹⁴ *Id.* at 33-34, 207 P.2d at 2-3.

³⁹⁵ *Id.* at 39-41, 207 P.2d at 6-7. In fact, the court found that the developer's position was greatly improved because of the particular type of exactions imposed. *Id.* The exactions ordinarily imposed would have required him to make a more extensive dedication at a greater cost to him. *Id.* Consequently, the exactions actually imposed resulted in a savings in land and cost to the developer. *Id.*

³⁹⁶ See *Johnston, supra* note 354 at 892.

³⁹⁷ See *supra* note 378 and accompanying text.

³⁹⁸ See *supra* notes 378-80 and accompanying text.

³⁹⁹ See *supra* notes 390-91 and accompanying text.

⁴⁰⁰ See *supra* notes 351-55 and accompanying text.

engaging in any balancing process.⁴⁰¹ *Loretto* expressly held that any permanent physical occupation of property was a taking regardless of the public interest involved⁴⁰² or type of property occupied.⁴⁰³ Consequently, all subdivision exactions would be necessarily invalidated as takings. The courts would no longer be able to distinguish between subdivision development property and single tract residential lots. A determination under *Loretto's per se* rule that subdivision exactions constituted unconstitutional takings would have a serious impact on a community's continued ability to control subdivision development. Exactions are presently used to insure that land for necessary facilities such as sewers, sidewalks and even parks will be available.⁴⁰⁴ It is doubtful in this era of strained budgets and tight finance that local governments could afford to pay for the land presently acquired via exactions.⁴⁰⁵ Nor is it unreasonable to speculate that if the Court was willing to invalidate a rental property regulation on the basis that it authorized a permanent physical occupation of private property, it would also be willing to invalidate a subdivision property regulation on the same basis.

Instead of establishing a *per se* rule with the potential power to invalidate subdivision exactions, the Court in *Loretto* should have borrowed the lower courts' rationale for upholding subdivision exactions. Just as the subdivider is faced with a choice between not subdividing or voluntarily complying with all applicable exactions regardless of whether they require a permanent physical donation of land, the apartment building owner should be faced with a choice between not using his property as an apartment building or complying with all applicable rental property regulations. Like the subdivider, the apartment building owner is engaged in a profit making enterprise. He is not defending hearth and home against a governmental intrusion, but simply attempting to maximize the profit potential of his property. As applied to him, section 828 is merely another regulation governing his business. Subdivision exactions have been upheld as valid business regulations designed to protect the public regardless of their required permanent physical donation of land.⁴⁰⁶ Section 828 and similar rental property regulations could also be upheld on that basis. Logic requires that the alternative is to invalidate both subdivision exactions and rental property regulations which require any permanent physical occupation of private property by the public. Precedent demonstrates, however, that the lower courts have been unwilling to invalidate useful exactions if they are related to a need created by the subdivider and necessary to promote the public welfare.⁴⁰⁷

In *Loretto*, the New York Court of Appeals found that section 828 was both reasonable and necessary to promote the public welfare.⁴⁰⁸ The invasion authorized by the statute was minimal in nature and did not interfere with any reasonable expectation that the space occupied by the cable would be income productive.⁴⁰⁹ In addition, the statute even provided for the protection of the landlord's interests by requiring the cable

⁴⁰¹ *Loretto*, 458 U.S. at 426.

⁴⁰² *Id.*

⁴⁰³ *Id.* at 439. "We fail to see . . . why a physical occupation of one type of property but not another type is any less a physical occupation." *Id.*

⁴⁰⁴ See *supra* notes 346-50 and accompanying text.

⁴⁰⁵ For a comprehensive discussion of the budgetary effects of subdivision exactions, see Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964).

⁴⁰⁶ See *supra* notes 374-84 and accompanying text.

⁴⁰⁷ See *supra* notes 367-71 and accompanying text.

⁴⁰⁸ *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 143-44, 440 N.Y.S.2d 843, 852-53, 423 N.E.2d 320, 329-30 (1981).

⁴⁰⁹ *Id.* at 154-55, 440 N.Y.S.2d at 848-59, 423 N.E.2d at 336.

television company to pay for the installation, maintenance and removal of the equipment, and to indemnify the landlord for any damages caused by the equipment.⁴¹⁰ Moreover, the New York Legislature had determined that section 828 insured that landlords would not selfishly impede the spread of an important means of public communication and education.⁴¹¹ The legislators had discovered that landlords often charged tenants who subscribed to the service a higher monthly rent or charged the cable television company a higher fee for the use of the landlord's property.⁴¹² The legislature had feared that these fees would inhibit the development of cable television, a service which, in their estimation,⁴¹³ benefitted the general welfare. Given those factors, it would have been reasonable for the Supreme Court to conclude that section 828 was a valid and carefully planned regulation designed to protect the public interest in the spread of cable television, from price-gouging landlords, while at the same time, limiting as much as possible the interference with the landlord's property rights. The lower courts have already determined that subdivision exactions similarly protect communities from deficient subdivision developments, through a limited and valid interference with the developer's property rights and profit potential.⁴¹⁴ Yet subdivision exactions, like section 828, require a permanent physical occupation of property. Either the *per se* rule in *Loretto* may mandate the invalidation of subdivision exaction, or in retrospect, the *Loretto* Court should have considered the rationale supporting exactions to uphold section 828 as a valid police power measure to protect the public welfare.

CONCLUSION

Loretto's per se rule that all permanent physical occupations of private property authorized by government are takings, contradicts the recent trend toward the development of a multifactor balancing test suitable for all takings disputes. The *per se* rule lacks the flexibility inherent in the balancing test and essential for the resolution of modern disputes arising out of the complex urban and technological environment of the twentieth century. In a changing world, old concepts of private property and public interest should also change. The *Loretto* Court has attempted to halt that necessary evolution with its old fashioned, overly simplistic and rigid rule. Such a rule not only seems unsuited to the modern age, but may also have a far-reaching and disastrous impact on important regulations such as subdivision exactions.

VALERIE WELCH

⁴¹⁰ See *supra* note 32.

⁴¹¹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 141, 440 N.Y.S.2d 843, 851, 423 N.E.2d 320, 328 (1981).

⁴¹² *Id.* at 143-44, 440 N.Y.S.2d at 852-53, 423 N.E.2d at 329-30.

⁴¹³ *Id.*

⁴¹⁴ See *supra* notes 388-99 and accompanying text.