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Test of a Taking: An Analysis of the 1984 Cable Act's "Mandatory Access" Provision

INTRODUCTION

Cable television has come to have a phenomenal impact on Americans today. From pay-per-view sports events to the MTV generation, the industry has defined home entertainment and will continue to do so for the foreseeable future. Of the approximately 147 million people who have access to cable television, 1 there are actually 56 million subscribers and cable operators serviced by 11,314 cable systems in some 30,579 communities throughout the United States.2

So pervasive an industry rarely escapes regulation, and the cable industry is no exception. A federal cable regulatory policy was adopted in the form of the Cable Communications Policy Act of 19843 (the "Act"). Prior to its enactment, the involvement of different levels of government in the regulation of cable created considerable problems.4 Not only did the Federal Communications Commission (the "FCC") have an interest in protecting broadcast television,5 state and local governments had an interest in oversee-

2. Id.
ing cable operators’ use of public streets and rights of way.\textsuperscript{6} Passed on October 29, 1984, the Act was the first comprehensive cable legislation of its kind.\textsuperscript{7} For the first time, federal legislation defined the scope of regulatory power at all levels of government.\textsuperscript{8}

The Act begins with a list of six purposes\textsuperscript{9} that reflect a reasonable compromise between the public’s right to a free flow of information, local government’s interest in franchising and regulating cable operators, and cable industry’s desire for growth.\textsuperscript{10} While the Act as a whole has been largely successful, one issue

\begin{itemize}
  \item \textsuperscript{9} 47 U.S.C. § 521 (1988 & West Supp. 1992). The purposes of the Act were to:
    \begin{enumerate}
      \item establish a national policy concerning cable communications;
      \item establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;
      \item establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;
      \item assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;
      \item establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator’s past performance and proposal for future performance meet the standards established by this subchapter; and
      \item promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.
    \end{enumerate}
    \textit{Id.}
    \item \textsuperscript{10} 130 CONG. REC. S14,284 (daily ed. Oct. 11, 1984) (statement of Sen. Gorton) (“[The Act] reflects a reasonable compromise which protects the interests of not only the cities and the cable industry, but those of the consumers of cable services as well.”); \textit{see also} \textit{Id. at} S14,283 (statement of Sen. Goldwater) (“Nonetheless, this bill is a compromise, and on the whole, it is a good bill, and a needed bill. It is proconsumer, procity, and pro-cable.”).
that it sought to address—but failed to remedy—was the debate over the right of franchised cable operators to obtain mandatory access to private, residential co-easements.\textsuperscript{11} Although the issue was addressed in § 621(a)(2) of the Act,\textsuperscript{12} courts have interpreted its statutory language and legislative history in varying ways that have resulted in inter-circuit, as well as intra-circuit, conflicts.\textsuperscript{13}

The question that has yet to be definitively answered is whether § 621(a)(2) of the Act allows cable operators to use co-easements dedicated for compatible uses without effectuating a taking of property under the Takings Clause of the Fifth Amendment to the United States Constitution. Of course, if § 621(a)(2) does effectuate a

\textbf{\textsuperscript{11}} Compare Centel Cable Television Co. of Fla. v. Thos. J. White Dev. Corp., 902 F.2d 905, 911 (11th Cir. 1990) (holding that cable company had right of access to private utility easements in development) with Media Gen. Cable, Inc. v. Sequoyah Condominium Council of Co-Owners, 737 F. Supp. 903, 913 (E.D. Va. 1990) (holding that the Act did not create right of mandatory access to private utility easements).

\textbf{\textsuperscript{12}} Section 621(a)(2), 47 U.S.C. § 541(a)(2) (1988) states:

Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure—

(A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and

(C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

\textbf{\textsuperscript{13}} Compare Cable Holdings of Ga., Inc. v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600 (11th Cir.) (holding that the government cannot authorize co-use of easements "\textit{even when a property owner has privately allowed other occupations which are 'compatible'}") (emphasis in original), cert. denied, 113 S. Ct. 182 (1992) and Cable Invs., Inc. v. Woolley, 867 F.2d 151, 162-63 (3d Cir. 1989) (holding that § 621(a)(2) does not mandate access to cable operators) with Centel Cable Television Co. of Fla. v. Thos. J. White Dev. Corp., 902 F.2d 905, 911 (11th Cir. 1990) (holding that easements need not be publicly dedicated and that compatible easements include private easements) and Centel Cable Television Co. of Fla. v. Admiral's Cove Assocs., Ltd., 835 F.2d 1359, 1363 n.7 (11th Cir. 1988) (holding that § 621(a)(2) allowed a cable company to use the easement without violating the Takings Clause).
taking, the Fifth Amendment requires that the property owner be given just compensation for his or her lost value.

An example may help to elucidate the issues involved here. Suppose a landlord decides that instead of getting cable service from the local cable franchise operator for the tenants in his complex, he would like to use a satellite television operator. The cable operator, who has a franchise in the neighborhood in question, will claim that his installation of cable by means of an existing utility easement is a compatible use under § 621(a)(2), which gives him the right of mandatory access to the landowner's property. Thus, he will argue that the landowner cannot refuse him access. The landlord, on the other hand, will assert that his fundamental rights as a property owner include the right to exclude. This right would be infringed upon by § 621(a)(2), and the landlord would argue that the statute—to the extent that it requires mandatory access—would be an unconstitutional taking without just compensation.

Both arguments have substantial support depending on one's interpretation of the statute's wording and its legislative history. Both sides would agree, however, that mandatory access to public easements where utility lines are already laid raises no controversy. The statute provides for access to some easements, but the statute is unclear as to which easements allow for a right of access and which do not.

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14. Satellite Master Antennae Television (SMATV) are cable television systems that do not use public rights-of-way. They primarily serve private, multi-unit residential buildings and offer the residents both over-the-air broadcast signals and satellite delivered services. See In re Earth Satellite Communications, Inc., 95 F.C.C.2d 1223 (1983), aff'd sub nom. New York State Comm'n on Cable Television v. FCC, 749 F.2d 804 (D.C. Cir. 1984).

15. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 n.12 (1982) (the Court considered the owner's right to exclude a decisive factor in determining whether it would characterize a physical taking as permanent or temporary; if the owner's right to exclude is absolutely lost, then the physical invasion is permanent in nature). The landowner would argue that this is the situation here.

Although cases addressing this dilemma have come down on both sides of the debate, only two circuits have attempted to interpret the Act. In *Cable Investments, Inc. v. Woolley*, the United States Court of Appeals for the Third Circuit, held that the Act did not give cable system operators a right of access to multi-unit dwellings for purposes of providing services for tenants.17

Until recently, the United States Court of Appeals for the Eleventh Circuit had concluded that § 621(a)(2) embraced private easements, giving rights to cable franchises over property owners. This was illustrated in both *Centel Cable Television Co. of Florida v. Admiral’s Cove Associates, Ltd.*,18 and *Centel Cable Television Co. of Florida v. Thos. J. White Development Corp.*19 These cases held that cable franchisees have an implied right of action under the Act to enforce their right of access to utility easements in private, single residential communities during the construction phase of the communities’ development.

What has created some controversy is that the Eleventh Circuit recently decided a case in favor of a property owner. In *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*,20 the court held that § 621(a)(2) granted franchised cable companies a right of access to easements that have been dedicated for “compatible uses” but that the section did not authorize access to private, non-dedicated easements for particular utilities in multi-unit apartment buildings.21 Furthermore, the court held that construing the Act as according a cable franchise operator the right to construct a cable system on private property regardless of the presence of any compatible easements would violate the Takings Clause of the Fifth Amendment.22 In essence, the court restricted § 621(a)(2) to situations in which the easement was dedicated to public use.23

The Eleventh Circuit distinguished *Cable Holdings* from its two

17. 867 F.2d at 151.
18. 835 F.2d 1359 (11th Cir. 1988).
19. 902 F.2d 905 (11th Cir. 1990).
20. 953 F.2d at 600.
21. *Id.* at 605.
22. *Id.* at 604.
23. *Id.* at 607.
earlier opposing decisions. In reality, however, the conclusion reached in *Cable Holdings*—that the Act did not give a right of access to private easements—was in conflict with its earlier decisions. As a result, the Eleventh Circuit’s two opposing views only add to the present confusion.

What is common to all of these opinions, however, is that in one way or another, they resort to a takings analysis to justify their position. Part One of this Note provides an overview of easement law as general background on the property issues at stake. Part Two discusses the Takings Clause and explains the two major categories of takings—"per se" and regulatory. Part Three examines the interpretations of takings law employed by the Third and Eleventh Circuits in analyzing the Act. Part Four argues that a bright-line physical invasion test, similar to the de minimis physical invasion test developed in *Loretto v. Teleprompter Manhattan CATV Corp.*, is the appropriate standard for determining whether a taking has occurred.

This Note concludes that giving cable companies mandatory access to private easements would constitute a taking under the Fifth Amendment. Since Congress did not authorize compensation in the statute, it could not have intended for § 621(a)(2) to allow cable companies to utilize private easements without property owners’ permission. Furthermore, the legislative history of the Act clearly supports the view that Congress did not intend cable companies’ right of access to include private easements.

24. *Id.* at 608 (the court differentiated, for example, "dedicated" from "non-dedicated" easements and "private" from "public" easements).
25. *See Admiral's Cove*, 835 F.2d 1359; *White*, 902 F.2d 905.
27. 458 U.S. 419, 426 (1982) ("a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve").
I. EASEMENTS

An easement is a grant of an interest in land that entitles a person to use land possessed by another.29 It can be created by express agreement, by estoppel, by implication, by necessity, or by prescription.30

Easements can be classified as affirmative or negative.31 This classification differentiates easements on the basis of the kind of action permitted to the easement owner with respect to the servient estate. An affirmative easement gives its owner the right to go onto the land of another and do some act on that land.32 Negative easements, on the other hand, are those that prohibit the owner of the servient estate from doing something otherwise lawful upon his estate because it would affect the dominant estate (i.e. the easement);33 it consists solely of a veto power.34 Examples of this would be light and air easements that would prevent the owner of one building from denying these necessities to the owner of a nearby or adjoining building. Negative easements are rare and are not discussed in the Act. The Act does, however, address affirmative easements.

In addition to being characterized as affirmative or negative, easements are either appurtenant or in gross.35 An appurtenant


The general rule is stated in 28 C.I.S., Easements § 5, p. 639 [sic] to the effect that 'an easement may be created or passed only by deed, that is, by grant, reservation, or covenant, or by prescription which presupposes a grant.' . . . That appears to be true on account of the policy of the law particularly because of the statute of frauds, not to permit the creation of an interest in the land of another except by the methods as mentioned.

3 POWELL, supra note 29, ¶ 406 (quoting Coumas, 230 P.2d at 754); 2 AMERICAN LAW OF PROPERTY, (Casner et al. eds., 1952 & Supp. 1962)) (same).
31. 3 POWELL, supra note 29, ¶ 405, at 34-19.
33. Id. at 510.
34. 3 POWELL, supra note 29, ¶ 405, at 34-20.
35. RESTATEMENT OF PROPERTY §§ 453-54 (1944).
easement benefits its owner in the use of another (frequently adjacent) tract of land. The land benefitted is the dominant tenement while the land burdened is the servient tenement. A easement in gross, on the other hand, does not benefit its owner in the use and enjoyment of land but merely gives him the right to the use of the servient land. An easement in gross benefits its owner independently of his ownership or possession of other land. Thus, it benefits an entity other than the owner. Since easements in gross tend to involve property interests that are commercial in nature, most utility easements fall into this category.

As briefly illustrated, easements can fall into a variety of categories, but as a general rule, the scope of the easement depends upon the intention of the parties. In ascertaining this intent, a court may examine whether the easement was created expressly or by prescription (adversely), the changes in use that might be foreseeable by the parties, and the changes in use that are required to achieve the purpose of the easement under modern conditions while preserving the usefulness of the easement to the dominant tenement.

While it is common for easements in gross to exist on private property as private easements, the question of whether particular

36. 3 POEHL, supra note 29, ¶ 405, at 34-20, 34-21 (citing Shingleton v. State, 133 S.E.2d 183 (N.C. 1963) (noting that an easement appurtenant is one that is owned in connection with other land and is an incident to ownership of such land and holding that a grant by the state wildlife resources commission to use roads existing on other lands of the commission for ingress to and egress from land conveyed to grantee was a grant of an easement appurtenant to such conveyed land)).
37. RESTATEMENT OF PROPERTY § 454 cmt. a (1944). See also Shingleton, 133 S.E.2d at 185 (stating that an easement in gross is a mere personal interest in or a right to use the land of another); W.R. Vance, Assignability of Easements in Gross, 32 YALE L.J. 813 (1923).
38. 3 POEHL, supra note 29, ¶ 405, at 34-20.
39. See Crane v. Crane, 683 P.2d 1062, 1067 (Utah 1984) (applying the definition that “an easement in gross is of a commercial character when the use authorized by it results primarily in economic benefit rather than personal satisfaction,” to find that an easement involving a herd of cattle being driven to their summer range was transferrable) (quoting Sandy Island Corp. v. Ragsdale, 143 S.E.2d 803, 807 (S.C. 1965)).
41. Id.
42. See Salvaty v. Falcon cable television, 212 Cal. Rptr. 31, 34-36 (Ct. App.
easements are public or private is critical in interpreting the Act. In making these determinations, it is necessary to ascertain the landowner's intent in creating an easement and the meaning of the word "dedicated" in the statute. For example, landowners typically argue that easements must be private unless intentionally dedicated to public use. As might be expected, this dedication question has become the fulcrum of courts' analysis of whether the application of § 621(a)(2) constitutes a taking. Consideration of the varying judicial analyses of the takings question requires a brief overview of takings law.

II. TAKINGS ANALYSIS

The Takings Clause of the Fifth Amendment to the U.S. Constitution states, in part, "nor shall private property be taken for public use without just compensation." Federal, state, and local governments thus have the power of eminent domain—the power to take title to property against the owner's will. They simply must pay the owner just compensation for his or her property.

In examining takings law, it helps to reflect on its two basic premises:

1. All takings must be for public use, and
2. Even takings that are for public use must be accompanied by just compensation.

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43. "A private easement is one in which the enjoyment is restricted to one or a few individuals, while a public easement is one the right to the enjoyment of which is vested in the public generally or in an entire community; such as an easement of passage on public streets and highways . . . ." BLACK'S LAW DICTIONARY 510 (6th ed. 1990).

44. See Section 621(a)(2), 47 U.S.C. § 541(a)(2) ("easements . . . dedicated for compatible uses"). See also infra notes 110-116 and accompanying text (case law discussion of "dedicated" as related to the Act).

45. U.S. CONST. amend. V.

It is part of current takings jurisprudence that a wide range of uses can serve the public even if the public does not take actual possession of "taken" land.\textsuperscript{47} If property is taken for public benefit, however, eminent domain laws require just compensation.\textsuperscript{48} The policy value underlying the compensation requirement is the sense that if government is seeking to produce some public benefit (the public use requirement), it is appropriate that the payment come from the public at large—taxpayers—rather than from identifiable individuals.\textsuperscript{49} The Constitution's compensation requirement thus operates as insurance to that effect.

One of the fundamental rights that a property owner has is the right to exclude.\textsuperscript{50} An eminent domain action forces the landowner to give up that right either partially or completely. To minimize the injustice of such a situation, the law has required that the owner be compensated at fair market value. Courts have refined their takings analysis by categorizing takings as one of two types: regulatory or per se.

A regulatory taking is the more complex of the two types because there is no set formula for determining when there has been a taking. The classic case setting forth the difference between an invalid taking and a valid exercise of police power is \textit{Pennsylvania Coal Co. v. Mahon}.\textsuperscript{51} At issue in \textit{Mahon} was the constitutionality of the Kohler Act,\textsuperscript{52} a 1921 Pennsylvania statute that sought to combat the persistent problem of soil subsidence in Pennsylvania's anthracite mining region.\textsuperscript{53} The statute prohibited the mining of anthracite coal deposits located beneath someone else's property in

\textsuperscript{47} See Michelman, \textit{supra} note 46, at 1170 (discussing the Mill Acts, which permitted riparian owners the right to erect and maintain dams that flooded neighboring property).

\textsuperscript{48} \textsc{William B. Stoebuck}, \textsc{Non-Trespassory Takings in Eminent Domain} 18 (1977).

\textsuperscript{49} Michelman, \textit{supra} note 46, at 1170.

\textsuperscript{50} Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).

\textsuperscript{51} 260 U.S. 393 (1922).

\textsuperscript{52} 1921 Pa. Laws 1198.

such a manner as to cause the sinking of various structures on the surface (including streets, railroad lines, churches, hospitals, and most importantly in Mahon, dwellings). Before the statute was enacted, the Pennsylvania Coal Company had sold the surface rights to land that it owned to Mahon, reserving the right to remove the coal thereunder. Because the statute made it commercially impracticable to mine the coal, and thus had nearly the same effect as the complete destruction of the mineral rights, the Court held the statute invalid as a taking without just compensation. Writing for the Court, Justice Oliver Wendell Holmes stated: “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.” In creating this test, now known as the “diminution-in-value” test, Justice Holmes recognized that the exercise of police power could diminish “to some extent values incident to property” without implicating the Takings Clause because otherwise “[g]overnment hardly could go on.” Holmes also noted that the compensation provision of the Takings Clause imposed certain limitations on the exercise of police power. It is the extent of the diminution that is the factor for consideration. “When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.”

The second, and more readily comprehensible, type of takings analysis focuses on the actual physical invasion that occurs when the government takes property. It is this kind of analysis that courts have used to determine whether a taking has occurred in the context of the Act.

55. Id. at 415.
56. Id. at 413.
57. Id.
58. Id.

For an analysis of the diminution in value test in relation to the Act, see Matthew P. Pritts, Note, The Material Burden Test: The Better Method of Determining Takings
Most of the opinions discussing § 621(a)(2) of the Act have relied on Loretto v. Teleprompter Manhattan CATV Corp. In Loretto, the United States Supreme Court considered the constitutionality of a New York statute that required landlords to permit the installation of cable television facilities on their property. The New York statute also prohibited landlords from demanding payment from cable television companies in excess of the amount that the State Commission on Cable Television determined reasonable. The plaintiff in Loretto, a purchaser of an apartment building that had cable wires and boxes already attached to its roof and side, sued for damages and injunctive relief, claiming that the New York statute authorized a taking without just compensation. The Loretto Court noted that the ordinary inquiry into the takings issue was based on the following criteria: the economic impact of the regulation, the extent of interference with investment-backed expectations, and the character of the governmental action. It observed, however, that if a law authorized a permanent physical occupation of an owner's property, the character of the governmental action pursuant to the law rendered it a taking per se.

The Loretto Court upheld New York's access statute but required payment of just compensation for the permanent physical

Issues Arising Under Section 621(a)(2) of the Cable Communications Policy Act of 1984, 48 WASH. & LEE L. REV. 1109 (1992). The diminution in value test will continue to pose problems because it is an ambiguous test. The question of how much diminution in value is too much cannot be answered with objectivity.


62. Id. at 421.


64. Loretto, 458 U.S. at 423.

65. Id. at 424.

66. Id. at 426.

67. Id.
occupation of the landlord's property. The rationale behind the decision was that New York's statutorily approved, permanent physical occupation of property destroyed not only the owner's right to possess the space and exclude others from it, but also the owner's right to control the space and his right to dispose of it by transfer or sale.

Writing for the Court, Justice Thurgood Marshall wrote that a property owner suffered a special kind of injury when a stranger directly invaded and occupied the owner's property. Regulations that authorized this type of physical occupation would be viewed by the Court as serious intrusions, regardless of whether the physical interference caused a substantial economic loss or served an important public purpose. Thus, under the terms of Loretto, any physical invasion, no matter how small, will be considered a taking. The Court has recently affirmed this de minimis permanent physical invasion test.

III. SURVEY OF CASE LAW

In interpreting the legislative history and statutory language of § 621(a)(2) prior to February 1992, courts followed either the Third Circuit's "physical invasion" or the Eleventh Circuit's mandatory

68. Id. at 441.
69. Id. at 435.
70. Id. at 436.
71. Id.
72. There are some who consider the Loretto holding a narrow one and argue that it should not be applied. See, e.g., Richard Harmon, Co-Use of Compatible Private Easements by Cable Television Franchisees Under the 1984 Cable Act: Federal Refinement of an Established Right, 22 GOLDEN GATE U. L. REV. 1 (1992). However, dicta in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992), support the interpretation of Loretto used in this Note.
73. See Lucas, 112 S. Ct. at 2893. In Lucas, Justice Scalia stated, "In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." Id.
access\textsuperscript{75} approach. Both circuits applied a per se approach to takings law.

The Third Circuit has followed the permanent physical invasion test of \textit{Loretto} and considers it controlling on this issue.\textsuperscript{76} In the leading case of \textit{Cable Investments, Inc. v. Woolley},\textsuperscript{77} the court found that § 621(a)(2) of the Act did not give franchises the right of access to the inside of private apartment buildings.\textsuperscript{78} In arriving at their decision, the court relied on the legislative history of the Act and in particular, § 633,\textsuperscript{79} a section that was ultimately dropped.


\textsuperscript{76} See \textit{Woolley}, 867 F.2d at 155 (holding that § 621(a)(2) of the Act does not give franchises the right of access to the inside of private apartment buildings).

\textsuperscript{77} Id.

\textsuperscript{78} Id.

\textsuperscript{79} Consumer Access to Cable Service, H.R. 4103, 98th Cong., 2d Sess. (deleted section of the Act) [hereinafter "Deleted Section 633"] . This section provided:

(a) The owner of any multiple-unit residential or commercial building or manufactured home park may not prevent or interfere with the construction or installation of facilities necessary for a cable system, consistent with this section, if cable service or other communications service has been requested by a lessee or owner (including a person who owns shares which entitle such person to occupy a unit in a cooperative project) of a unit in such building or park.

(b)(1) A State or franchising authority may, and the Commission shall, prescribe regulations which provide—

(A) that the safety, functioning, and appearance of the premises and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both;

(C) that the owner be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator; and

(D) methods of determining just compensation under this section.

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(d) In prescribing methods under subsection (b)(1)(D) for determining just compensation, consideration shall be given to—
from the bill that was passed by Congress.\textsuperscript{80} Section 633 expressly provided for mandatory access to tenants within a multi-unit dwelling.\textsuperscript{81} The \textit{Woolley} court reasoned that the fact that Congress deleted this section from the final version of the Act indicated that "Congress did not intend that cable companies could compel the owner of a multi-unit dwelling to permit them to use the owner's private property to provide cable service to apartment dwellers."\textsuperscript{82} In addition, the \textit{Woolley} court examined statements in the Congressional Record—both opposed to and those in favor of § 633. The court found that these statements further strengthened its conclusion that the Act contains no provision mandating access to private apartments buildings.\textsuperscript{83}

\begin{itemize}
\item[(1)] the extent to which the cable system facilities physically occupy the premises;
\item[(2)] the actual long-term damage which the cable system facilities may cause to the premises;
\item[(3)] the extent to which the cable system facilities would interfere with the normal use and enjoyment of the premises; and
\item[(4)] the enhancement in value of the premises resulting from the availability of services provided over the cable system.
\end{itemize}

\textit{Id.} (emphasis added).

\textsuperscript{80} \textit{Woolley}, 867 F.2d at 156.
\textsuperscript{81} Deleted Section 633, supra note 80.
\textsuperscript{82} \textit{Woolley}, 867 F.2d at 156 (citing \textit{Russello v. United States}, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."); \textit{Thompson v. Kennickell}, 797 F.2d 1015, 1024-25 (D.C. Cir. 1986) (finding deletion of provision contributes to evidence of congressional intent).
\textsuperscript{83} \textit{Woolley}, 867 F.2d at 156.

The absence of a mandatory access provision in the bill as finally enacted was specifically remarked upon by Congressman Wirth, the Chairman of the Subcommittee on Telecommunications of the House Energy and Commerce Committee from which the bill emanated. Representative Wirth was one of the original sponsors of the bill and had been in favor of the multi-unit dwelling provision. After its deletion, he stated:

"The purpose of [section 633] was to ensure that all consumers including those who reside in apartments and mobile home parks, had the opportunity to receive cable service .... The provision prohibited landlords from interfering with a consumer's ability to receive cable service—an increasing [sic] troublesome problem whereby landlords become the ultimate electronic editors .... I applaud these efforts" [of states who have enacted laws to provide for citizen access] "and, of course, the fact that a similar provision is no longer
Finally, the court noted that when § 633 was deleted from the final version of the Act, many of its provisions were transferred to § 621.\textsuperscript{84} Interestingly enough, those provisions which dealt with just compensation for a taking were not transferred.\textsuperscript{85} The court reasoned that the Act did not provide for mandatory access because otherwise the physical invasion would be a taking without just compensation and therefore unconstitutional under \textit{Loretto}.\textsuperscript{86}

Contrary to \textit{Woolley}, several courts have held that § 621(a)(2) of the Act grants cable companies a federal right to use both public and private easements.\textsuperscript{87} Most notably, until \textit{Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.},\textsuperscript{88} the Eleventh Circuit held this view. Unlike the Third Circuit, the Eleventh Circuit, while also applying a per se takings approach, avoided the takings problem\textsuperscript{89} by relying on a case which employed a voluntary

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part of [the bill] in no way affects the applicability of those State laws.

In addition, Representative Fields, also a member of the House Energy and Commerce Committee who had opposed the mandatory access provision commented:

The bill before us today does not contain a provision [which] I had particular concern about in committee, the so-called consumer access to cable.

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Although I concur with the intent of this provision, to make cable service available to the greatest number of individuals, I believe this goal can be achieved in a better, more orderly manner through a negotiated agreement between the cable operator and the property owner, and not by legislative fiat as this legislation had provided.

\textit{Id.} at 156-57.

84. \textit{Id.} at 156-58.

85. \textit{Id.} at 157.

86. \textit{Id.} at 159-60.


88. 953 F.2d 600 (11th Cir. 1992).

89. \textit{Id.} at 609 & 609 n.11 (Eleventh Circuit's non-taking rationale). Basically, the
takings analysis, *FCC v. Florida Power Corp.* 90

In *Florida Power*, the United States Supreme Court considered the constitutionality of the Pole Attachments Act 91 which gives the FCC power to regulate the rates that a utility charges cable companies for the use of the utility companies' poles. 92 The Court held that regulation of the rates utilities charge cable television companies to place their cables on the utilities poles does not amount to a taking. 93

What distinguishes *Florida Power* from *Loretto* is that the utility companies in *Florida Power* voluntarily granted the easements to the cable companies. 94 Similarly, the Eleventh Circuit's argument prior to the Cable Holdings decision was that the "compatible easements" described in § 621(a)(2) of the Act were also voluntary because they had been dedicated. For example, in *Centel Cable Television Co. of Florida v. Admiral's Cove Associates, Ltd.*, 95 a cable operator successfully challenged a developer who sought to prevent the company from laying cable at the same time as telephone and electric utilities lines. The court reasoned that because the owner voluntarily had granted the easement to the utility companies, Congress had the authority to allow a cable company to use the easement without violating the Takings Clause. 96

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93. Id. at 254.
94. Id. at 252-53.
95. 835 F.2d 1359 (11th Cir. 1988).
96. Id. at 1363 n.7.

Since most developers voluntarily grant easements for use by utilities, however, Congress may force the developer to allow a cable franchise to use the easement without offending the taking cause [sic] of the Constitution. See *FCC v. Florida Power Corp.*, [480 U.S. 245 (1987)]. Such "voluntary" action by developers may be an integral part of zoning procedures or the obtaining of necessary building permits. However obtained, once an easement is established for utilities it is well within the authority of Congress to include cable television
The Eleventh Circuit followed Admiral’s Cove in Centel Cable Television Co. of Florida v. Thos. J. White Development Corp.\(^9\) In White, the defendants excluded a cable operator from using private roads within a private development that were necessary to maintain its cable system, which was constructed along utility easements. In order to justify this exclusion, the defendants argued that the Act authorized use of public easements, but not utility easements, and that the Act would be unconstitutional if applied to non-public easements. The district court, relying on Admiral’s Cove and the trial court holding in Cable Holdings,\(^9\) rejected these contentions stating that “the legislature did not place any special significance on the meaning of the term ‘dedicate’ over and above its common meaning ‘to set.’”\(^9\)

In general, Admiral’s Cove and White stand for the proposition that once an easement is voluntarily granted to one entity, another entity that desires to make a similar use (which will not unduly burden the easement or interfere with either the underlying property owner’s use of his land or the easement holders use of the easement), may use that easement without effectuating a taking of the property.\(^10\)

The holdings of Admiral’s Cove and White have been restricted, however, by the Eleventh Circuit’s latest decision, Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.\(^10\) which limits access to publicly dedicated easements. This decision has caused an intra-circuit conflict.\(^10\)

In Cable Holdings a landlord had given a cable system operator permission to provide cable service in a private apartment complex. In doing this, the landlord excluded its competitor, the local fran-
chised cable firm. The district court, in applying § 621(a)(2), found that the landlord could not exclude the local cable company from his buildings in this manner. The court held "clearly and unambiguously" that the language of § 621(a)(2) contains no requirement that the easement be dedicated for public use. Furthermore, the court held that a cable operator could "piggyback" on telephone, electrical or even a SMATV operator's own lines to gain access to private apartment buildings.

In February 1992, the Eleventh Circuit reversed the lower court decision. It held that the Act "only allows a franchised cable company to access easements on private property when the property owner has dedicated those easements for general utility use." In so holding, the court relied—as did the Woolley court—on the legislative history of the Act and on the Loretto decision. The court recognized the importance of a property owner's right to exclude. It found that this right needs to be "tenaciously guarded by the courts."

The court had a difficult task in attempting to reconcile its decision with Admiral's Cove and White. It distinguished these cases by the fact that the easement in Cable Holdings was "non-dedicated" as opposed to the dedicated easements found in Admiral's Cove and White. A dedicated easement is typically granted before a private property owner develops a new residential subdivi-
sion by recording plats. In *Cable Holdings*, the court reasoned that because the easements were not dedicated, forcing cable access would have been an involuntary permanent physical invasion that required just compensation. This consideration, in the court’s opinion, was not provided for in the statute.

Although the *Cable Holdings* court saw its holding as distinct from *Admiral’s Cove* and *White* on the “dedicated” versus “non-dedicated” easements issue, the harmonization ran afoul on other problems. For example, in *White*, the landowner classified certain “rights-of-way as private” and then argued that congressional authorization for co-use of “‘private easements’ is a *per se* violation of the Takings Clause.” The court rejected this argument, as have other courts in the Eleventh Circuit. This is in direct opposition to the *Cable Holdings* decision in which the court intimated that access to compatible, private easements would constitute a per se taking of private property by usurping the property owner’s right to exclude.

In *Cable Holdings*, the court encountered some of the many dilemmas that have plagued courts attempting to interpret § 621(a)(2) of the Act. A review of the cases reveals inter- and intra-circuit conflicts and demonstrates the need to develop a single standard to be followed in interpreting § 621(a)(2).

IV. A BRIGHT-LINE TEST: FOLLOWING *LORETTO*

If § 621(a)(2) did authorize cable companies to construct their cable systems on private properties, regardless of the presence of compatible easements, it would be a taking under *Loretto v.*

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111. *Id.* at 608. In *Admiral’s Cove* and *White*, the Florida utility law required the developer to dedicate the corridors for utility use. In both cases the developers recorded the plates with the appropriate governmental authority showing the corridors of land available for utility use. *Id.* at 609.

112. *Id.* at 605 (citing *Loretto*, 458 U.S. 419).

113. *Id.* at 602.


115. *Id.* at 910 (citations omitted).

116. *Cable Holdings*, 953 F.2d at 604.
Teleprompter Manhattan CATV Corp.117 Placement of cable in or along an easement is plainly a physical occupation of easement space. While this burden may not be great and the economic impact and interference with investment-backed expectations may be small,118 the invasion here is physical and constitutes a taking. Furthermore, constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.119 The laying of the cable cords is a permanent physical occupation120 and constitutes a taking under Loretto.121 The avoidance of the takings analysis in the Eleventh Circuit opinions prior to Cable Holdings is misguided because Loretto’s physical invasion test is essential to any analysis of this issue. Although Admiral’s Cove and White disagree with this proposition, these courts incorrectly rely on the “voluntary” rationale of FCC v. Florida Power Corp.122 This erroneous supposition is relegated to one footnote in Admiral’s Cove where the takings issue is presented and dismissed in two sentences.123 This same footnote is the basis for dismissing

117. 458 U.S. 419.
118. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 401 (1922).
121. See id. at 907 n.8.
123. Centel Cable Television Co. of Fla. v. Admiral’s Cove Assocs., Ltd., 835 F.2d 1359, 1363 n.7 (11th Cir. 1988).
the takings analysis in White as well. Thus, although the Eleventh Circuit agrees with Loretto, it finds no need to analyze the decision in relation to the Act on the theory that the Act should be looked at from a "voluntary" perspective.

The Florida Power court distinguished Loretto on the grounds that the New York statute in that case involved forced governmental access to a landlord’s property, while the Pole Attachments Act in Florida Power merely regulated commercial leases already "voluntarily" established between cable companies and the property owner. Unlike the dilemma where a cable franchiser is fighting to gain access, in Florida Power, a landlord/tenant relationship already existed. As such, the decision in Florida Power serves to support proponents of rent-control statutes more than it favors those advocating mandatory access. Moreover, the Supreme Court held there that statutes regulating the economic relations of landlords and tenants are not per se takings, but statutes mandating the physical occupation of an owner’s property by an interloper with a government license are such takings. Correctly understood

Admiral’s Cove assumes that Congress could not authorize a cable franchise to use utility easements because such an authorization would be an unconstitutional taking under [Loretto]. Since most developers voluntarily grant easements for use by utilities, however, Congress may force the developers to allow a cable franchise to use the easement without offending the taking[s] clause of the Constitution. See [Florida Power].

Id. at 911-12 (Henley, J., concurring).

124. Centel Cable Television Co. of Fla. v. Thos. J. White Dev. Corp., 902 F.2d 905, 910 (11th Cir. 1990). Interestingly, Senior Circuit Judge J. Smith Henley, in a concurring opinion, stated that:

Notwithstanding the Admiral’s Cove panel’s reliance on Florida Power, I do not believe that this Supreme Court case decides the takings issue at stake in the present case. Unlike the pole owners in Florida Power, the developer here has never voluntarily permitted the cable company itself to occupy the property.

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[It] would require a more extensive analysis of the Supreme Court’s takings jurisprudence than that present here to resolve the complex issue present in this case. Needless to say, I do not think that Admiral’s Cove adequately addressed the takings concerns in the one footnote that it devoted to this topic.

Id. at 251-52.

125. Florida Power, 480 U.S. at 251-52.

126. Id. at 252.

127. Id.
then, *Florida Power* stands for the limited proposition that where a property owner voluntarily permits a cable franchisee on its property, Congress may not regulate the rates the owner charged the franchisee.\(^{128}\)

Relying on *Florida Power*, proponents of mandatory access to private easements argue that the meaning of "dedicated" demonstrates that the Act's legislative history favors the cable franchisee.\(^{129}\) The legislative history of the Act reveals that a property owner who has already dedicated or is obligated to grant an easement for utilities cannot deny cable access.\(^{130}\) This proposition assumes that the word "dedicate" has a common use meaning, which, upon a closer analysis, appears not to be the case.

Arriving at a solution to the interpretational question of what "dedicated" means involves reviewing different opinions and determining what definition best suits the statute. Proponents of cable rights, for example, have argued that the common dictionary definition\(^{131}\) should be used to define "dedicate."\(^{132}\) On the other hand, those who favor the landowner and property rights feel that a more technical definition from a legal source such as *Black's Law Dictionary*\(^{133}\) makes better sense.\(^{134}\)

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128. See Media Gen. Cable, Inc. v. Sequoyah Condominium Council of Co-Owners, 737 F. Supp. 903, 913 (E.D. Va. 1990) (the government cannot authorize co-use of easements even when a property owner has privately allowed other occupations which are compatible).

129. See, e.g., Centel Cable Television Co. of Fla. v. Admiral's Cove Assocs., Ltd., 835 F.2d 1359, 1362 n.5 (11th Cir. 1988) ("The legislative history informs us that Congress intended to authorize the cable operator to 'piggyback' on easements 'dedicated for electric, gas or other utility transmission.'" (quoting H.R. REP. No. 934, supra note 8, at 59 reprinted in 1984 U.S.C.C.A.N. at 4696)).

130. Id.

131. To "dedicate" is to: "[S]et apart or devote formally or seriously to a definite use, end or service." WEBSTER'S THIRD NEW WORLD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 589 (1986).


133. BLACK'S LAW DICTIONARY 412 (6th ed. 1990) (Dedicated: "To appropriate and set apart one's private property to some public use as to make a private way public by acts evincing an intention to do so."); cf. id. (Dedication: "The appropriation of land, or an easement therein, by the owner, for the use of the public and accepted for such use by
In deciding between the two viewpoints, it helps to look at the general congressional intent when interpreting statutory words in the context of an art or science. Generally, when Congress uses technical words or terms of art, these words are to be construed by reference to the art or science involved. Here, "dedicated" is being used in the context of real property law and therefore the construction of that word under the concepts of real property law seems best suited for this statutory analysis.

Furthermore, the Congressional Record and statements of Representatives working on the Act make it very clear that § 621(a)(2) was not intended to provide mandatory access to private easements. This background supports the proposition that the word "dedicated" in the statute should have a more technical meaning. Thus, while the Act can lead to two interpretations for easements dedicated for a compatible use, a technical definition is appropriate. The issue of dedication relates to property law and, as such, requires specificity.

Moreover, if the technical definition of "dedicated" employed by the Third Circuit is used in interpreting the statute, it can be looked upon as an intentional conveyance of certain rights in propo
erty by the landowner to the public, as opposed to a private easement involuntarily set apart for compatible purposes. Using this "real property" definition then, means that a landowner cannot unknowingly grant a private easement for public use.

In the Cable Holdings decision, the Eleventh Circuit adopted this technical definition of "dedicated." The problem in following the Cable Holdings decision, however, is that the court distinguished its earlier holdings based on the fact that the developers in those opinions "dedicated" their easements for general utility use.

Like the landowners in all of the cases on the issue, the Admiral's Cove and White landowners did not purposely "dedicate" their easements for cable use. Thus, if read in the context of a technical definition of "dedicate," the lack of intent on the part of the landowners might render a different decision. In reality, these easements are still private. They are just being invaded by a cable company. Accordingly, the court in Media General Cable, Inc. v. Sequoyah Condominium Council of Co-Owners states that "no act of a grantor manifests an intent to dedicate, nor does any act of a cognizant public body establish an acceptance. And nothing on the present record demonstrates that any government entity is responsible for maintaining these easements or would be accountable for any tort liability incurred."

While such a statutory interpretation supports the rights of a landowner and the interpretation that § 621(a)(2) was not a mandatory access statute, the legislative history of § 621(a)(2) buttresses the interpretation. In the original draft of the Act, there was, in addition to § 621(a)(2), an express provision which required that a franchisee be given access, but also explicitly provided just compensation for the taking. As originally drafted, the deleted § 633 gave cable franchisees mandatory access to multi-unit dwellings

140. Id. at 608.
141. 737 F. Supp. at 912.
while § 621(a)(2) provided access over public lands.\textsuperscript{143}

Because the statute contains a mandatory access provision, the discussion in the \textit{Congressional Record} specifically points out that a just compensation provision must also be present to adhere to \textit{Loretto}.\textsuperscript{144} In the subsequent deletion of the mandatory access provision before the final draft, the just compensation provisions were \textit{not} added to § 621(a)(2). The history indicates that Congress deleted both the mandatory access provision and the just compensation provision from the Act because they were concerned with the constitutional strictures of \textit{Loretto}.\textsuperscript{145} Failure to incorporate the just compensation calculation provisions while incorporating the other regulatory provisions from the same section in the draft is virtually conclusive evidence that Congress never intended § 621(a)(2) to permit a taking.\textsuperscript{146}

With the exception of the just compensation provision, the mandatory access provision of the deleted § 633 and the final version of § 621(a)(2) are practically identical.\textsuperscript{147} What differs is that while both acts have a damages provision for just compensation caused by the "installation, construction, operation or removal of such facilities by the cable operator,"\textsuperscript{148} § 633 had two additional

\textsuperscript{143.} See \textit{Media Gen. Cable}, 737 F. Supp. at 911 (discussing the fact that the language and legislative history of the Act indicated that § 621(a)(2) did not provide a right of access to wholly private easements granted to property owners in favor of particular utilities).

\textsuperscript{144.} See H.R. REP. NO. 934, supra note 8, at 81, reprinted in 1984 U.S.C.C.A.N. at 4718 ("In order to comply with the constitutional requirements set forth by the court in [\textit{Loretto}], this section requires that Commission regulations, and any regulations promulgated by a state of franchising authority, assure that the owner of any affected premises does receive just compensation.").


\textsuperscript{146.} \textit{But see} Greater Worcester Cablevision, Inc. v. Carabetta Enters., Inc., 682 F. Supp. 1244, 1259 (D. Mass. 1985) (where an argument was made that just compensation was provided for under the act). The court, however, ruled that they could not make an accurate interpretation of legislative intent and therefore ruled in favor of the landowner. \textit{Id.} This case, along with the district court decision in \textit{Cable Holdings}, is cited in all cases favoring cable companies as the case which decides the "just compensation" issue of § 621(a)(2).

\textsuperscript{147.} See \textit{supra} note 12 and accompanying text; \textit{see also} \textit{supra} note 79 and accompanying text.

\textsuperscript{148.} See Sections 621(a)(2)(C) & 633(b)(1)(C), 47 U.S.C. § 541(a)(2)(C) & Deleted
provisions directly addressing just compensation for the taking.\textsuperscript{149}

Thus, although the original draft of the Act allowed for just compensation for mandatory access, the deletion of § 633 in the final version of the Act, combined with the transfer of some of its provisions to § 621(a)(2) (but not those provisions detailing the factors to be considered in arriving at just compensation for a taking), is fairly conclusive evidence that § 621(a)(2) was not a mandatory access provision. The statements of the Representatives who worked on the Act clearly support this conclusion.\textsuperscript{150} They indicate that Congress made a considered decision that the Act should not give cable operators the right to impose their service on owners of multi-unit dwellings who chose not to use them.\textsuperscript{151}

In short, the better alternative is to follow the Third Circuit’s reading that § 621(a)(2) is not a mandatory access statute. While this proposition may look bleak for cable operators, that is not necessarily true. A mandatory access provision would serve to undermine one of the main purposes of the Act: the growth of the cable industry.\textsuperscript{152} Mandatory access would undermine growth because the statute would then be anti-competitive. Only “franchised” cable operators would be protected by it while there are many other services, including SMATV and non-franchised cable operators, that can provide the same functions.

A determination that the statute does not provide mandatory access also will not hurt the cable consumer. While some might question whether this presents a First Amendment problem due to a denial of access, it must be remembered that the issue here is not whether cable service will or will not be provided, but rather, the

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\textsuperscript{149} See H.R. 4103, 98th Cong., 2d Sess. § 633 (1984), reprinted in H.R. REP. No. 934, supra note 8, at 13, reprinted in 1984 U.S.C.C.A.N. at 4718. Section 633(b)(1)(D) required that state franchising authorities or the FCC regulate just compensation determinations, and § 633(2)(d) set forth factors to be considered in determining this just compensation, including: (1) the extent of physical occupation; (2) the long-term damage; (3) extent of interference with normal use and enjoyment of the property; and (4) the enhancement of the property’s value from the availability of cable.

\textsuperscript{150} See supra note 83 and accompanying text.

\textsuperscript{151} See Cable Invs., Inc. v. Woolley, 867 F.2d 151, 159 (3d Cir. 1989).

question is whether or not a landowner will have the opportunity to decide which cable system will provide it.

**CONCLUSION**

Section 621(a)(2) of the Cable Communications Policy Act of 1984 could not have given cable operators mandatory access to co-easements dedicated for compatible uses without effectuating a taking of property under the Takings Clause of the Fifth Amendment to the United States Constitution. The creation of an easement in gross by a landowner involves intent.\(^1\) Inherent in this concept is the fundamental right of a property owner to choose to exclude certain entities from his or her property. Therefore, if an easement has not been “dedicated” for such a use by the landowner, to allow mandatory access without just compensation would be an unconstitutional taking under the test laid out in *Loretto v. Teleprompter Manhattan CATV Corp.*,\(^2\) which held that a permanent physical invasion, no matter how small, is a taking that requires just compensation.

The Courts of Appeals for the Eleventh and Third Circuits give *Loretto* a broad interpretation. That is, they understand its holding to apply to any involuntary permanent physical invasion, no matter how de minimis it might be. The point on which the two circuits differ is the meaning of “dedicated” in relation to the voluntary/involuntary rationale of the Act. While the Eleventh Circuit holds that an easement dedicated once is dedicated always, the Third Circuit considers the matter to be a property issue and employs a technical legal definition of this term which relates to real property and gives some control to the landowner.\(^3\) The latter view supports a landowner’s fundamental right to exclude others

\(^1\) See supra notes 131-134 and accompanying text (discussion of intent-based “dedication” of an easement).

\(^2\) 458 U.S. 419 (1982).

\(^3\) The Third and Eleventh Circuits have supported this definition, and it has also been adopted by a district court in the Fourth Circuit. Cable Holdings of Ga., Inc. v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600 (11th Cir.), cert. denied, 113 S. Ct. 182 (1992); Media Gen. Cable, Inc. v. Sequoyah Condominium Council of Co-Owners, 737 F. Supp. 903 (E.D. Va. 1990).
from using his or her property. The Eleventh Circuit, on the other hand, assumes that the dedication is voluntary (despite the fact that later users occupied the easement without the landowner's consent), and thus, it avoids having to apply the involuntary takings test found in *Loretto*.

In addition to statutory construction, an examination of the statute's legislative history also supports the conclusion that the Third Circuit is correct. Both the present statute as well as the deleted sections serve to illustrate that a just compensation clause was not included in the statute because it was not meant to provide mandatory access to private easements. The fact that an earlier version of the Act did have such a just compensation provision further demonstrates this point. In its current form, if the Act provides for mandatory access, it would be a violation of the Takings Clause.

The latest Eleventh Circuit decision, *Cable Holdings*, agreed with the Third Circuit's interpretation of the Act and found that the statute only provides mandatory access to public easements by cable operators. This decision, which has caused an intra-circuit conflict, attempts to distinguish the Eleventh Circuit's prior holdings by the fact that the easements in *Cable Holdings* were not dedicated. It held that because the *Cable Holdings* easements were not dedicated, unlike the easements in its earlier decisions, mandatory access to private easements is a taking without just compensation.

In trying to avoid the takings problem, the *Cable Holdings* court focused on the legislative history of the Act and ultimately agreed with the Third Circuit in its legislative history rationale. The case is a troublesome one, however, in that it has taken parts of each approach and left future interpretations of the Act by the Eleventh Circuit a daunting task. In short, *Cable Holdings* has demonstrated the need for a uniform approach to the question of mandatory access.

In light of the significant factors just highlighted, the approach
of the Third Circuit, that § 621(a)(2) is not a mandatory access statute, is realistic. It avoids constitutional violations, adheres to legislative history, and comports with modern property law. If the statute is interpreted in this manner, landlords retain their fundamental property right to exclude, legislative history is complied with, and cable companies are forced to compete, thereby promoting the free-market system.

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