Cable Operators' Fifth Amendment Claims Applied to Digital Must-Carry

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I. INTRODUCTION

As we face the widespread transition from analog to digital television, arguments are being made with increasing frequency by organizations such as the National Cable Television Association ("NCTA") that regulations like digital must-carry violate cable operators' Fifth Amendment rights.[1]

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1. *See, e.g.*, LAURENCE H. TRIBE, WHY THE COMMISSION SHOULD NOT ADOPT A BROAD

These arguments have been made in the past, although most cases have failed to reach the Fifth Amendment claims by deciding the issues solely on First Amendment grounds.[2] And yet, without a clear understanding of the extent of the property rights held by cable operators, and the relationship between such property rights and speech rights, the legal analysis of such claims will remain incomplete.

Although such claims are nascent, they ultimately raise important policy implications for the future of cable regulation, particularly in the broadband era.[3] Property rights may form an alternative basis by which to limit must-carry and access regulations because property rights form the basis of takings and due process claims brought under the Fifth and Fourteenth Amendments. The Takings Clause, as incorporated through the Fourteenth Amendment, prohibits both state and federal governments from appropriating private property for public use without just compensation.[4] Similarly, the Due Process Clause prohibits state or federal deprivations of property without due process of law.[5] At least theoretically, a taking requires just compensation while a due process violation requires invalidation.[6] Differences between due process and takings analyses,

VIEW OF THE "PRIMARY VIDEO" CARRIAGE OBLIGATION, Enclosure to Letter from David L. Brenner, Senior Vice President, NCTA, to Marlene H. Dortch, Sec'y, Federal Communication Commission (Jul. 9, 2002), www.ncta.com/Pdf_Files/exparte_tribe.doc.pdf [hereinafter TRIBE MEMORANDUM].

2. *See, e.g.*, Turner Brdcst. Sys. v. FCC (*Turner I*), 512 U.S. 622 (1994). Justice O'Connor in *Turner I* noted that imposing common carrier like obligations on cable operators may raise Takings Clause questions. *Id.* at 684. In fact, the only case to date that has analyzed cable property rights in the access context was later vacated. Berkshire Cablevision of Rhode Island, Inc. v. Burke, 571 F. Supp. 976, 988–89 (D. R.I. 1983), *vacated*, 773 F.2d 382 (1985).

3. Yochai Benkler, commenting on the cable broadband access debate, in 2000, noted that "[t]he importance of the question of whether infrastructure is privately or publicly owned (or not owned at all) is partly dependent on our regulatory response to the question of the relationship between ownership over physical infrastructure and control over content." Yochai Benkler, *Net Regulation: Taking Stock and Looking Forward*, 71 U. COLO. L. REV. 1203, 1236 (2000) (citation omitted).

4. U.S. CONST. amend. V. The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. XIV. "No State shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States . . . ."

5. U.S. CONST. amend. V & U.S. CONST. amend. XIV, § 1. The Due Process Clause of the Fifth Amendment provides that "nor [shall any person] be deprived of life, liberty, or property without due process of law . . . ." "The Due Process Clause of the Fourteenth Amendment states that "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

6. Danaya C. Wright, *Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court's Fifth Amendment Takings Jurisprudence?*, 26 Colum. J. Envtl. L. 399, 414 (2001).

however, have been historically muddled. The process beginning with the 1922 Supreme Court decision in *Pennsylvania Coal v. Mahon*, in which the majority announced that certain regulations can go too far in their interference with property rights, thus becoming the de facto equivalent of a direct taking.[7]

With respect to cable regulation, significant free speech implications may be muddying the waters further. Neither speech nor property rights are exclusive of one another. The degree to which cable historically has had autonomy over its facilities—as established through regulation and tradition—influences both speech and property rights. The legal ownership of particular channel space through obligations—such as public, educational, or government ("PEG") channels, leased-access, and must-carry—influences the degree to which a cable company may have editorial control over those channels.[8] The degree to which a franchise creates property rights, and the degree to which those rights and agreements may be modified by local or federal law, may influence how a cable facility is used and who can use the facility.[9] While private property owners, in the traditional sense, may have the right to exclude unwanted and disruptive speakers from their property,[10] cable operators operate under significant regulation, but unlike many regulated businesses, cable operates in a field historically imbued with free speech values. If regulation limits the property-based claims of highly regulated businesses in fields that do not

7. 260 U.S. 393, 415 (1922); *see also* Carol M. Rose, Mahon *Reconstructed*: *Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984) (discussing *Mahon* and its significance to the takings jurisprudence).

8. *See, e.g.*, Denver Area Educ. Telecomm. Consortium, Inc. v. FCC (*Denver Area*), 518 U.S. 727, 727 (1996) (plurality opinion) (explaining that cable companies may choose to permit the airing of sexually offensive material).

9. *See, e.g.*, Cox Cable Comm., Inc. v. United States, 866 F. Supp. 553 (M.D.Ga. 1994); Cox Cable Comm. Inc. v. United States, 774 F. Supp. 633 (M.D.Ga. 1991); Madison Cablevision, Inc.v. City of Morganton, 1990 U.S. Dist. LEXIS 18794 (W.D.N.C., 1990); Triad CATV, Inc. v. City of Hastings, 1989 U.S. Dist. LEXIS 17617 (W.D.Mi. 1989); City Comm., Inc. v. City of Detroit, 650 F. Supp. 1570 (E.D.Mi. 1987); Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc., 562 F. Supp 543 (W.D.Ky 1982); Telecomm. of Key West, Inc. v. United States, 580 F. Supp. 11 (D.D.C. 1983); Telecomm. of Key West, Inc. v. United States, 757 F.2d 1330 (D.C. Cir. 1985); Carlson v. Village of Union City, 601 F. Supp. 801 (1985).

10. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) (describing a historical basis for the right to exclude); Lloyd Corp. v. Tanner, 407 U.S. 551, 568 (1972) (stating that it never before "held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only. Even where public property is involved, the Court has recognized that it is not necessarily available for speaking, picketing, or other communicative activities.").

directly implicate free speech concerns,[11] then potentially, regulations designed to serve free speech values may significantly constrain the property-based claims of cable providers.

The recent resurgence of legal claims related to digital must-carry offers the opportunity to reconsider our approach to cable autonomy and to address the balance of these rights. Addressing this balance is particularly important given the programming diversity made available through digital innovation, which increases programming streams and scanning formats as well as cable capacity to transmit. The debate over digital must-carry must take into account the administrative and capacity burdens on a cable operator that attend such diversity, the concerns of local broadcasters in their attempt to reach cable subscribers, and the concerns of consumers over access to local broadcast programming. Conceptions of the property and free speech rights of cable operators influence each of these concerns.[12] While it may be easier to decide cable autonomy issues solely on First Amendment grounds, or to attempt to separate the speech and property concerns, a more holistic picture of cable autonomy rights may only be possible with the development of a hybrid analysis that looks at the intersection of speech and cable property rights.

By identifying the legal and policy implications of property rights in the digital must-carry issue, this Article identifies underlying points of confusion associated with cable autonomy—a confusion that arises out of cable's quasi-public, quasi-private status. Absent such analysis, this confusion may create an inconsistent and unpredictable regulatory and legal regime in which ever-expanding notions of property may silently and slowly encroach on prevailing notions of access or, alternatively, buttress speaker rights. Part II of this Article will begin with a review of must-carry regulations, including the recent policy debate over dual and multicast carriage. Part III will present a traditional Fifth Amendment analysis of must-carry. Part IV will address some of the free speech implications of this property-based analysis. Finally, Part V will conclude by showing how these property-based claims may influence future cable regulatory policies.

II. MUST-CARRY AND RETRANSMISSION CONSENT RULES

The Federal Communications Commission ("FCC") faces numerous

11. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1010–11 (1984) (holding that businesses that operate in highly regulated fields may have limited reasonable expectations of property claims in light of current and potential regulation).

12. Even though the FCC in 2005 ruled that cable operators only have to carry either an existing analog or digital-only television station, this debate is far from settled. Broadcasters have vowed to contest the FCC's decision. Drew Clark, *FCC Sides with Cable Industry in 'Multicasting' TV Debate*, NATIONAL JOURNAL'S CONGRESSDAILY, Feb. 11, 2005.

concerns regarding must-carry and retransmission consent in the digital context,[13] most notably the calculation of cable channel capacity,[14] the definitions of "primary video"[15] and "program-related[ness],"[16] and the preservation of digital signal quality (e.g., material degradation).[17] Part of the FCC's dilemma in applying the must-carry rules to digital television is that initial rules were written in an analog environment when each station delivered programming in the same signal format[18] (NTSC, 525 lines, 4x3 aspect ratio) and in the same amount of channel space (6 MHz).[19] In a digital environment, however, each station can transmit in eighteen different scanning formats and may send up to six simultaneous digital streams of programming. As a result, the application of the must-carry rules in the digital environment creates a policy quagmire.

A. Analog Must-Carry

The original must-carry rules are found in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), which amends the Communications Act of 1934.[20] The 1992 Cable Act prohibits cable operators and other multichannel video programming distributors from retransmitting commercial and low-power television signals, as well as radio broadcast signals, without the broadcaster's consent. This permission is commonly referred to as retransmission consent.[21] When a broadcast station chooses to negotiate a retransmission consent agreement, the cable operator will compensate the station for the placement of its programming on the cable system.[22] Network-affiliated broadcasters are better positioned to negotiate retransmission agreements

13. For an overview of the constitutional issues of applying the must-carry rules to digital television ("DTV"), see Albert N. Lung, Note, *Must-Carry Rules in the Transition to Digital Television: A Delicate Constitutional Balance*, 22 CARDOZO L. REV. 151 (2000).

14. *See* Carriage of Digital Television Broadcast Signals, *First Report and Order and Further Notice of Proposed Rule* [sic] *Rulemaking*, 16 F.C.C.R. 2598, paras. 124–27 (2001) [hereinafter *DTV Must-Carry*].

15. *Id.* paras. 50–57.

16. *Id.* para. 122.

17. *Id.* paras. 70–72.

18. *See* Carriage of Digital Television Broadcast Signals, *Notice of Proposed Rulemaking*, 13 F.C.C.R. 15092, para. 18 (1998).

19. *Id.* para. 9.

20. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.).

21. *See generally* Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision (47 U.S.C. § 325(b)) of the 1992 Cable Act*, 49 FED. COMM. L.J. 99 (1997) (providing an overview of cable television and retransmission content regulation).

22. 47 U.S.C. § 325(b)(10) (2000).

because of the popularity and ratings of their programs. Without these stations on their cable lineup, the cable system is likely to lose many customers. Estimates demonstrate that about 80% of commercial television broadcasters chose retransmission consent over must-carry in the 1993–96 election cycle.[23]

Under the 1992 Cable Act, however, a station may elect the must-carry option when its carriage does not financially benefit the cable system. Section 4 of the 1992 Cable Act requires cable operators to carry "the signals of local commercial television stations and qualified low power stations . . . ."[24] If a cable operator has twelve or fewer usable activated channels, the cable operator must carry only three local commercial stations, selected at the cable operator's discretion. Cable operators, however, may not select a low-power station over a local affiliate and, if the cable operator elects to carry a local affiliate of a network, it must carry the affiliate that is nearest to the area served by the cable system. If a cable operator has more than twelve usable activated stations, however, then this operator must carry local commercial stations as requested, up to one-third of all channel capacity.[25]

Section 5 of the 1992 Cable Act also gives noncommercial (i.e., public) television stations authority to demand carriage.[26] Cable systems consisting of 12 or fewer channels are required to carry the signal of one qualified local noncommercial educational station.[27] Systems with thirteen to thirty-six channels are required to carry at least one but not more than three stations,[28] and cable systems with more than thirty-six channels are required to carry the signal of three noncommercial, educational stations.[29] In order to be considered a qualified noncommercial station, a station either must be licensed as such and "owned and operated by a public agency,

23. Stuart N. Brotman, *National Cable Television Association, "Priming The Pump": The Role of Retransmission Consent in the Transition to Digital Television*, October 1999, *available at* http://brotman.com/whatsnew_article_priming_content.html (follow link to Retransmission's Consent Track Record).

24. 47 U.S.C. § 534(a) (2000).

25. 47 U.S.C. § 534(b)(1)(B) (2000).

26. *Id.* § 535. Some commentators suggest the must-carry provisions protecting public television were singled out separately from commercial stations because more public stations had been dropped absent must-carry rules. Yet, the courts have failed to treat Section 4 or 5 of the 1992 Cable Act discriminately. Monroe E. Price & Donald W. Hawthorne, *Saving Public Television: The Remand of* Turner Broadcasting *and the Future of Cable Regulation*, 17 HASTINGS COMM. & ENT. L.J. 65, 83 (1994).

27. 47 U.S.C. § 535(b)(2)(A).

28. *Id.* § 535(b)(3)(A)(i).

29. *Id.* § 535(e).

nonprofit foundation, corporation, or association[,]"[30] or be owned and operated by a municipality transmitting "predominantly noncommercial programs for educational purposes."[31] Noncommercial stations rely exclusively on must-carry and, unlike their commercial counterparts, are not able to seek compensation under the retransmission consent provisions.[32]

In the findings section of the 1992 Cable Act, Congress cited many justifications for the must-carry and retransmission rules. Congress found the cable industry to be highly concentrated and worried that this concentration could lead to barrier-of-entry problems for new programmers and a reduction of media outlets (i.e., diversity) available to consumers.[33] Congress also contended the cable industry is increasingly vertically integrated consisting of common ownership among cable operators and cable programmers, and thus, operators favor affiliated programmers.[34] This integration made it "more difficult for noncable-affiliated programmers to secure carriage on cable systems."[35] Most importantly, Congress found there was "substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media."[36] As laid out in Section 307(b) of the 1934 Communications Act, Congress articulated an important governmental interest in the carriage of local stations because such carriage was necessary to provide a "fair, efficient, and equitable distribution of broadcast services."[37] Local origination of programming was seen as a "primary objective" of must-carry regulation because local broadcast stations are an "important source of local news and public affairs programming" vital to "an informed electorate."[38]

Given all the praise for local broadcasting, Congress found it necessary to promote the availability of free, over-the-air television to the public. Realizing the shift in audiences from broadcast to cable programming, Congress acknowledged that some advertising revenues would be reallocated to cable. In effect, cable systems carrying local broadcast stations were competing for advertising revenues on their own

30. *Id.* § 535(l)(1)(A)(i).

31. *Id.* § 535(l)(1)(B).

32. 47 U.S.C. § 325(b)(2)(A) (2000).

33. Cable Television Consumer Protection and Competition Act of 1992, 102 Pub. L. No. 385, §2(a)(2)–(4), 106 Stat. 1460, 1460 (1993).

34. *Id*. § 2(a)(5).

35. *Id.*

36. *Id.* § 2(a)(6).

37. *Id.* § 2(a)(9).

38. *Id.* § 2(a)(11).

systems, and theoretically, cable operators had an economic incentive to terminate the retransmission of broadcast signals. Congress contended that absent must-carry, there was a strong likelihood that "additional local broadcast signals will be deleted, repositioned, or not carried."[39]

B. Analog Must-Carry Rules Are Constitutional

In 1997, by a five-to-four vote, the Supreme Court ruled the must-carry rules to be constitutionally valid under intermediate scrutiny as specified by the *O'Brien* test.[40] The Court examined the two inquiries left open during its prior review in *Turner I*: first, whether the factual record developed by the three-judge district court "supports Congress' predictive judgment that the must-carry provisions further important governmental interests[,]"[41] and second, whether the rules did "not burden substantially more speech than necessary to further those interests."[42]

In answering its first question, the Court reasserted that the rules furthered three important, interrelated governmental interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.[43]

Combining these elements, the Court determined the must-carry rules aided in preserving a multiplicity of broadcast outlets, a substantial governmental objective. In reaching this conclusion, the Court exhaustively elaborated on predicted threats that existed absent any must-carry requirements. The increasing trends of vertical and horizontal integration in cable provided operators with the incentive and ability to give preferential treatment to their affiliated-programming services.[44] Moreover, when cable subscription percentages leveled off, cable operators were expected to compete more aggressively with broadcasters for advertising revenue.[45]

39. *Id.* § 2(2)(a)(15). In light of the frequency with which retransmission consent is invoked, many researchers and commentators criticize the findings in the 1992 Cable Act and the Supreme Court's use of these findings to uphold the rules. *E.g.*, Nancy Whitmore, *Congress, the U.S. Supreme Court and Must-Carry Policy: A Flawed Economic Analysis*, 6 COMM. L. & POL'Y 175, 177, 223–24 (2001); Thomas W. Hazlett, *Digitizing "Must-Carry" Under* Turner Broadcasting v. FCC, 8 SUP. CT. ECON. REV. 141, 195, 201 (2000).

40. Turner Brdcst. Sys. v. FCC (*Turner II*), 520 U.S. 180, 185 (1997) (citing United States v. O'Brien, 391 U.S. 367 (1968)).

41. *Id.*

42. *Id.*

43. *Id.* at 189 (quoting *Turner I*, 512 U.S. at 662).

44. *Id*. at 197 ("Horizontal concentration was increasing as a small number of multiple system operators (MSO's) acquired large numbers of cable systems nationwide.").

45. *Turner II*, 520 U.S at 203.

The Court also demonstrated that a significant number of broadcasting stations had been dropped during periods without must-carry rules,[46] placing some stations in financial disarray.[47] Accordingly, the Court found the provisions to be consistent with the first prong of *O'Brien*.[48]

Next, the Court examined the additional prong of *O'Brien*—namely whether the must-carry rules were broader than necessary to accomplish Congress's objective. Upon reviewing the evidence adduced on remand, the Court found "cable operators have not been affected in a significant manner by must-carry."[49] The Court cited many statistics to support its finding: 87% of the time cable operators had been able to meet must-carry requirements through previously unused channel capacity, 94.5% of cable systems nationwide did not drop any programming to fulfill their obligations, and cable operators carry an average of 99.8% of the programming they carried before enactment of must-carry.[50] The Court conceded that a majority of stations continue to be carried without must-carry. The Court also noted that the 5,880 broadcast channels, which appellants contended would be dropped absent any legal obligations, only placed a small burden on cable systems. In turn, "[b]ecause the burden imposed by must-carry is congruent to the benefits it affords,"[51] the Court concluded the provisions are narrowly tailored to meet its objective of preserving "a multiplicity of broadcast stations for the 40 percent of American households without cable."[52]

46. *Id.* at 202.

47. *Id.* at 208–09. Although contrary evidence was presented, the Court clarified its role, which was determining whether the legislative conclusion was supported by the record before Congress, not "reweigh[ing] the evidence *de novo*," or "replac[ing] Congress' factual predictions with [its] own." *Id.* at 211 (quoting *Turner I*, 512 U.S. at 666).

48. *See id.* at 196.

49. *Id.* at 214.

50. *Id.* While cable operators contended these figures were overblown, the Court believed the results of must-carry spoke for themselves and stated, "It is undisputed that broadcast stations gained carriage on 5,880 channels as a result of must-carry. While broadcast stations occupy another 30,006 cable channels nationwide, this carriage does not represent a significant First Amendment harm to either system operators or cable programmers . . . ." *Id.* at 215.

51. *Turner II*, 520 U.S at 215. The Court analyzed and rejected several proposed alternatives to the current must-carry rules, including: (1) the use of an A/B input selector switch, (2) a leased-access regime system, (3) subsidy mechanisms to support financially weak stations, and (4) antitrust enforcement or anticompetitive administrative procedures. *See id*. at 219, 221–22. Even though such alternatives placed less strain on cable operators, the Court articulated that "content-neutral regulations are not 'invalid simply because there is some imaginable alternative that might be less burdensome on speech.'" *Id.* at 217. (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

52. *Id.* at 216.

C. Digital Must-Carry

Provisions in the Telecommunications Act of 1996 address advanced television,[53] a new system of broadcast television commonly referred to as digital television. In the legislative history, Congress stated that it did not intend to "confer must carry status on advanced television or other video services offered on designated frequencies" and added that the "issue is to be the subject of a Commission proceeding under section 614(b)(4)(B) of the Communications Act."[54] Furthermore, according to the House Conference Report's interpretation of the 1992 Cable Act, when the FCC adopts new standards for broadcast television signals, such as the authorization to broadcast in high definition, the FCC must conduct a proceeding to make any changes to signal carriage requirements.[55] Thus, the must-carry laws seem to be flexible enough to cover technological improvements,[56] and the FCC has authority to conduct a proceeding to determine in what way these laws should apply.

In 2001 the FCC established must-carry for digital-only television stations by providing for carriage of a digital station that returns its analog spectrum.[57] The FCC found that the 1992 Cable Act "neither mandates nor precludes the mandatory simultaneous carriage of both a television station's digital and analog signals ('dual-carriage')."[58] The FCC also ruled that Congress intended the term "primary video" in the digital context to "mean[] a single programming stream and other program-related content"[59] and not the multicast streams that local broadcasters may offer.[60] As a result, the digital-only station must elect which programming stream is its primary video, and the cable operator must provide mandatory carriage to

53. 47 U.S.C. § 336(a)(1)–(2) (2000).

54. BENTON FOUND., LEGISLATIVE BACKGROUND: DIGITAL TELEVISION AND CABLE TV, http://www.benton.org/publibrary/policy/tv/legislation.html (last visited Mar. 23, 2006).

55. H.R. CONF. REP. NO. 102-862, at 67 (1992).

56. To further demonstrate its authority to reinterpret the must-carry rules in the digital context, the FCC referred to the legislative history of the 1992 Cable Act. *DTV Must-Carry*, *supra* note 14, para. 8. The FCC stated:

> [T]he relevant language states that when the FCC adopts new standards for broadcast television signals, such as the authorization of broadcast high definition television (HDTV), it shall conduct a proceeding to make any changes in the signal carriage requirements of cable systems needed to ensure that cable systems will carry television signals complying with such modified standards in accordance with the objectives of this section.

Id. n.25 (quotation omitted).

57. *DTV Must-Carry*, *supra* note 14.

58. *Id.* para. 2.

59. *Id.* para. 57.

60. *See id.* para. 55.

the broadcaster's primary video stream.[61] The FCC allowed stations flexibility to negotiate for full or partial carriage of its digital TV signal.[62] In addition, the FCC also allowed a commercial station that negotiates retransmission consent of its analog signal to tie carriage of its digital signal to carriage of its analog signal.[63]

Despite acknowledging the substantial governmental interests in preserving free television, a multiplicity of information sources, and fair competition in the programming market,[64] the FCC tentatively concluded that dual carriage places an undue burden on cable operators and therefore violates their First Amendment rights.[65] Presently, cable operators are "required to carry local television stations on a tier of service provided to every subscriber and on certain channel positions designated in the [1992 Cable] Act."[66] However, under the 1992 Cable Act, cable operators "are not required to carry duplicative signals or video that is not considered primary."[67] During the temporary transition from analog to digital broadcasting, an "increasing redundancy of basic content between the analog and digital signals as the Commission's simulcasting requirements are phased in."[68] If the FCC imposed a dual-carriage requirement, cable operators would be required to carry identical digital and analog television signals, and because of lessened channel capacity, cable operators could be forced to drop other programming services.[69] To make a final determination on dual-carriage, the FCC raised numerous questions regarding the seven DTV proposals[70] and requested further comment on

61. *Id.* para. 57. For further analysis on the meaning and importance of "primary video" within the digital must-carry debate, see Michael M. Epstein, *"Primary Video" and Its Secondary Effects on Digital Broadcasting: Cable Carriage of Multiplexed Signals Under the 1992 Cable Act and the First Amendment*, 87 MARQ. L. REV. 525 (2004).

62. *DTV Must-Carry*, *supra* note 14, para. 27.

63. *Id.* para. 30.

64. *Id.* para 4.

65. *Id.* para 3. For further analysis of dual and multicast carriage, see Joel Timmer, *Broadcast, Cable and Digital Must Carry: The Other Digital Divide*, 9 COMM. L. & POL'Y 101 (2004).

66. *DTV Must-Carry*, *supra* note 14, para. 6 (citing 47 U.S.C. § 534(b)(6)–(7), § 535(g)(5), (h)).

67. *Id.* (citing 47 U.S.C. § 534(b)(3)(A), (b)(5), § 535(b)(3)(C), (g)). While the broadcast industry urged the FCC to impose a dual-carriage requirement during the transition period to "ensure that viewers have continued access to all available local television programming[,]" cable operators argued that dual carriage would create blank screens on their channel line-up, since "most consumers will not have digital television receivers or converters allowing them to display digital signals on analog sets." *Id.* para. 10 (citations omitted).

68. *Id.* para 9.

69. *Id.*

70. *See* Carriage of the Transmissions of Digital Television Broadcast Stations, *Notice*

other digital must-carry concerns, including evaluating digital carriage agreements, retransmission consent, and market forces;[71] calculating cable system channel capacity;[72] and identifying and applying program-relatedness.[73]

In February 2005, the FCC reaffirmed its earlier decisions in its *Second Report and Order and First Order on Reconsideration*.[74] Specifically, the FCC reconsidered and ruled against the dual must-carry requirement.[75] The FCC also reconsidered and ruled primary video only constitutes one programming stream, not the full bit stream of a local digital broadcast station's combined multicast signals.[76] The FCC refuted that a number of governmental interests would not be met absent a dual-carriage requirement during the digital television transition. In light of the *Turner I* and *Turner II* decisions and the application of intermediate scrutiny, the FCC examined whether or not dual carriage would preserve free over-the-air television and promote "widespread dissemination of information from a multiplicity of sources."[77] The FCC concluded that the interests of viewers who wish to see local, over-the-air broadcast stations are not clearly threatened without dual must-carry. Cable carriage is not needed to ensure that noncable households have access to a digital broadcast station, and nearly all local analog stations are carried under retransmission consent or must-carry. In addition, "[t]he absence of a dual carriage requirement might in fact encourage broadcasters to produce a 'rich mix of over-the-air programming' in order to convince cable operators to voluntarily carry their digital signal."[78] Dual carriage also promotes duplicative programming—the same program in both analog and digital—and therefore does not promote the widespread dissemination of information from a multiplicity of sources.[79]

of Proposed Rulemaking, 13 F.C.C.R. 15092, paras. 40–50 (1998) [hereinafter *Carriage of DTV*].

71. *DTV Must-Carry*, *supra* note 14, para. 130.

72. *Id.* para. 123.

73. *Id.* para. 122.

74. Carriage of Digital Television Broadcast Signals, *Second Report & Order and First Order on Reconsideration*, 20 F.C.C.R. 4516, paras. 2–3 (2005) [hereinafter *DTV Must-Carry II*].

75. *Id*. para. 27.

76. *Id*. para. 44.

77. *Id*. para. 14 (citation omitted).

78. *Id*. para. 18.

79. *Id.* para. 19. Furthermore, evidence suggests dual carriage would not necessarily expedite the DTV transition. *See id*. As of the beginning of 2005, cable operators offer an HDTV program package option in 184 of the 210 designated market areas ("DMAs") and carry more than 500 local DTV stations nationwide. Eighteen cable networks now offer some form of HDTV programming during part of their schedule. *Id*. para. 24. As a result,

After striking down dual carriage, the FCC examined what the must-carry policy should be after the digital television transition is completed for local stations who engage in multicasting. Even though the Congressional intent is unclear regarding the meaning of what constitutes primary video in the digital context,[80] the FCC examined whether an alternative interpretation would further the important governmental interests of free over-air-television—"widespread dissemination of information from a multiplicity of sources"[81] and facilitation of the digital television transition.[82] According to the FCC, Congress and the broadcast industry have failed to demonstrate that free local broadcasting would be jeopardized without multicast carriage. With the single program stream carriage requirement, a local broadcaster will still have a presence on the local cable system and requiring additional broadcast streams from the same broadcaster "would not promote diversity of information sources" and "arguably diminish the ability of other, independent voices to be carried on the cable system."[83] The FCC believes that high quality digital programming will best facilitate the transition, including cable operators' desire to carry local HDTV broadcast content, a scenario still possible under the single program stream carriage requirement.[84]

Currently, the only viable regulatory alternative that exists for the industry is to work within the parameters set forth by the FCC's *DTV Must-Carry Report and Order and Further Notice of Proposed Rulemaking* and the FCC's *Second Report and Order and First Order on Reconsideration*. Until the digital transition is complete,[85] or until a local station returns its

the FCC believes that the above trends will be more likely to spur the sales of DTV sets than the imposition of a dual-carriage requirement. *Id*. para. 25.

80. *Id*. para. 33.

81. *Id*. para. 37 (citation omitted).

82. *Id*. paras. 37–41.

83. *Id*. para. 39.

84. *Id*. para. 40.

85. To facilitate the timely recovery of analog spectrum, Congress and the FCC adopted an aggressive policy requiring broadcasters to convert to digital so it could reallocate and auction part of the existing spectrum utilized by analog broadcasting. The Balanced Budget Act of 1997 provides an exception for the termination of analog services. A station may extend its analog operation beyond 2006 if the television market in which it is operating has not received an 85% penetration in DTV viewership. Otherwise, analog operation will end when 85% of households in a given market can receive a digital signal. See Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3003, 111 Stat. 251, 265 (codified at 47 U.S.C. § 309(j)(14)(B)). Congress changed the 85% rule to a hard date of February 18, 2009, when broadcasters must return their analog spectrum to the government, effectively shutting down analog TV broadcasting. *See* Digital Television Transition and Public Safety Act of 2005, Pub L. No. 109-171, § 3002, 120 Stat. 4 (2006) (codified in scattered sections of 47 U.S.C).

analog spectrum voluntarily ahead of schedule, a local broadcaster may only elect must-carry for its analog signal. When a station returns its analog spectrum, then a station may invoke must-carry for the single, primary video program—whether in HDTV or standard-definition—that they elect. Unless otherwise specified in the future,[86] the plan only provides a mandatory right for a station's single, primary video signal. As a result, retransmission consent bargaining and market forces are undoubtedly key variables to examining viable policy alternatives, both during and after the digital broadcast transition. Because more than sixty percent of all households receive their local television broadcast signals through cable systems,[87] significant progress needs to take place in reaching additional retransmission consent agreements if the public at large is to reap the potential benefits of digital broadcasting.

III. CABLE FIFTH AMENDMENT CLAIMS

Because the FCC ruled against dual and multicast carriage, the FCC declined to explore and reach any conclusions on the merits of the Fifth Amendment Takings Clause arguments brought by cable operators.[88] Because of the FCC's most recent *Order*,[89] cable operators may no longer face the prospect of significant must-carry burdens in the form of dual or multicast carriage of multiple channel streams.[90] Rather, as noted earlier, the FCC ruled that "primary video" in the digital context meant only "a single programming stream and other program-related content"[91]

86. Based upon the DTV policy model employed in Germany, Ferree and Powell believe the down-converting plan would expedite the transition because existing cable and satellite subscribers who receive local stations may be included in the 85% rule calculation. In addition, such a policy would nullify any need for a dual-carriage requirement for analog and digital signals during the transition. Ted Hearn, *Powell Floats a Rigid DTV Switchover*, MULTICHANNEL NEWS, Mar. 15, 2004, at 50; Ted Hearn, *Powell Pushes Back on DTV Plan*, MULTICHANNEL NEWS, Apr. 5, 2004, at 26. For more specific details and analysis of the Berlin plan and its utility in the United States, see *German DTV Transition Differs from U.S. Transition in Many Respects, But Certain Key Challenges Are Similar: Testimony Given Before Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce,* REP. NO. GAO-04-926T (2004) (statement of Mark L. Goldstein, Director, Physical Infrastructure Issues). In addition, the FCC deferred the issue of program-relatedness in the context of digital must-carry for a subsequent report and order. *See DTV Must-Carry II*, *supra* note 74, para. 44.

87. *See* Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, *Twelth Annual Report*, FCC 06-11, para. 37 (2006), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-11A1.pdf. As of June 2005, 65.4 million of the nation's 109.6 million television households subscribed to cable television service. *Id*.

88. *DTV Must-Carry II*, *supra* note 74, paras. 26, 42.

89. *See id.*

90. *See supra* notes 72–82 and accompanying text.

91. *DTV Must-Carry*, *supra* note 14, para. 57.

Nevertheless, broadcasters are likely to challenge the FCC's most recent order on constitutional grounds or urge Congress to pass specific digital must-carry legislation.[92] Furthermore, the FCC has extended a basic, single program must-carry regime into the digital era.[93] Cable operators may view the transition as an opportunity to gain more control over their facilities by challenging any carriage and advocating for a regime based primarily on retransmission consent.

Cable operators and their advocates are developing their Fifth Amendment arguments. Lawrence Tribe, a law professor at Harvard Law School, for example, was commissioned by the National Cable Television Association ("NCTA") to write a report about digital must-carry in 2003. In this report, he argued that multichannel must-carry violated the Fifth Amendment.[94] More specifically, he argued that multichannel must-carry is a form of actual, physical invasion that takes advantage of the substantial investments made by cable operators in upgrading their facilities for digital transmission, a *per se* violation of the Takings Clause.[95] Legal representatives for public broadcasting have responded to Tribe's arguments by emphasizing that since must-carry was upheld by the Supreme Court in the *Turner* litigation, the issue of multichannel carriage does not raise Fifth Amendment implications.[96]

92. *See supra* note 13 and accompanying text. The National Association of Broadcasters ("NAB") "will be working to overturn today's anti-consumer FCC decision in both the courts and Congress." Todd Shields, *It's Official: Must-Carry is Out*, MEDIAWEEK, Feb. 14, 2005, at 7, http://www.mediaweek.com/mw/search/article_display.jsp?schema=&vnu_content_id=1000798343&WebLogicSession=QhcqraUzNNyuPtU9fouOTEtLUzcQnEGa1PlJfhqEbMcJQPIar6Da%7C1399616429770259426/181605430/6/7005/7005/7002/7002/7005/-1 (quoting Eddie Fritts, Chairman & CEO of the National Association of Broadcasters). The NAB also asked the FCC to reconsider its second order concerning digital must-carry. *See* Carriage of Digital Television Broadcast Signals, *Petition for Reconsideration of the National Association of Broadcasters and the Association for Maximum Service Television*, Inc., CS-Docket No. 98-120, April 21, 2005, *available at* http://www.nab.org/Newsroom/PressRel/Filings/ReconPetitionCarriage42105.pdf.

93. *See* Clark, *supra* note 12.

94. TRIBE MEMORANDUM, *supra* note 1.

95. *See generally id.* (discussing the Takings Clause and the government's inability to avoid the clause when the government takes a business and continues its operation). The mere fact that cable operators may retain "title to and bare possession of the tangible real and personal property necessary to provide programming," in the view of Tribe, does not make the government's commandeering of the channel capacity any less blatant. *Id.* at 15 (citation omitted). Although Tribe acknowledged that must-carry obligations only occupy a small portion of the cable operators' total bandwidth capacity, he stressed "[t]here is no constitutional exception that allows the government to avoid the Takings Clause by taking one strand of property at a time." *Id*. (citation omitted).

96. *See* Letter from Lonna M. Thompson et al., Vice President and General Counsel, Ass'n of Public Television Stations, to Marlene H. Dortch, Sec'y, FCC, 7 n.8 (Mar. 4, 2004), *available at* http://www.apts.org/members/legal/public/loader.cfm?url=/commonspot

But because neither *Turner* decision directly addressed the Fifth Amendment implications of must-carry,[97] such claims remain open as an alternative basis for relief. The Fifth Amendment implications of digital must-carry will likely be complex—more so than outlined in the debate thus far. Following a typical Fifth Amendment analysis, this Part looks first to whether must-carry qualifies as a *per se* taking, an actual physical invasion, and then proceeds with an analysis of whether must-carry is a regulation that goes too far in its interference with property rights, thus giving rise to just compensation under a traditional regulatory takings analysis.

A. Physical Appropriation

Must-carry may be characterized as a physical taking because the provision authorizes local broadcasters to physically invade cable channel capacity.[98] State action that authorizes a permanent physical invasion constitutes a *per se* taking, automatically giving rise to just compensation, even if the economic impact of the regulation on the property owner is negligible. This rule, formed from a long line of precedent,[99] was summarized and succinctly announced in the 1982 decision of *Loretto v. Teleprompter Manhattan CATV Corp.,*[100] when the Court invalidated a state statute that authorized the attachment of cable boxes to tenant housing.[101] Ignoring the *de minimis* nature of the space occupied by the cable box,[102] the Court emphasized that any state-compelled, permanent occupation gives rise to "a historically rooted expectation of compensation."[103]

/security/getfile.cfm&pageid=6352_1.pdf.

97. In *Turner I*, however, Justice O'Connor noted that there may be Fifth Amendment implications to must-carry. Unfortunately, the argument was not developed. *See Turner I*, 512 U.S. at 684 (O'Connor, J., concurring in part and dissenting in part).

98. *See supra* notes 24–31 and accompanying text. If a station elects retransmission consent, then the cable operator compensates the station for programming. Such compensation is dependent on market factors. *See supra* notes 21–23 and accompanying text. As such, no Fifth Amendment implications arise.

99. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979) ("We hold that the 'right to exclude' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.") (citation omitted); Int'l News Serv. v. Assoc. Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("An essential element of individual property is the legal right to exclude others from enjoying it.").

100. 458 U.S. 419 (1982).

101. *Id.*

102. *Id.* at 436–37.

103. *Id.* at 441 (noting that an occupation is "qualitatively more intrusive than perhaps

However, the Court cautioned that the *per se* rule did not extend to "restrictions upon the owner's *use* of his property."[104] Had the statute, for example, simply required the landlord to provide cable service to requesting tenants, the landlord would have retained sufficient control over cable installation and the *per se* rule would have been inapplicable.[105] Indeed, the right to exclude, as used in the *Loretto* decision, seems closely related to trespass.[106] The state statute in *Loretto* allowed individual cable installers to enter the landowner's property at will.[107] The *Loretto* Court noted that "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property."[108] Thus, a regulation that did not completely and permanently divest an owner of this right to exclude would not be a *per se* taking.[109] It would be a restriction on use, a restriction more appropriately analyzed under a traditional regulatory takings analysis.

Determining how and when a regulation governs a use of a property and when a regulation authorizes an actual, physical occupation may be a bit tricky in the must-carry context. Does must-carry authorize an actual, physical invasion of channel space, or does must-carry require cable operators to offer local broadcast channels to subscribers in a convenient manner? Many cable operators face pre-existing limitations on their use of channel space per their historical development as a quasi-public, quasi-private entity subject to limited public interest obligations.[110] Is must-carry a permanent invasion in the same way that the attachment of a cable box is permanent, or is it more analogous to the temporary invasion of speakers in a mall environment? Does must-carry compel a physical invasion in physical space by taking cable bandwidth, or does must-carry merely modify a use of a property by mandating limited relationships with local broadcasters?

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any other category of property regulation.").

104. *Id.* Such powers included the right to impose "affirmative duties on the owner." *Id.* at 436.

105. *Id.* at 440–41 n.19.

106. *See* Dennis H. Long, Note, *The Expanding Importance of Temporary Physical Takings: Some Unresolved Issues and An Opportunity for New Directions in Takings Law*, 72 IND. L.J. 1185, 1198–99 (1997) (citation omitted).

107. *See Loretto*, 458 U.S. at 423 n.3.

108. *Id.* at 436.

109. In *Dolan v. City of Tigard*, the Court further drew a distinction between a permanent "occupation" and a temporary "use." 512 U.S. 374 (1994). The Court agreed that landowners would issue "time, place, and manner" restrictions on speech activities so as to ensure that such speech does not disrupt commercial functions. *See id*. at 394 (citing PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980)).

110. *See* Midwest Video Corp. v. FCC, 440 U.S. 689, 701 (1979) (determining that cable could not be made into "pro tanto common carriers").

Loretto suggests that *per se* analysis only applies in situations involving a pre-existing, historically-based right to exclude.[111] The Court has traditionally protected real property interests with great zeal because of the certain historical expectations associated with the development and use of real property.[112] Property-based protections for business interests fell into disfavor after the demise of *Lochner*-era substantive due process review in the 1930s because such protections tended to equate laissez-faire economics with constitutional protection.[113] While the Fifth Amendment continues to protect business interests and equipment against regulations that go too far, less of a historical basis exists on which to base reasonable expectations. As a result, the right to exclude and the *per se* test may not extend to all forms of tangible and intangible property.

If this were so, claimants could require compensation by simply couching their claims in terms of an actual, physical invasion. For instance, a bank might allege that a regulation requiring a bank to divest for fraudulent practices was a compelled, physical invasion of their shareholders' profits.[114] A company might allege that a settlement deduction for the use of a governmental tribunal was a compelled, physical occupation of the settlement.[115] However, to borrow a term from the Supreme Court, these examples show an "extravagant extension of *Loretto*."[116] In such circumstances, the *Loretto* rule would usurp contract remedies and other forms of relief; any person who faced economic harm from a regulation would be able to claim an actual, physical invasion and entitlement to just compensation. The cost of regulation would be

111. *See Loretto*, 458 U.S. at 435 (citation omitted).

112. *See* Molly S. McUsic, *The Ghost of* Lochner*: Modern Takings Doctrine And Its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 612–14.

113. *See id*. at 610. *See also* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937) ("Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations . . . .") (quoting Chicago, B. & Q. R. Co. v. McGuire, 219 U.S. 549, 567 (1911)).

114. In *Golden Pacific Bancorp v. United States*, 15 F.3d 1066 (Fed. Cir. 1994), the court of appeals faced a Fifth Amendment claim by the Golden Pacific Bank that was based in part on a claim there was a *per se Loretto* taking and in part on the *Penn Central* balancing test. *See id.* at 1071–72. In this case, the Comptroller of Currency began an investigation of Golden Pacific, the bank, for insolvency. Rumors of the investigation of the bank lead to a run on the bank; the Comptroller then, based in part on this run, declared that the bank was insolvent. *See id*. at 1069. The bank alleged that this was a physical invasion of the bank's property, asserting that the action was a taking of the value of the stock for the stockholders. *See id*. at 1073 (diminishing the value of the stock was not a physical invasion). The court held however that there was no "historically rooted expectation of compensation," and that because the bank was operating in a highly regulated field it had "less than the full bundle of property rights." *Id.* at 1073–74 (citations omitted).

115. United States v. Sperry Corp., 493 U.S. 52, 62 (1989).

116. *Id.* at 62 n.9.

prohibitive.[117] In essence, a deregulatory mandate would be encrypted into the Constitution.

As a result, in those few cases that have looked at access to telecommunication facilities from a property-based perspective, the courts have avoided a direct application of the *per se* rule.[118] For example, in *Qwest Corp. v. United States*,[119] a federal claims court determined there was no permanent physical invasion when a law required incumbent local telephone services to carry the signals of competing local telephone service providers on an unbundled, nondiscriminatory basis.[120] The *Qwest* court distinguished *Loretto* by emphasizing that the statute gave cable operators control over the installation process itself,[121] but the telephone interconnection law gave incumbent phone companies power over installation and service of equipment as well as the interconnection process.[122] Qwest argued that physical occupation of the telephone wires existed in terms of "flow of electrons."[123] The court rejected this argument, emphasizing that *Loretto* applied to invasion by physical objects that invade physical space,[124] that the regulation governed not real property but

117. McUsic, *supra* note 112, at 655 ("Economic interests, such as personal property, trade secrets, copyright, and money, are all recognized by the Court as 'property' under the Fifth Amendment, but receive little protection against government regulation.") (citation omitted).

118. *See, e.g.*, Qwest Corp. v. United States., 48 Fed. Cl. 672 (2001); Berkshire Cablevision of Rhode Island, Inc. v. Burke, 571 F. Supp. 976 (D.R.I. 1983), *vacated*, 773 F.2d 382 (1st Cir. 1985).

119. 48 Fed. Cl. 672 (2001).

120. *Id.* at 675 (citing 47 U.S.C. § 251(c)(3)).

121. *Id.* at 691.

122. *Id.*

123. *Id.* at 693. Specifically, Qwest argued that there was physical occupation of its loops, the telephone wire that comes into the home and is connected to a central office switch—also known as the "first and last mile." *Id*. at 695.

124. *Id*. at 694. The physical and virtual collocation requirements in the Communications Act were slightly more problematic. Physical collocation allowed competing access providers to enter the physical offices of local exchange carriers and to "install and operate its circuit terminating equipment" in this space, which virtual collection, allows the local exchange carriers to mandate the equipment used by competing access providers and "to string . . . cable to a point of interconnection . . . ." *Id.* at 691–92 (citation omitted). A prior but noncontrolling decision had found physical collocation to be in violation of *Loretto*. *Id*. (citing GTE Northwest, Inc. v. PUC, 900 P.2d 495 (1995), *cert. denied*, 517 U.S. 1155 (1996)). The *Qwest* court emphasized that three main factors determinative in these decisions—there is a direct physical attachment; a third party owns the material to be attached; and, attachment is mandatory—would also be determinative if Qwest were directly challenging a competing exchange carrier's physical collocation without just compensation. *Id*. at 692. The holdings were not determinative, however, with regard to the loops, since none of the factors were truly satisfied. *See id*. at 693.

closely regulated equipment,[125] and that interconnection regulated the use of property by mandating a lessor/lessee relationship.[126]

In the context of highly regulated equipment—particularly when no direct, physical, and tangible attachment is made—regulations may almost always be construed as constituting property use rather than a physical invasion. While *Loretto* stressed that the *de minimis* nature of the cable box did not alter the nature of the invasion,[127] a *de minimis* exception does seem to exist for intangible property and functional equipment. A fundamental difference can be seen between digital and analog signals passing to and fro along the cable lines and actual individuals passing to and fro on a person's land. The latter instance is "qualitatively more intrusive," thus justifying the application of a *per se* rule.[128] To refuse a distinction would be to create a constitutional matrix that prioritized property rights to such an extent that many other rights would be crippled. The exception would subsume the rule, traditional takings analysis, and even, as will be discussed *infra*, First Amendment analysis.

Furthermore, even in situations involving tangible, real property invasions, it is unclear whether a pre-existing right to exclude continues to exist regardless of the property's current use. In 1980, just two years before *Loretto*, the Supreme Court in *PruneYard Shopping Center v. Robins*[129] determined that California could, pursuant to its state constitution, require mall owners to allow peaceful public speech on the premises.[130] The Court had previously stated that the First Amendment did not limit private property rights by extending public speech rights on private property.[131] Nevertheless, the Court held that state legislatures could extend greater speech protection than that afforded by the First Amendment by limiting state-created property rights.[132] The Court thus suggested that the invasion in *PruneYard* was not egregious because the mall owner profited by creating a sense of public space.[133]

In *Loretto*, the Court distinguished *PruneYard* by emphasizing that the invasion in *Loretto* was permanent, while the invasion in *PruneYard* was only temporary and limited.[134] It is unclear, however, whether the

125. *See id.* at 694–95.
126. *See id.* at 695.
127. *See* Loretto v. Teleprompter Manhatten CATV Corp., 458 U.S. 419, 436–37 (1982).
128. *Id.* at 441.
129. 447 U.S. 74 (1980).
130. *Id.* at 83.
131. Lloyd Corp. Ltd. v. Tanner, 407 U.S. 551 (1972).
132. *See PruneYard*, 447 U.S. at 82–83.
133. *Id*. at 83–84.
134. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434 (1982).

Court would continue to view a right of access for speech purposes as a temporary invasion. For example, *in dicta* from *Nollan v. California Coastal Comm'n* the Court explained that when "individuals are given a permanent and continuous right to pass to and fro" on private property by an act of government, a violation of *Loretto* is likely.[135] How do we distinguish between a right of access to pass to and fro and a right of access to speak, as with must-carry?

The initial decision to open the property to the public in *PruneYard* made the speech access right qualitatively less intrusive.[136] The Court further developed this distinction in *Yee v. City of Escondido*,[137] upholding a rent control law against an allegation of invasion because the landowner made the initial decision to enter the rental market. Determining how regulations that give access to particular channels modify historical expectations, and whether cable operators, like landlords, make the initial

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The distinction between a permanent and temporary invasion, particularly in the must-carry context, is further discussed in the context of regulatory takings. *See* Danaya C. Wright & Nissa Laughner, *Shaken, Not Stirred: Has Tahoe-Sierra Settled or Muddied the Regulatory Takings Waters?* 32 E.L.R. 11177, 11180–82 (2002). The time component adds a dimension to the question of how to define the relevant property right being regulated. Per the current analysis, permanence seems to refer to the fact that in the malls, speakers may come and go. In the context of must-carry, however, the channels are more permanently occupied by broadcasters.

135. Nollan v. California Coastal Comm'n, 453 U.S. 827, 832 (1987).

136. In *Lloyd Corp., Ltd v. Tanner*, however, a plurality of the Court reversed an injunction against a mall owner preventing the owner from interfering with peaceful demonstrations on the mall property. The Court reasoned that

> [a]lthough accommodations between the values protected by [the First, Fifth, and Fourteenth] Amendments are sometimes necessary, and the courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only. Even where public property is involved, the Court has recognized that it is not necessarily available for speaking, picketing, or other communicative activities.

407 U.S. at 567–68.

The Court also stressed that property remains private even if the "public is generally invited to use it for designated purposes," such as commerce. *See id.* at 569. However, in the dissenting opinion joined by Justices Douglas, Brennan, and Stewart, Justice Marshall spoke of the implications of too strongly expanding property rights in this context:

> As governments rely on private enterprise, public property decreases in favor of privately owned property. It becomes harder and harder for citizens to find means to communicate with other citizens. Only the wealthy may find effective communication possible unless we . . . continue to hold that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.

Id. at 586 (quoting Marsh v. Alabama, 326 U.S. 501, 506 (1946)).

137. 503 U.S. 519, 531 (1992).

decision to open their properties creates imperfect analogies.

Such imperfection is reflected in the fractured *Denver Area* decision[138] in which the Court was asked to determine the extent of cable control over leased and PEG channels. Some Justices, for example, determined that PEG access channels were a historical and pre-existing limitation on cable franchises,[139] while other Justices would have required a consistent and formal property-like demand of PEG channels by local authorities in order to find such a pre-existing limitation.[140] With respect to leased access channels, Justices in *Denver Area* argued that the leased grant did not guarantee freedom from cable editorial control,[141] and with respect to both leased and PEG channels, three Justices argued that cable operators were the original owners in much the same way booksellers own and control bookstores and the materials sold therein.[142]

Analogizing must-carry to either PEG or leased channels is also imperfect. Historically, early cable television systems did carry broadcast channels almost exclusively until the FCC, through the origination rules, required cable to produce original programming.[143] Unlike PEG channels, however, which were negotiated by local authorities in exchange for franchise rights to use local rights-of-way, must-carry is not the result of negotiation, but of a government mandate to carry when negotiation, in the form of retransmission consent, fails.[144] While the initial decision of cable operators to offer cable communications may historically have included an expectation of carriage,[145] the primary purpose of cable operators is to offer their own programming and to offer channel space on a competitive basis to nonaffiliated programmers.[146] Additionally, must-carry does not

138. 518 U.S. 727 (1996).

139. *See id.* at 760–64 (plurality opinion).

140. *See id.* at 828 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring in judgment in part and dissenting in part) (emphasizing that a public forum analysis, the basis of the analysis for a historical and pre-existing limitation on cable channel control, would require, in the least, "property in which the government has held at least some formal easement or other property interest permitting the government to treat the property as its own in designating the property as a public forum.") Justice Thomas distinguished PEG access channels as a regulatory restriction, not the appropriation of a formal property interest. *See id*.

141. *See id.* at 746–52, 771 (Stevens, J., concurring), 824–27 (Thomas, J., concurring in judgment in part and dissenting in part).

142. *Id*. at 824–27.

143. *See* United States v. Midwest Video, 406 U.S. 649, 655–56.

144. *See supra* notes 24–31 and accompanying text.

145. *See Midwest Video*, 406 U.S. at 655–56.

146. The vertical program limit, however, stipulates that cable operators may air no more than 40% of programming that they have an affiliated ownership interest in. *See* Time Warner Entm't v. FCC (*Time Warner*), 240 F.3d 1126 (D.C. Cir. 2001) (remanding the

mandate a lessor/lessee relationship because broadcasters are not required to pay for connection to the cable facility.[147]

Nevertheless, it is unlikely that the actual, physical invasion rule would protect a cable company's ability to offer channel space on a competitive basis to nonaffiliated programmers completely, particularly since cable has historically been subject to public interest obligations. Indeed, cable operators are limited in assuming a historically-based right to exclude because they serve a uniquely public function and because of particularly technological characteristics. In *Turner I*, the Court reasoned that while cable operators were speakers for First Amendment purposes, they may be subject to limited, viewpoint-neutral regulations like must-carry because of their detrimental impact on free over-the-air programming.[148] The Court was concerned with the ability of cable operators to "restrict, through the physical control of a critical pathway of communication, the free flow of information and ideas."[149] Unlike other forms of mass communication like newspapers, cable operators were uniquely positioned to prevent other speakers from reaching cable subscribers—unless such speakers were able to contract for space on the cable facility.[150] In the property context, such gatekeeping might suggest that a physical takings analysis is inappropriate.[151]

In sum, the utility of the *per se* permanent, physical occupation test in the context of digital must-carry is doubtful. Access for speech purposes is considered a limitation on the right to exclude that is constitutionally valid unless, as the Court in the later decision of *Dolan* explained, such

FCC's national household penetration cap and affiliated program channel limits to the FCC for factual justification). The FCC is in the process of revising both the horizontal and vertical ownership rules that apply to cable systems. *See* The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules, *Further Notice of Proposed Rulemaking*, 16 F.C.C.R. 17312 (2001); The Commission's Cable Horizontal and Vertical Ownership Limits, *Second Further Notice of Proposed Rulemaking*, 20 F.C.C.R. 9374 (2005).

147. *See* 47 U.S.C. §534(b)(10) (2000).

148. *See Turner I*, 512 U.S. at 656–57.

149. *Id.* at 657 (citation omitted).

150. *Id.* at 656–57.

151. In some respects, must-carry may be viewed as analogous to an easement by necessity, a common law doctrine allowing a right of passage across surrounding private property if a parcel is completely encapsulated. *See* Quinn v. Holly, 146 So. 2d 357, 359 (Miss. 1962). An easement by necessity seems to be an historical exception to a general right to exclude that evolves out of practical necessity and public policy. Similarly, access, if historically necessary to reach cable subscribers, may be an historical exception to a general right of cable systems to exclude speakers. *See* Harold Feld, *Whose Line Is It Anyway? The First Amendment and Cable Open Access*, 8 COMMLAW CONSPECTUS 23, 24 (2000) (suggesting that, with respect to broadband open access, "an open access requirement amounts to a 'virtual easement' over the cable plant.").

restriction unqualifiedly and unreasonably impairs the primary value or use of the property.[152] An actual, physical invasion requires that there be an actual, historical right to exclude based on both the nature and the function of the property. Thus, even though the *Loretto* test, as a *per se* analysis, is based on a lower evidentiary standard than that used in traditional regulatory takings analysis, the application of this *per se* rule is limited.[153] Even if the *Loretto* rule does not apply, must-carry may certainly be viewed as a regulation on the use of the property and thus may be analyzed under a traditional regulatory takings analysis.

B. Regulatory Takings

The traditional test for regulatory takings emerged in *Penn Central Transp. Co. v. New York* ("*Penn Central*").[154] *Penn Central* involved a claim against the designation of the Penn Central Station as a state historic landmark, thus prohibiting its owners from developing the air space above the monument. The Court utilized a three-prong, ad-hoc analysis that considered the following: (1) the character of the governmental action; (2) the economic impact of the action; and (3) the extent to which such action interferes with the claimant's reasonable investment backed expectations.[155] In general, the more intrusive the governmental action, the greater the negative economic impact of the regulation on the plaintiff, and the more reasonable the plaintiff's reasonable investment backed expectations, the more likely a regulatory taking has occurred.[156]

Based upon the three-part test articulated above, Penn Central could not prevail on its regulatory takings claim. First, the character of governmental action in *Penn Central*—the historical landmark designation—was not a direct physical invasion or motivated by a "uniquely public function[]."[157] Second, in terms of economic impact of the historic landmark designation, Penn Central gained transfer development rights and still had the ability to use the airspace above the terminal.[158] Third, because the regulation did not interfere directly with the

152. *See* 512 U.S. at 393 (citation omitted).

153. *See* Wright & Laughner, *supra* note 134, at 11,180.

154. 438 U.S. 104 (1978).

155. *Id.* at 124. This test may not be applicable to facial challenges. *See* Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1301, 1361 (1989). Some courts have suggested that a facial challenge requires that the mere enactment of the legislation may deprive the owner of "all economically viable use." *See id.*

156. *Penn Central*, 438 U.S. at 127–28.

157. *Id.* at 128.

158. *See id.* at 136 (noting that obstructions to Penn Central's use of the airspace were

use of the station as a station, Penn Central still retained investment-backed expectation interests.[159]

Particularly egregious violations of any one of the *Penn Central* factors may cause a court to award just compensation. For instance, an actual, physical invasion may be a particularly egregious form of government action because permanent, physical occupations interfere with several property rights concurrently. Similarly, the Supreme Court has determined that denial of economically viable use of a property is a taking.[160] Absent these two limited circumstances, one of the most determinative factors in regulatory takings analysis is the reasonableness of the investment.[161] Such reasonableness is measured in terms of historical protection of the uses affected by the regulation[162] as well as in terms of the regulatory regime under which the owner does business.[163] The Court has repeatedly stated that "mere unilateral expectations" and "abstract need" do not translate into reasonable expectations.[164]

Doing business in a highly regulated field raises the bar for cable operators hoping to show reasonable expectations.[165] In highly regulated industries, the reasonableness of any expectation is significantly curtailed. In *Ruckelshaus v. Monsanto Co.*,[166] for example, the Court identified a traditional property interest in trade secrets—a taking would not occur when disclosure of that trade secret is not prohibited by law.[167] Two years later, the Court in *Connolly v. Pension Benefit Guaranty Corp.*[168] emphasized that federal law could disregard or destroy existing contract rights in highly regulated fields without violating either the Due Process or Takings Clause.[169] As a result, when a property owner does business in a highly regulated field, the owner may only have a viable Fifth Amendment

not known to the Court).

159. *Id.* at 138 (holding that Penn Central retained the ability to improve the property).

160. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992).

161. *Penn Central*, 438 U.S. at 109 (assessing the constitutionality of the New York City's Landmarks Preservation Law in terms of the "reasonable return" that was still possible on the property owner's investment).

162. *See Lucas,* 505 U.S. at 1016 n.7.

163. *See Monsanto*, 467 U.S. at 1011–12.

164. *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 578 (1972) (finding an abstract concern, but an insufficient property interest).

165. *See generally Monsanto*, 467 U.S. at 986 (assessing whether "reasonable investment-backed expectation" existed with trade secrets, warranting just compensation for the government taking them).

166. *Id*.

167. *See id.* at 1004–8.

168. 475 U.S. 211 (1986).

169. *See id.* at 223–24.

claim against federal law affecting the final use, and only when there is an explicit federal guarantee protecting such a use.[170]

The statutory framework governing cable operators has never included an express guarantee that regulators will not impinge on the cable company's use of its franchise, but preserved the right to encourage competition and protect the public interest.[171] In *United States v. Midwest Video*, the Court held that the FCC had ancillary jurisdiction over cable for the purpose of enhancing television services.[172] Historically, cable has been subject to a dual regulatory regime, where local authorities issue franchises, the terms of which are curtailed by both federal legislation and the First Amendment.[173] As a result of this history, cable operators have difficulty arguing that they have reasonable expectations in any given regulatory regime.[174] Furthermore, cable operators may be hard pressed to find an explicit federal guarantee protecting expectancies against must-carry. One such guarantee may come in the form of a federal prohibition that prevents the regulation of cable as a common carrier.[175] Common carriers are federally required to carry the speech of others on a nondiscriminatory basis.[176] While the issue was raised in first *Turner* decision by dissenting Justice O'Connor,[177] in neither *Turner* decision did the Court hold that must-carry contravened the federal prohibition against regulating cable as a common carrier.[178]

Furthermore, the Telecommunications Act of 1996 authorizes the FCC to hold a hearing to determine whether the extension of must-carry to

170. *See Monsanto*, 467 U.S. at 1011.

171. *See* 47 U.S.C. 253(a)–(d) (2000).

172. *See* 406 U.S. at 665–66.

173. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 702 (1984) (citing the *Cable Television Report and Order*, 36 F.C.C.2d 143, 207 (1972)).

174. *See, e.g.*, *Cox*, 866 F. Supp. at 556–59 (explaining that there were no property interests in a contract and thus no takings).

175. 47 U.S.C. § 541(c) (2000) ("Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.").

176. *See* 47 U.S.C. § 153 (10) (2000). *See also* MICHAEL K. KELLOGG, JOHN THORNE, & PETER W. HUBER, FEDERAL TELECOMMUNICATIONS LAW 11–15 (2d ed. 1999).

177. *Turner I*, 512 U.S. at 684 (1994) (O'Connor, J., dissenting). Justice O'Connor stated:

> Congress might also conceivably obligate cable operators to act as common carriers for some of their channels . . . . Setting aside any possible Takings Clause issues, it stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies; such an approach would not suffer from the defect of preferring one speaker to another.

Id.

178. *See id.*; *see also Turner II*, 520 U.S. 180.

digital technologies is appropriate.[179] As in *Monsanto*, it would seem that protecting property rights in this instance would have the result of interfering with federal flexibility in instituting a regulatory plan.[180] Absent interference with a fundamental property right, or an outright appropriation of the entire cable facility, cable seemingly has limited reasonable expectancies in control over certain channels. Admittedly, however, *Monsanto* involved the protection of trade secrets as a property right,[181] and intellectual property may not receive the same degree of protection as more tangible property and equipment, such as the channel space commandeered for must-carry channels.

Nevertheless, given the extensive regulatory treatment of cable, it appears unlikely that cable would be able to prove reasonable investment-backed expectations to be free from access regulations, such as digital must-carry. If the FCC had imposed a dual or multicast must-carry regime, or if such a regime were to come into effect in the future, the added burdens associated with digital must-carry—including the added administrative costs—would make cable claims to reasonable investment stronger. Under the current history in which reasonable expectations are limited, however, cable operators may not be able to sustain a regulatory takings claim because of *Penn Central*.[182]

If, however, a court did find reasonable expectancies, it would balance such expectancies against the nature of the governmental action and the economic impact of the regulation. The central goal of this balancing is to determine whether the regulation is merely adjusting benefits and burdens of social welfare[183] or "forcing some people to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[184] The central goal of evaluating the "character of government action" is to "prevent unfair forms of redistributions [of wealth]."[185] An egregious government action, like an actual, physical

179. *See supra* notes 53–54 and accompanying text.

180. *See Monsanto*, 467 U.S. at 1008. In *Monsanto*, the Court emphasized that "the Trade Secrets Act is not a guarantee of confidentiality to submitters of data, and, absent an express promise, Monsanto had no reasonable, investment-backed expectation that its information would remain inviolate in the hands of EPA." *Id*. Similarly, the mandate that the FCC hold a hearing to determine whether or not to extend must-carry, as authorized by federal law, may limit the reasonable expectancies in complete channel space ownership.

181. *Id*. at 1003–04.

182. *See Penn Central*, 438 U.S. at 135 (setting the test to determine whether a regulation is a taking requiring just compensation).

183. *See id*.

184. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) (Harlan, J., dissenting).

185. *See* Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1433–34 (1991). Generally, fairness is based on (1) historical protections for the autonomy

invasion, favors the property owner,[186] while preventative measures, such as those prohibiting a nuisance, favor the regulator.[187]

The *Penn Central* Court further distinguished situations in which the government is "acting in an enterprise capacity, has appropriated part of . . . [a] property for some strictly governmental purpose" and situations in which the government is regulating in favor of public welfare.[188] When public welfare concerns arise, the government action is better justified—even when regulations substantially interfere with the value or use of a property.[189] If an entire property interest or an essential right[190] is destroyed, the government action, regardless of its public welfare purpose, is constitutionally suspect.

In the case of cable operators, regulation is usually limited to actions designed to serve the public interest and, as *Turner* emphasized, to balance unequal technological and economic advantages that cable operators possess.[191] The cable industry is controlled by several large companies and

of the landowner and (2) the necessity of balancing property rights against communal interests. Two significant considerations that impact a court's analysis of the "character of the governmental action," are the reason for, or purpose of, the action, and the degree to which the action interferes with property rights. For instance, government reallocation of property rights is likely to be viewed more negatively than reallocation for public interest purposes. *See id.*; *see also Webb*, 449 U.S. at 160–61.

186. *See Kaiser Aetna*, 444 U.S. at 180; *Loretto*, 458 U.S. at 433.

187. *See Lucas*, 505 U.S. at 1022–23 (noting that there is no right to use property in a manner "akin to public nuisances," even if in denying the landowner the right to commit a nuisance, the regulation destroys all economically viable use of the property).

188. *See Penn Central*, 438 U.S. at 135.

189. *See id.* at 131.

190. *See* Hodel v. Irving, 481 U.S. 706, 717 (1987); *but see* Andrus v. Allard, 444 U.S. 51, 65 (1979). In *Andrus*, the Court refused to hold that a complete abolition of the right to sell eagle feathers was a taking, since the property owner had not one "strand" in the "full bundle" of property rights. *Id.* at 65–66. The Court noted that the owners could give the feathers away or devise them. *Id.* Additionally, the Court noted that the "loss of future profits" from the sale of the feathers is a "slender reed upon which to rest a takings claim." *Id.* at 66. The burden in this case was to "secure the 'advantage of living and doing business in a civilized community.'" *Id.* at 67 (citation omitted). It is difficult to reconcile *Andrus* with *Hodel*, except the Court in *Hodel* noted that the regulation seemed overbroad for its purpose, and because the Native American land in that case was so fractionalized, it had no real resale value. *Hodel*, 481 U.S. at 718.

191. *See Turner I*, 512 U.S. at 632–33. The Court stated:

> Congress found that the physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, are endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues. Congress determined that regulation of the market for video programming was necessary to correct this competitive imbalance.

Id.

faces little competition in a given market area.[192] A competing cable company would likely be dissuaded from overbuilding by the high cost of entry and the economies of scale.[193] Furthermore, cable has the ability to gatekeep through its physical control over the first and last mile.[194] Because of this physical control, information is funneled through a cable bottleneck, and thus, cable can prevent broadcasters and other programmers from reaching cable subscribers.[195] These concerns, if reasonable, would seem to be sufficient to end any inquiry into the social-welfare purpose of the government regulation.

Nevertheless, if certain regulations interfere with a substantial property right to a significant degree, such interference, regardless of its overarching social-welfare purpose, violates fundamental property protection. Thus, the character of government action in the context of must-carry may favor the cable company if a cable company can show that a fundamental or entire property right is taken. This question raises a common problem in takings jurisprudence: the characterization of the relevant property interest. Such a problem would not arise if, for example, the government completely and directly appropriated a fundamental property interest or an entire parcel.[196] Regulations, however, are seldom so sweeping.

Courts measure the governmental action and the economic impact of a regulation, not only in terms of the extent to which property rights are modified, but also in terms of how much of the property is affected.[197] For this reason, claimants attempt to make regulations appear more egregious

192. *Id*. at 633.

193. *Id.*

194. *Id*. at 656.

195. *Id.* For more analysis on how this bottleneck metaphor emerged within intermediate scrutiny, see generally *Whitmore*, *supra* note 39.

196. *Loretto*, 458 U.S. at 436 ("constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied"); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331–32 (2002), where the Court stated:

> An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of 'the parcel as a whole,' whereas a temporary restriction that merely causes a diminution in value is not.

Id. (citation omitted).

197. *See* Benjamin Allee, Note, *Drawing the Line in Regulatory Takings Law: How a Benefits Fraction Supports the Fee Simple Approach to the Denominator Problem*, 70 FORDHAM L. REV. 1957, 2006 (2002) ("Substantiality [as an approach by which to evaluate the effect of a regulation on the property rights of a landowner] deals with losses to conceptually independent parcels of land.").

by narrowly characterizing the affected property—limiting it to a particular property interest that is directly regulated.[198] Cable operators, for instance, may claim that access or must-carry regulations essentially condemn the affected bandwidth rather than merely a portion of their entire capacity to transmit.[199] In this way, the character of the governmental action and the economic impact of the regulation appear more intrusive.

In order to determine the relevant property right, courts often look to the substantiality of the alleged taking—both in qualitative and quantitative terms.[200] The *Loretto* Court, for example, determined that the actual, physical invasion was more significant than the minimal size of the property affected because the regulation had a permanent impact on a fundamental property right—the right to exclude.[201] Permanence, however, may not be required to invoke Fifth Amendment protection.

The Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*[202] held that a temporary regulation could constitute a taking just as in older cases where temporary wartime appropriation of businesses, such as steel plants, were takings.[203] In these cases, the temporary nature of the invasion did not mitigate the Fifth Amendment implications of the invasion.[204] In the must-carry context, cable operators may argue by analogy that the cable company's decision to enter the cable business cannot be conditioned on the occupation of channel space by broadcasters and other competitors.[205]

Wartime appropriation, however, took over the entire business and thus today might be a denial of all economically viable use[206] and a direct interference with historical protections for the right to exclude[207]—both

198. *See* Andrew S. Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings*, 107 DICK. L. REV. 571, 616–17 (2003).

199. *See, e.g.*, Complaint at 78–81, Comcast Cablevision v. Broward Co. (S.D.Fla. 1999) (No. 99-6934-CIV), http://www.techlawjournal.com/courts/broward/19990720.htm.

200. *See* Allee, supra note 197; *see also* Tahoe-Sierra Pres. Council, 535 U.S. at 331–32.

201. *Loretto*, 458 U.S. at 433 (citation omitted).

202. 482 U.S. 304 (1987).

203. *Id.* at 317–18; *see also* Wright & Laughner, *supra* note 134, at 11184.

204. *Id.* at 318 ("Though the takings were in fact 'temporary,' there was no question that compensation would be required for the Government's interference with the use of the property . . . .") (citation omitted).

205. *See* Daniel F. Spulber & Christopher S. Yoo, *Access to Networks: Economic and Constitutional Connections*, 88 CORNELL L. REV. 885, 940 n.220 (2003) (noting that even a partial and temporary occupation of private property, as per access to network regulations, requires just compensation because such access requirements prevent the business owner from creating new facilities.).

206. *See Lucas*, 505 U.S. at 1016–19.

207. *See Loretto*, 458 U.S. at 419 (citation omitted).

constitute *per se* takings.[208] More importantly, to read *First English*[209] consistently with *PruneYard*,[210] *Yee*,[211] and other access cases, it seems that the importance of the permanence of the invasion is indirectly proportional to the size of the entire property interest affected. Thus, the relative permanence of the invasion seems somewhat dependent on the definition of the relevant property interest in quantitative terms.

Courts use federal and state laws to define the relevant property interest[212] unless, of course, a *per se* violation is implicated.[213] Franchise agreements set the terms of cable service. Such agreements are modifiable by federal regulation and local ordinance.[214] Thus, while must-carry provisions do take bandwidth,[215] it is unlikely that the court would find the particularly affected bandwidth to be the relevant property interest. As the physical appropriation discussion makes clear, it is also doubtful that the court would find must-carry to be a permanent invasion because only a relatively small portion of the bandwidth is taken, much like a temporary easement.[216] Even if multicast must-carry is ultimately implemented, the anticipated six-fold increase in carriage burdens that result from multiple broadcast streams is relatively small in comparison to the overall channel capacity of a cable provider, and the six-fold increase will not change the overall amount of bandwidth occupied.[217] Thus, must-carry may not be a particularly egregious form of governmental action since cable operators retain significant editorial control over a majority of their facility.[218]

The final factor in the traditional *Penn Central* regulatory takings analysis looks at the "economic impact of the regulation."[219] Just as the

208. *See* Wright & Laughner, *supra* note 134, at 11184.

209. 482 U.S. 304.

210. 447 U.S. 74.

211. 503 U.S. 519.

212. *See Monsanto*, 467 U.S. at 1001.

213. *See Loretto*, 458 U.S. at 436–37 ("[C]onstitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.").

214. *See* 47 U.S.C. 545 (2000); *see also* Tribune–United Cable Company v. Montgomery County, 784 F.2d 1227 (4th Cir. 1986).

215. *See* Complaint, *supra* note 199, para. 81.

216. *See Loretto*, 458 U.S. at 433 (finding that a temporary easement is not a *per se* taking).

217. *See* Epstein, *supra* note 61, at 562–63 (citations omitted). Epstein explains that "[a]lthough a digital signal may be split into up to six sub-channels, the amount of signal bandwidth remains the same as it was as an analog signal, 4.3 Mhz." *Id.* at 563 (citation omitted). Epstein also notes that there has been a "large increase in cable programming on most analog cable systems in the last decade"—an increase likely to make the must-carry burden seem proportionally less burdensome. *See id.*

218. *Denver Area*, 518 U.S. at 828–29 n.11.

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

character of government action becomes more egregious when it substantially affects the entire property interest, so too does the economic impact become more egregious when economic loss "relative to the particularly affected property" is proportionally greater.[220] In *Penn Central*, the Court noted that mere diminution in property value did not tip the balance in favor of the claimant, particularly with respect to speculative land uses.[221] Instead, the Court looked exclusively at the regulation's impact on the present use of the property, not on the prospective use of airspace above the station.[222] Just as there is no constitutional guarantee preventing the passage of regulations that would ultimately and incidentally diminish the value of corporate stock, there is likewise no guarantee embedded in the Fifth and Fourteenth Amendments that would guarantee property against regulations that might harm resale value.[223] To the extent the cable operators allege the government is appropriating their future profits and market share, it is unlikely they would fair any better than Penn Central did when alleging that a historic preservation statute appropriated airspace.[224]

This is particularly true with respect to access-type cable regulations like must-carry. As one lower court has noted, Fifth Amendment protections do not include "eternal monopolistic, industry-wide protection from competition."[225] Must-carry, however, differs from leased-access in that carriage is mandated and no money changes hands.[226] Cable operators may be able to argue that they no longer have the channel space to carry independent public interest programming, such as C-SPAN, PEG channels, or local public television stations because of must-carry burdens to carry local broadcast stations.[227] While the FCC's denial of multicasting obligations may lessen these costs and burdens, cable operators may experience a loss in revenue represented by the channel space now occupied by must-carry channels that would otherwise be open to

220. *See* Paul, *supra* note 185, at 1501.

221. *Penn Central*, 438 U.S. at 131 (citations omitted).

222. *Id.* at 136–37.

223. *See* Wright & Laughner, *supra* note 134, at 11188 (citation omitted).

224. *See Penn Central*, 458 U.S. at 138.

225. *See Cox*, 866 F. Supp. at 559.

226. *See supra* notes 24–25 and accompanying text.

227. *See, e.g.*, Carriage of Digital Television Broadcast Stations, *Comments of A&E Television Networks*, FCC CS Docket No. 98-120, at 14–18 (2001), http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512569255; Letter from Glenn Moss, Sr. V.P. for Business Affairs & Affiliate Relations, Courtroom Television Network, to Marlene H. Dortch, Secretary, FCC,. (2002), http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513291503.

independent programmers.

In summary, cable operators face an uphill battle in making a traditional regulatory takings claim against the current digital must-carry requirements. However, if multicast obligations are legislatively imposed, or if broadcasters successfully challenge the limited must-carry order, then cable operators may be in a slightly stronger position to show that digital must-carry infringes on their reasonable investment-backed expectations. Further, digital must-carry has a greater economic impact on cable operators, particularly if dual and multicast carriage requires them to abandon independent and cable network programming. Even if greater digital must-carry burdens were imposed, the ultimate fate of a regulatory takings claim would depend on the characterization of cable's regulatory history, cable's ability to anticipate heavier must-carry burdens in light of digital technology, and the relative amount of channel space occupied by any digital must-carry burdens. In light of these concerns, one may argue that the cable industry could anticipate some increased must-carry burden because of the technological innovation associated with digital broadcasting (e.g., efficiency of bandwidth) and changing expectations of the public with respect to free over-the-air broadcasting.[228]

But even if the bottleneck argument is no longer as persuasive because of increased competition and innovation of digital broadcast television and direct-broadcast satellite ("DBS"), it nevertheless could be established that retransmission consent is more consistent with cable property rights than mandatory carriage—a point thoroughly discussed in Part IV.

IV. COMPELLED SPEECH AND PROPERTY IN THE CABLE CONTEXT

As mentioned previously, cable is a quasi-public entity that is protected as a speaker under the First Amendment[229] and, yet, subject to limited public-interest regulations because of its ancillary effect on broadcasting.[230] When discussing the gatekeeping control inherent to the cable industry, the *Turner* Court emphasized that cable subscribers could be denied access to a certain type of programming.[231] At the time *Turner I* was decided, cable service may have been the only service available in certain areas.[232] Now, alternatives like DBS are more prevalent.[233]

228. *See* Epstein, *supra* note 61, at 560 (emphasizing that broadcaster's must-carry needs do not remain static in light of changing technology).

229. *See Turner I*, 512 U.S. at 650, 656.

230. *Id.* at 650–52.

231. *See id*. at 656.

232. *Id*. at 633.

Nevertheless, concern over gatekeeping was not focused on the ability of cable to reach consumers when other television providers could not.[234] Rather, the Court focused on the ability of cable to block access to cable subscribers.[235] Because of this ability to drown out other speakers, the *Turner I* Court distinguished must-carry regulations from situations involving compelled speech—when a state actively forces individuals to advocate for, or associate with, a particular speaker or viewpoint.[236]

Gatekeeping control can also influence a property-based analysis. For example, when the government compelled a utility service to include a competitor's views in its billing statements, there was a question as to whether the law interfered with the public utility's property right in its envelopes.[237] The Court in *Pacific Gas and Electric Company v. Public Utilities Commission of California* found that First Amendment rights were not contingent on ownership, though the envelopes were property of Pacific Gas.[238] Applying a First Amendment analysis, the *PG&E* Court held that the regulation was content-based because it prioritized the speech of a particular point of view—a difference the Court used to distinguish *PruneYard*.[239]

How might the space in a billing envelope and space on channel capacity compare? Per the common description, property describes a series of rights associated with ownership, such as the right to exclude, the right to alienate, and the right to develop. If property encompasses a series of rights, is there a way to draw a practical distinction between the right to exclude unwanted speakers from space on a letter and to exclude unwanted speakers from space on a channel? The Court has increasingly extended property based protections for more nebulous economic and contractual rights,[240] and a significant possibility remains that a regulatory takings

233. *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Tenth Annual Report*, 19 F.C.C.R. 1606, paras. 7, 69 (2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-5A1.pdf.

234. *See Turner I*, 512 U.S. at 656.

235. *Id.* ("[S]imply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude.").

236. *Id*. at 653.

237. *See* Pac. Gas & Elec. Co. v. Pub. Util. Comm'n (PG&E), 475 U.S. 1, 17–18 (1986).

238. *Id.*

239. *See id*. at 12.

240. *See* McUsic, *supra* note 112, at 624–26. McUsic emphasizes that in the late 1970s and 1980s, the Court began to combine a broad definition of property that incorporated reference to economic rights and tests that smacked of traditional due process analysis, such as the fragmentation of property interests and the means/end test used in *Dolan*, 512 U.S. at 374. This trend has been well documented by legal scholars.

analysis might raise constitutional implications with respect to access-type regulations like must-carry.

On the surface it would seem that where compelled speech and property intersects, a due process analysis may be the appropriate framework. Under such a lens, the issue becomes whether the government is illegally overstepping its bounds by interfering with a fundamental constitutional right like property. To analyze space in an envelope as a form of property subject to Takings, however, would import such an expansive reading of property rights into the Takings and Due Process clauses that it would be difficult to envision a social welfare regulation that would be able to pass Fifth Amendment scrutiny in the absence of just compensation. Such a broad reading of property would essentially have the same effect that the *Lochner* era substantive due process review had on social welfare legislation.[241] In essence, it would tie the hands of regulators and legislators hoping to promote the public interest by defining public interest to mean laissez-faire economic policies and private interests superseding public rights.[242]

Despite problems associated with defining how to set limits on property, however, property rights help establish the degree of association between the speaker and the allegedly compelled message. In the presence of strong, traditional property rights—such as real property interests—compelled speech and property strengthen one another in terms of the association between the property owner and the speaker. In the absence of private property rights, such an association is difficult to establish. With respect to PEG access channels, for example, courts have considered a limited public fora analysis, which would prevent cable operators and the local governments from claiming that mandatory carriage of broadcast

241. *See* McUsic, *supra* note 112, at 614 (discussing the impact of *Lochner*); The reasons such review is disfavored was succinctly stated by the Court in *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955), where it noted that:

> The day is gone when this Court uses the Due Process Clause . . . to strike down . . . laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought . . . . We emphasize what Chief Justice Waite said in *Munn v. State of Illinois* . . . [f]or protection against abuses by the legislatures the people must resort to the polls, not to the courts.

Id. (citation omitted).

242. *See* Cass R. Sunstein, *A New Deal For Speech*, 17 HASTINGS COMM. & ENT. L.J. 137 (1994); *See* McUsic, *supra* note 112, at 624–25. It would seem that too strong of a reliance on property rights would have the regulatory effect of returning us to a pre-New Deal public interest philosophy viewing corporate rights as virtually synonymous with public rights. *See* LOUISE M. BENJAMIN, FREEDOM OF THE AIR AND THE PUBLIC INTEREST: FIRST AMENDMENT RIGHTS IN BROADCASTING TO 1935 4–6 (2001).

signals via must-carry requirements compel speech.[243] Such an analysis also limits any assertion of a property-based right to exclude because the property owner benefits from making his or her property publicly available.[244]

Both rights also are modified by necessity when balancing multiple constitutional rights. A landowner cannot prevent workers from gathering information about their legal rights by alleging that the transmission of information across the property is a form of invasion or trespass.[245] The rights of the individual on the property to receive information in these circumstances are paramount to the property rights of the landowner.[246] Similarly, in the compelled speech cases, nonviewpoint specific regulations that prevent businesses from walling off subscribers and listeners do not violate the First Amendment rights of the provider. In *Red Lion Broadcasting v. FCC*, the right of the public to a variety of information on a public medium was paramount to the broadcasters' right of editorial control.[247] In *Turner I*, the right of the cable subscriber to receive broadcast television without having to change his or her home technology configuration through a broadcast switch was effectively paramount to the

243. Horton v. City of Houston, 179 F.3d 188, 192–94 (5th Cir. 1999), *cert denied*, 528 U.S. 1021 (1999). In *Horton*, the court considered but did not determine whether PEG access channels were public fora. *See id*. at 190–93. It noted, however, that the Supreme Court has said that the "the public forum doctrine should not be extended in a mechanical way to the very different context of public television-broadcasting." *Id*. at 192 (citing Arkansas Educ. Television Comm. v. Forbes, 523 U.S. 666 (1998)). And that the majority of justices in *Denver Area* refused to consider Justice Kennedy's argument that access channels are a public forum. *Id*; *See also Denver Area*, 518 U.S. 780–81 (Kennedy, J., concurring in part, concurring in judgment in part, and dissenting in part); *Denver Area*, 518 U.S. at 749–50 (Breyer, J.) (refusing to consider public forum doctrine); *Denver Area*, 518 U.S. at 826–30 (Thomas, J., concurring in the judgment in part and dissenting in part) (arguing that PEG channel is not a public forum)).

244. *See PruneYard*, 447 U.S. at 83–84.

245. *See* New Jersey v. Shack, 277 A.2d 369 (N.J. 1971).

246. *See id*. at 373–74. The Supreme Court of New Jersey determined that by law, an attorney and health care worker could enter private property to inform migrant workers of their rights without raising Fifth Amendment right to exclude concerns since the interests of the migrant worker outweighed the values supported by private property in this context. *Id*.

247. 395 U.S. 367, 387 (1969). Although the *Red Lion* decision was based in part on the now defunct and much criticized fairness doctrine, two aspects of the *Red Lion* decision are particularly germane to this analysis. First, the Court in *Red Lion* noted that "[t]he right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace the right to snuff out the speech of others." *Id*. (citing Assoc. Press v. United States, 326 U.S. 1 (1945)). The right of a broadcast license had not conveyed a right to monopolize the use of a scarce resource, but only the right to use the medium as a proxy for the public interest. Second, the *Red Lion* Court noted that there were countervailing interests at stake: the "right of the viewers and listeners," an interest that was "paramount" to the broadcast licensee's right to engage in "unlimited private censorship . . . in a medium not open to all." *Id*. at 390, 392.

cable operators' right to be free from broadcasters' views.[248] In *Miami Herald v. Tornillo*, the Court upheld the right of newspapers to exclude unwanted speakers because of historical protections associated with a free and vibrant press.[249] As explained in *Turner I*, because newspapers cannot prevent delivery of alternative views in a separate publication, newspapers have no control over the mailbox or the public.[250]

With respect to Fifth Amendment takings claims to must-carry, such challenges must account for the technological changes that may make gatekeeping a less-than-persuasive argument. In light of the anticipated success of local digital broadcasting multicast services and robust DBS competition, cable may no longer be a technological gatekeeper. Absent gatekeeping control, and in light of the Supreme Court's recognition of cable as speakers, must-carry may violate the First Amendment because cable subscriber rights to receive information would not be directly implicated. Concurrently, property rights in such channels would be strengthened.

To the degree that gatekeeping concerns continue to focus on the right of cable subscribers to receive local broadcast programming, neither the digital broadcast transition nor increased competition from DBS are particularly persuasive. Instead, the analysis would depend on whether gatekeeping concerns are reconceptualized from focusing narrowly on cable subscribers and broadly on a general video audience. The question remains whether the government could show a continued substantial interest—that is, whether must-carry is necessary to preserve broadcasting and whether, as emphasized in *Turner II*, must-carry continues to pose a proportionally limited burden on cable operators.[251] Therefore, the ultimate question with respect to must-carry and gatekeeping concerns, whether from a First or a Fifth Amendment perspective, hinges on whether limiting cable autonomy rights is necessary to preserve access to the information and diversity that local broadcast stations provide to the public.

V. CONCLUSION

The idea that the First Amendment protects against compelled speech but does not protect those that would drown out others is not a novel

248. *See Turner I*, 512 U.S. at 656–57.

249. 418 U.S. 241, 256 (1974) ("A responsible press is an undoubtedly desirable goal, . . . press responsibility is not mandated by the Constitution and like many other virtues, it cannot be legislated.").

250. *Turner I*, 512 U.S. at 656 ("A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.").

251. *See supra* notes 49–52 and accompanying text.

concept. Such a view was expressed by the Supreme Court in *Associated Press v. United States*[252] when it stated that "[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."[253] The idea that the Fifth Amendment does not protect against easements by necessity and against rights of access for legal counseling is also not new.[254] And yet, pressure to allow such drowning in favor of private rights seems to be mounting. Furthermore, when private interests seek to repress alternative voices, reliance on property rights and Fifth Amendment claims seems to be growing, particularly as private property protections expand.[255]

Fifth Amendment claims against digital must-carry represent only one of many takings challenges in today's telecommunications landscape, each of which has its own set of permutations. Admittedly, this analysis only begins to explore property implications associated with telecommunications policy issues. For example, it also may be anticipated that property-based claims may be used in the future to influence regulatory policies concerning Interactive Television Services ("ITV"). Digital technology allows for the development and use of new interactive television services that will provide subscribers with the ability to select and input information related to, or in addition to, the video programming available. Currently, however, questions exist as to whether a nondiscrimination rule should prevent cable from discriminating in favor of the ITV enhancements of affiliated programmers and from discriminating against the enhancements of independent programmers and local broadcasters.[256] Such a nondiscrimination rule would likely raise similar First Amendment and Fifth Amendment concerns expressed here with respect to digital must-carry.

The possibility remains that public rights may be paramount when necessary to receive information and may modify the historical and reasonable expectations of the property owner. This possibility is influenced on those factors emphasized by the Supreme Court in its

252. 326 U.S. 1 (1945).

253. *Id*. at 20.

254. *Shack*, 277 A.2d at 373.

255. Professors Norman Dorsen and Joel Gora in an article analyzing the way property rights influenced First Amendment rights during the Burger Court reached this conclusion. They emphasized that "when free speech claims are weighed in the balance, property interests determine on which side of the scales 'the thumb of the Court' will be placed." Mark Cordes, *Property and the First Amendment*, 31 U. RICH. L. REV. 1, 2 (1997) (quoting Norman Dorsen & Joel M. Gora, *Free Speech, Property, and the Court: Old Values, New Balances*, 1982 SUP. CT. REV. 195).

256. *See, e.g.*, Nondiscrimination in the Distribution of Interactive Television Services Over Cable, *Notice of Inquiry*, 16 F.C.C.R. 1321, para. 6 (2001).

approach to the First Amendment rights of cable, newspapers, and broadcasters: technology, particularly gatekeeping control and historical public use and tradition, as argued in this analysis.

In all of the cases mentioned herein, and as this must-carry property analysis demonstrates, competing and overlapping First and Fifth Amendment concerns create ambiguities. In the context of cable and property rights, Fifth Amendment doctrine and takings law seems to be isolated from First Amendment doctrine and even from more traditional takings analysis.[257] While analogies can be drawn between real property takings and intellectual property cases, courts seem to be reluctant to draw these analogies. The process of drawing such analogies is important, however, to understand the meaning of private property rights in a quasi-public business.[258] Indeed, with respect to many forms of communication providers, such as common carriers, property rights jurisprudence remains ambiguous;[259] such ambiguity is naturally extended to cable technologies.

If, as Commissioner Abernathy suggests, the regulation of certain services, such as cable broadband services, is motivated by assumptions about protecting personal property rights in order to encourage innovation and development,[260] this cable property analysis of must-carry may provide the foundation for overcoming speculative assumptions about cable property rights. Subsequently, this understanding may help prevent the misuse of property-based rhetoric to inappropriately harm competition or limit the scope of must-carry or other access regulation. Indeed, if must-carry has become a policy quagmire because it was written for an analog world, it is also a legal quagmire with respect to the property and speech rights implicated by any regulatory approach. As shown, cable property arguments against must-carry are riddled with ambiguities and weakness. Nevertheless, these arguments may influence regulatory policy and indirectly contribute to a loss of public access to the benefits of digital broadcast television, if and when market forces fail to allow for negotiation.

257. *See, e.g.*, PruneYard, 447 U.S. at 88.

258. *See* Eric R. Claeys, Assistant Professor of Law, St. Louis University, The Telecommunications Act of 1996, The Takings Clause, and Tensions in Property Theory, Paper Presented Before the Conference Avoiding a Tragedy of the Telecomms: Finding the Right Property Rights Regime for Telecommunications (Mar. 18, 2004), at 2, http://www.manhattan-institute.org/pdf/cde5-17-04_claeys.pdf.

259. *Id.* at 26.

260. Kathleen Q. Abernathy, Commissioner, FCC, The Role of Property Rights in Understanding Telecommunications Regulation (May 17, 2004), at 2, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-247332A1.pdf ("Policymakers seldom focus explicitly on property rights, and yet such a discussion can shed light on how regulation affects investment incentives and the behavior of firms in the marketplace.").

Beyond the must-carry context, the unraveling and understanding of cable operators' Fifth Amendment claims have significant public-policy implications. Compared to other facilities-based competitors like DBS or local exchange carriers, the cable industry is arguably in the best market and technological position to provide households with a bundled array of services that include video programming, ITV, high-speed Internet access, and affordable telephone service, as evidenced through its recent rollout of Voice-over-Internet Protocol.[261] While Congress or the FCC may pass laws or rules in the public interest to curb the cable industry as it continues expand into new offerings, recent trends suggest the industry will continue to challenge such measures under First and Fifth Amendment claims. Although used predominantly as a current rhetorical device to influence policymakers, it is only a matter of time before cable operators' Fifth Amendment claims will further develop in court and serve as another check and balance to curb government regulation.

261. *See generally* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Eleventh Annual Report*, FCC 05-13 (2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-13A1.pdf (documenting trends in the market place and competition for the delivery of video programming).

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