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Just Compensation for Per Se Environmental Takings

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I. Introduction

The notion of exclusive ownership as a property right is fundamental to our theory of social organization . . . . The intruder who enters clothed in the robes of authority in broad daylight commits no less an invasion of these rights than if he sneaks in in the night wearing a burglar mask.[1]

Blackstone once wrote that nothing "so generally strikes at the imagination and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual."[2] John Locke espoused a similar concept embracing property rights as absolute.[3]

However, anyone familiar with basic tenets of land use law is aware that today "sole and despotic dominion" cannot truly be exercised.[4] Changing social conditions and heightened awareness of environmental conditions have led to a dramatic increase in land regulations.[5] One economist has estimated that land use controls have increased an astonish-

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1. Hendler v. United States, 952 F.2d 1364, 1365 (Fed.Cir.1991).

2. I. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 393 (1782).

3. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT, THE SECOND TREATISE OF CIVIL GOVERNMENT ¶¶ 123-31 (Thomas I. Cook ed. 1947).

4. *See id.*

5. *See generally* ROBERT R. WRIGHT & MORTON GITELMAN, LAND USE (5th ed. 1997).

ing 3000 percent since the turn of the century.[6] Fortunately for landowners, all of these controls are limited by the United States Constitution.[7]

In 1791 the Bill of Rights, consisting of the first ten amendments to the United States Constitution, was ratified. The Takings Clause of the Fifth Amendment reads: "[n]or shall private property be taken for public use, without just compensation."[8] The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[9] In 1897, the Supreme Court interpreted the Fourteenth Amendment to extend the Fifth Amendment Takings Clause as applicable to state actions.[10] For decades, courts have struggled with defining what constitutes private property,[11] public use,[12] and just compensation.[13] Courts and commentators have attempted to classify different types of government actions in evaluating whether a taking has occurred.[14] In attempting to classify government actions, many courts have unnecessarily created a difficult and unpredictable model of what constitutes a taking. This Comment will provide a general overview of the takings clause and will address the landmark decision in *Loretto v.*

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6. *See* ROGER CLEGG ET AL., REGULATORY TAKINGS: RESTORING PRIVATE PROPERTY RIGHTS 87 (1996).

7. *See generally* U.S. CONST. amend. V, XIV.

8. U.S. CONST. amend. V.

9. U.S. CONST. amend. XIV.

10. *See* Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, 235 (1897).

11. *See, e.g.*, MacKenzie v. City of Rockledge, 920 F.2d 1554, 1558 (11th Cir. 1991); Littlefield v. City of Afton, 785 F.2d 596, 602 (8th Cir. 1986).

12. *See, e.g.*, Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954). *See generally* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW (13th ed. 1997).

13. *See, e.g.*, United States v. Peewee Coal Co., 341 U.S. 114 (1951); United States v. Commodities Trading Corp., 339 U.S. 121 (1950); United States v. 105.40 Acres of Land, 471 F.2d 207 (7th Cir. 1972).

14. *See* Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 150 (1971) (citing Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964)); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

Teleprompter Manhattan CATV Corporation,[15] which produced the "permanent physical occupation" classification.

This Comment will further focus on and explore takings claims based on environmental surveillance. Under the Comprehensive Environmental Response & Liability Act (CERCLA),[16] the Environmental Protection Agency (EPA) has authority to gain access to real property and conduct tests – some of which require both the removal of soil and installation of monitoring devices.[17] Affected property owners have, in the past, challenged environmental surveillance as an unconstitutional taking.[18] While some landowners have been successful,[19] others have not.[20] This Comment will conclude that the current analysis of takings claims based on the physical occupation of private property must continue to be treated as per se compensable. However, this Comment will ultimately advance the theory that the compelling government interest in regulating and treating hazardous wastes requires a non-traditional approach to calculating what just compensation should be.

II. Background

A. The Concept of Takings

One of the principal purposes of modern government is to protect private property.[21] However, the government's *right* to take private property has been recognized at common law for decades.[22] The concept of takings emanated with the shift from the feudal system to private ownership of prop-

15. 458 U.S. 419 (1982).

16. 42 U.S.C. §§ 9601-9675 (1994).

17. *See id.* § 9604(e)(1), (3), (4).

18. *See* Stephen Daren Blevit, *A Tale of Two Amendments: Property Rights and Takings in the Context of Environmental Surveillance*, 68 S. CAL. L. REV 885, 894-903 (1995).

19. *See, e.g.,* United States v. Hendler, 952 F.2d 1364 (Fed. Cir. 1991).

20. *See, e.g.,* United States v. Fisher, 864 F.2d 434 (7th Cir. 1988).

21. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT, THE SECOND TREATISE OF CIVIL GOVERNMENT ¶¶ 123-31 (Thomas I. Cook ed. 1947).

22. *See* WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 77 (1995).

erty.[23] Under the feudal system, one held property by tenure granted from the sovereign.[24] In a strict sense, the sovereign could not "take" what it already owned and therefore, prior to the end of feudalism, it was unnecessary to discuss whether an appropriation even occurred.[25]

The most intrusive government taking is exercised through the process of eminent domain,[26] whereby legal title to private property is transferred to the government in exchange for compensation to the property owner.[27] The process of exercising eminent domain is often referred to as condemnation or expropriation.[28] Because the government's right to expropriate property has long been recognized,[29] challenges to takings pursuant to eminent domain are rare. Takings actions based on excessive government regulations, however, have been the source of considerable litigation.[30] The increased number of environmental regulations, in particular, has led to a rise in constitutional challenges alleging that the government effected a taking without providing the landowner with just compensation.[31]

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23. *See* I. NICHOLS, THE LAW OF EMINENT DOMAIN § 1.2[2] (Matthew Bender & Co., Inc. 3d ed. 1998).

24. *See* Robert Rubin, *Taking Clause v. Technology:* Loretto v. Teleprompter Manhattan CATV, *A Victory for Tradition*, 38 U. MIAMI L. REV. 165, 168 (1983).

25. *See id.*

26. *See id.* Grotius, a seventeenth-century philosopher, first advanced the concept of eminent domain. *Id.* (citation omitted).

27. See BLACK'S LAW DICTIONARY 523 (6th ed. 1990).

28. *See* BLACK'S LAW DICTIONARY 582 (6th ed. 1990). *See also* Tennessee Gas Transmission Co. v. Violet Trapping Co., 200 So. 2d 428, 433 (La. Ct. App. 1967).

29. *See supra* text accompanying note 23. However, the government's ability to take private property is restricted to public use. *See* U.S. CONST. amend. V. This limitation has little practical effect on curtailing government action. *See* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984). In *Midkiff*, the court ruled that the state could exercise its eminent domain powers as a method of wealth redistribution among private citizens. *See id.*

30. *See* Nancie G. Marzulla, *State Private Property Rights Initiatives as a Response to "Environmental Takings,"* 46 S.C. L. REV. 613, 626 (1995).

31. *See id.*

B. Regulatory Takings

Laws pertaining to coastal zone management,[32] wetland protection,[33] strip-mining,[34] and livestock quarantines[35] have been declared takings as applied to vested property rights. In evaluating whether a particular government regulation constitutes a regulatory taking, the courts have primarily considered three factors.[36] These factors are: (1) the effect the regulation has on the property's beneficial use; (2) the effect of the regulation on the landowner's reasonable investment backed expectations; and (3) the character of the governmental act.[37] Generally, if the effect of an ordinance or regulation deprives the landowner of all economically viable use of the property, the action will be declared a taking.[38]

C. Permanent Physical Occupation

In *Penn Central Transportation Co. v. City of New York,*[39] one of the three factors the court considered was the character of the governmental action.[40] The court stated, "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . ."[41]

Historically, the character of the government action has been given great weight in determining whether a taking has

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32. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (interpreting the South Carolina Beachfront Management Act).

33. *See* Formanek v. United States, 26 Cl. Ct. 332 (1992) (interpreting the Clean Water Act).

34. *See* Whitney Benefits Inc. v. United States, 926 F.2d 1169 (Fed. Cir. 1991) (interpreting the Surface Mining Control and Reclamation Act).

35. *See* Yancey v. United States, 915 F.2d 1534 (Fed. Cir. 1990).

36. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

37. *See id. See also* Royal C. Gardner, *Banking on Entrepreneurs: Wetlands, Mitigation Banking, and Takings,* 81 IOWA L. REV. 527, 543 (1996).

38. *See Lucas, supra* note 32, at 1004 (1992). *See also* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). This rule is not absolute. If the government is able to demonstrate that the regulation seeks to prevent a nuisance, then there will be no taking. *See id.* at 412.

39. 438 U.S. 104 (1978).

40. *See supra* text accompanying note 38.

41. 438 U.S. at 124.

occurred.[42] In *Pumpelly v. Green Bay Co.*,[43] 640 acres of private land was flooded due to the construction of a state-authorized dam.[44] The Supreme Court rejected the state's argument that all consequential damages resulting from lawful state activity are noncompensable.[45] The Court stated that, "where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having an artificial structure placed on it, so as to effectively destroy its usefulness, it is a taking . . . ."[46]

Pumpelly was followed by a number of similar challenges involving dam construction and its effect on private property.[47] In *United States v. Cress*,[48] the landowner conceded that the economic value of his property had only been diminished by fifty percent.[49] Over the government's objection, the Court found a partial taking, stating, "it is the character of the invasion, not the amount of damage resulting from it . . . ."[50] The economic implications of the government's action were completely ignored in *Transportation Co. v. Chicago*.[51] In *Transportation Co.*, the petitioner asserted that a taking resulted from flooding that impeded only *access* to his property.[52] Despite significant economic impact to the subject property, the Court held that since there was not a direct encroachment by the government, there could be no taking.[53]

In *Loretto v. Teleprompter Manhattan CATV Corp.*,[54] the Supreme Court was asked to rule whether a small yet permanent physical occupation authorized by a state government

42. *See* Pumpelly v. Green Bay Co., 80 U.S. 166 (1871).
43. *Id.*
44. *See id.* at 167.
45. *See id.* at 176.
46. *Id.* at 181.
47. *See* Transportation Co. v. Chicago, 99 U.S. 635 (1878); United States v. Lynah, 188 U.S. 445 (1903); United States v. Cress, 243 U.S. 316 (1917).
48. 243 U.S. 316.
49. *See id.* at 327.
50. *Id.* at 328.
51. 99 U.S. 635.
52. *See id.* at 636.
53. *See id.* at 642.
54. 458 U.S. 419 (1982).

constituted a taking.[55] On January 1, 1973, the State of New York enacted § 828 of the Executive Law.[56] Section 828 provided "that a landlord may not 'interfere with the installation of cable television facilities upon his property or premises . . . .' "[57] The law also prohibited the landlord from exacting payment from any CATV company "in excess of the amount the [State Commission on Cable Television] shall, by regulation, determine to be reasonable."[58]

The physical occupation complained of in *Loretto* consisted of a cable, less than one half-inch in diameter and approximately thirty-five feet in length.[59] The cable ran along the length of the building and was attached to directional taps of an adjoining building.[60] In addition, the cable company attached two silver boxes to the roof cable using nails that penetrated the masonry of the building at two-foot inter-

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55. *See id.*

56. *See* New York Public Service Law § 228 (1973) (originally enacted as New York Exec. Law § 828).

1. No landlord shall:

a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require:

i. that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well being of other tenants;

ii. that the cable television company or the tenant or a combination thereof bear the entire cost of installation, operation or removal of such facilities; and

iii. that the cable television company agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities.

b. demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable; or

c. discriminate in rental charges, or otherwise, between tenants who receive cable television services and those who do not.

2. Rental agreements and leases executed prior to the effective date of this article may be enforced notwithstanding this section.

458 U.S. at 423 n.3.

57. *Id.*

58. *Id.*

59. *See id.* at 422.

60. *See id.*

vals.[61] On January 15, 1976, pursuant to New York Executive Law § 828(1)(b), the Cable Commission determined that "a one-time $1 payment [was] the normal fee to which a landlord [was] entitled" for the placement of the components on the properties.[62] Prior to the enactment of § 828, landowners were customarily compensated at a rate equal to five percent of the gross revenues Teleprompter derived from the landowner's particular property.[63]

In 1976, Jean Loretto instituted a class action lawsuit on behalf of herself and all owners of real property affected by Teleprompter's placement of CATV components.[64] The complaint alleged that the essentially free installation of cable television components authorized by state statute constituted an "uncompensated trespass" and a condemnation of property in violation of the takings clause.[65] The lower state court granted the defendant's motion for summary judgment, stating, "the statute represents a reasonable and, therefore, justifiable exercise of the police power of the State. . . ."[66] The court continued, stating, "[t]here is no question that the obvious public advantage sought to be served by the legislation under attack greatly outweighs the insignificant nature of the physical use of private property permitted by the statute."[67]

The Appellate Division affirmed the lower court's decision without opinion.[68] On appeal to the New York Court of Appeals, the decision was again affirmed.[69] In rejecting the plaintiff's physical invasion claim, the court held that not all invasions of private property authorized by the government

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61. *See id.*

62. *Id.* at 423-24.

63. *See id* at 423.

64. *See* Loretto v. Teleprompter Manhattan CATV Corp., 415 N.Y.S.2d 180 (N.Y. Sup. Ct. 1979).

65. *See id.* at 181.

66. *Id.*

67. *Id.* at 182.

68. Loretto v. Teleprompter Manhattan CATV Corp., 422 N.Y.S.2d 550 (1st Dept. 1979).

69. Loretto v. Teleprompter Manhattan CATV Corp., 423 N.E.2d 320 (N.Y. 1981).

constitute takings.[70] The court, in justifying its opinion, cited the distinction between invasions authorized by the government for an entrepreneurial purpose,[71] and those in which the government acts as an arbiter.[72]

The court characterized entrepreneurial purpose invasions as those where the state acts in the furtherance of any governmental program normally carried out by government.[73] The court defined invasions undertaken by the government in its arbitral capacity as those where government interference is used to "straighten out situations in which the citizenry is in conflict over land use or where one person's use of his land is injurious to others."[74] The court asserted that when the government acts in its arbitral capacity, as in zoning or enjoining a noxious use of land, the action is noncompensable.[75] The court also noted that the regulation failed to present an excessive economic impact on the property and did not interfere with Ms. Loretto's reasonable investment-backed expectations.[76]

The Supreme Court reversed the Court of Appeals' ruling, stating that "an owner suffers a special kind of injury when a stranger directly invades and occupies an owner's property."[77] However, the Court was cautious in noting that:

> [t]he permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical invasion is a tak-

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70. *See id.* at 329.

71. *See id.* at 330-31. The Court of Appeals attempted to elucidate the government entrepreneurial invasion using two main cases: New York Tel. Co. v. Town of North Hempstead, 363 N.E.2d 694 (N.Y. 1977) (involving the government's ability to enact an ordinance that granted a town the right to affix street lighting to privately owned poles) and United States v. Causby, 328 U.S. 256 (1946).

72. *See Loretto*, 423 N.E.2d at 330.

73. *See id.*

74. *Id.* (quoting Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 62, 63 (1964)).

75. *See id.* at 330.

76. *See id.* at 333-34. Ms. Loretto admitted that she bought the property without knowledge as to Teleprompter's cable attachments. *See id.* at 323.

77. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982).

> ing. . . . [T]emporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.[78]

D. Just Compensation

The concept of providing just compensation for the taking of private property is rooted in English tradition.[79] The American colonists both before and after the Revolutionary War embraced this tradition.[80] However, as the population and geographical area of the nation expanded throughout the Revolutionary Era, uncompensated takings occurred on a regular basis.[81]

The need to transform benevolence into obligation arose after the Revolution, when states began to develop public works projects, yet had insufficient funds to finance the activity.[82] Prior to the ratification of the Bill of Rights, only two state constitutions addressed the issue of whether a taking of private property by the state should be accompanied by compensation.[83] Vermont's constitution read, "whenever any particular man's property is taken for the use of the public, the owner ought to receive an *equivalent in money.*"[84] Massachusetts' constitution provided that, "whenever public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a *reasonable*

78. *Id.* at 436 n.12.

79. *See* WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 78 (1995).

80. *See id.* (citing JAMES ELY, THE GUARDIAN OF EVERY RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (1992)).

81. *See* William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 698 (1985). *See also* ROGER CLEGG ET AL., REGULATORY TAKINGS: RESTORING PRIVATE PROPERTY RIGHTS 14 (1996).

82. *See* WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 79 (1995).

83. *See* ROGER CLEGG ET AL., REGULATORY TAKINGS: RESTORING PRIVATE PROPERTY RIGHTS 14 (1996).

84. VT. CONST. of 1777, ch. I, art. II, *reprinted in* VERMONT STATE PAPERS 241, 242 (W. Slade ed. 1823) (emphasis added).

compensation therefor."[85] Often, states authorized the construction of roads without paying for the real property or the material necessary for the improvement.[86] However, some landowners failed to object to the appropriation because the land was valueless without the roads.[87]

Under the United States Constitution, the takings clause operates to prevent any government body from taking private property for public use without providing *just compensation*.[88] The courts' interpretation of the phrase "just compensation" has been subject to widespread criticism.[89] The takings clause is now interpreted as remedial in nature.[90] The appropriate remedy in the event of a taking is the payment of just compensation, as opposed to the invalidation of the regulation.[91] Although the government may voluntarily choose to withdraw the particular condition that creates the taking, it is not required to do so.[92] As such, the takings clause itself does not limit the government's power to enact legislation; it merely requires payment to the affected landowner.[93] Historically, this has not always been the case.[94]

If the government refuses to withdraw the unconstitutional regulation, the landowner is undoubtedly entitled to just compensation. The current method used by federal courts to ascertain what constitutes just compensation is the

85. MASS. CONST. of 1780, pt. I, art. X (emphasis added).

86. *See* ROGER CLEGG ET AL., REGULATORY TAKINGS: RESTORING PRIVATE PROPERTY RIGHTS 7, 10-11 (1996).

87. *See id.*

88. U.S. CONST. amend. V, XIV (emphasis added). *See also* Chicago, B. & Q.R. Co., v. Chicago, 166 U.S. 226, 236 (incorporating the Fifth Amendment Takings Clause into the Fourteenth Amendment).

89. *See* ROGER CLEGG ET AL., REGULATORY TAKINGS: RESTORING PRIVATE PROPERTY RIGHTS 7, 10-11 (1996).

90. *See* Royal C. Gardner, *Taking the Principle of Just Compensation Abroad: Private Property Rights, National Sovereignty, and the Cost of Environmental Protection*, 65 U. CAN. L. REV. 539, 557 (1997).

91. *See id.*

92. *See id.*

93. *See id.*

94. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (holding that the Kohler Act could not be "sustained as an exercise of the police power" because it deprived the landowner of all economically viable use).

fair market value test (FMV).[95] Under FMV an aggrieved landowner is entitled to receive "what the willing buyer would pay in cash to a willing seller" at the time of the taking.[96] FMV can be calculated using one or a combination of up to three distinct tests.[97] These tests are:

> (1) "Comparable sales" or "market data" approach: the sales of comparable properties (in size, location, and time) are gathered to arrive at the value of the subject property;
> (2) "Income Capitalization" approach: the amount of income the property generates and is projected to generate-generally based on past history over the reasonably foreseeable future is determined and then discounted to its present value; and
> (3) "Reproduction or Replacement cost less depreciation" or "cost" approach: the present cost to construct a similar or comparable structure to that being taken less depreciation is estimated.[98]

Despite the federal courts' preference in measuring just compensation by FMV, there are circumstances where the courts deviate from the favored standard.[99] In *United States v. Commodities Trading Corporation (CTC)*,[100] the Supreme Court stated that "[it] has never attempted to prescribe a rigid rule for determining what is 'just compensation' under all the circumstances and in all cases."[101] In *CTC*, the government sought to enforce a price ceiling on pepper, pursuant to the Emergency Price Control Act of 1942,[102] which reflected a price significantly less than FMV.[103] The Court,

95. *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 510 (1979).
96. United States v. Miller, 317 U.S. 369, 374 (1943).
97. *See* H. DIXON MONTAGUE, THE WONDERFUL WORLD OF EMINENT DOMAIN: A FACTUAL ANALYSIS OF A FANTASY WORLD'S DETERMINATION OF JUST COMPENSATION, INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN 12-29 (1992) (citing AMERICAN INST. OF REAL ESTATE APPRAISERS, THE APPRAISAL OF REAL ESTATE (6th ed. 1974)).
98. *Id.*
99. *See* United States v. Commodities Trading Corp., 339 U.S. 121 (1950).
100. *Id.*
101. *Id.* at 123.
102. 50 U.S.C. § 921 (repealed 1966).
103. *See* 339 U.S. at 123.

although acknowledging FMV as the preferred standard, stated that "when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards."[104] The Court continued, "[w]e think the congressional purpose and necessities of a wartime economy require that ceiling prices be accepted as the measure of just compensation. . . ."[105]

The need to deviate from the traditional and preferred method of computing just compensation is even greater when the taking is for an indeterminate period, and when the property taken is seldom exchanged.[106] A taking may be for a temporary or indeterminate period of time.[107] In *Kimball Laundry Co. v. United States*,[108] a private laundry establishment was physically taken by the government to service the needs of the Armed Forces during wartime.[109] In refusing to award damages based on FMV loss, the Court stated that some loss to an owner for property or "idiosyncratic attachment to it, like loss due to an exercise of police power is properly treated as part of the burden of common citizenship."[110]

E. The Administrative Process Under CERCLA

The United States is the world's foremost industrial power.[111] Industrial operations naturally require the disposal of certain hazardous by-products.[112] Prior to the enactment of the Solid Waste Disposal Act[113] and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),[114] industries were free to dispose of their wastes in any manner they saw fit. For

104. *Id.*
105. *Id.* at 124.
106. *See* Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).
107. *See* First English Evangelical Lutheran Church v. City of Los Angeles, California, 482 U.S. 304, 318 (1987).
108. 338 U.S. 1.
109. *See id.*
110. *Id.* at 5.
111. *See* ALLAN TOPOL & REBECCA SNOW, SUPERFUND LAW AND PROCEDURE § 1.1 (1992).
112. *See id.*
113. 42 U.S.C. §§ 6901-6992(k) (1994).
114. 42 U.S.C. §§ 9601-9675 (1994).

years, common industry practice entailed the burial of waste products in land adjacent to plant sites.[115] Some companies sent their hazardous wastes to local municipal landfills with non-hazardous refuse or shipped them in drums and tank trucks to processing and treatment facilities.[116] Many of the practices failed to consider possible effects on the environment and human health.

As Love Canal[117] and other famous environmental disasters came to the forefront of the media, Congress took note of the inadequate safeguards in the hazardous waste industry.[118] Love Canal was an abandoned chemical dumpsite which began to emit noxious odors and dangerous liquids that ultimately led to a community-wide evacuation.[119] CERCLA[120] was enacted to address the increasing public concern over industrialization and hazardous waste disposal practices illuminated by the Love Canal catastrophe. In particular, the Act sought to preserve the integrity of the Nation's surface and groundwater.[121]

One representative noted that, "[t]hese hazardous wastes remained almost invisible until recently . . . it is incumbent on us to deal with them and make sure the lives and health of Americans are not unreasonably jeopardized by exposure to toxic substances."[122] Love Canal was undoubtedly a primary impetus behind the representative's remarks and ultimately the passage of CERCLA.[123]

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115. *See* 125 CONG. REC. 613-615 (1979) (statement of Rep. La Falce).

116. *See id.*

117. Love Canal is the name of an abandoned chemical dumpsite in Niagra Falls. *See, e.g., supra* note 115.

118. *See id.*

119. *See id.*

120. 42 U.S.C. §§ 9601-9675 (1994).

121. *See* U.S. v. Shell Oil Co., 605 F. Supp. 1064, 1071-72 (D. Colo. 1985) (CERCLA was designed to address the consequences of improperly disposed hazardous waste); Lone Pine Steering Committee v. EPA, 600 F. Supp. 1487, 1489 (D.N.J. 1985) (CERCLA was enacted as a response to increasing concern over abandoned and inactive sites that contain hazardous waste).

122. 125 CONG. REC. 613 (1979) (statement of Sen. La Falce).

123. *See id.*

1. Identification of a Hazardous Site

CERCLA enables EPA to identify contaminated sites and impose liability on potentially responsible parties (PRPs).[124] PRPs are classified as: (1) present "owners and operators" of hazardous waste sites; (2) "owners or operators" of the site at the time the hazardous waste was disposed; (3) waste generators who arranged for the disposal at the site; and (4) transporters of the waste that chose the particular disposal site.[125]

CERCLA's administrative process begins with the identification of a potential Superfund site.[126] Under CERCLA, only sites placed on the national priority list (NPL) qualify for Superfund-financed remediation.[127] A potential site can be brought to EPA's attention through a variety of means.[128] Most sites are first identified by state agencies, which in turn inform EPA.[129] Once EPA is notified of a potential site, the property is listed in the Comprehensive Environmental Response and Liability Information System (CERCLIS).[130] After a site is listed on CERCLIS, an on-scene coordinator (OSC) is assigned to conduct the first investigation at the site.[131]

The OSC compiles site information using photographs, interviews, site condition records, and samplings.[132] The OSC has a field assistance team and a technical assistance team to aid in data collection.[133] The field assistance team

124. 42 U.S.C. § 9607(a).

125. *See id.*

126. *See* ALFRED R. LIGHT, CERCLA LAW AND PROCEDURE 39 (1991).

127. *See id.* at 40. Sites not listed on the NPL may however qualify for Brownfields development. The Brownfields Initiative involves the redirection of resources for the development of industrial or commercial sites that have contamination. *See* Lari DeBrie Thanheiser, *The Allure of a Lure: Proposed Federal Land Use Restriction Easements in Remediation of Contaminated Property*, 24 B.C. ENVTL. AFF. L. REV. 274, 279 (1997).

128. *See* ALFRED R. LIGHT, CERCLA LAW AND PROCEDURE 39 (1991).

129. *See id.* On occasion a site will be referred to EPA by a private party. *Id.* (citing United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 830 (W.D. Mo. 1984)).

130. *See id.*

131. *See id.*

132. *See id.*

133. *See id.* (citation omitted).

completes the preliminary assessment (PA), which attempts "to determine whether there has been or is likely to be a hazardous release from the facility."[134] The PA addresses a number of factors in its ultimate recommendation.[135] Among the factors are the "site description and management practices; waste characteristics; disposal pathways, groundwater uses, and drinking water sources; and receptor population, and environment."[136] The second stage of the PA is an historical review of regulatory activity at the site.[137] On-site investigation during the PA stage is infrequent.[138] The final PA document consists of a general report that may recommend further investigation.[139]

If the PA recommends additional investigation, a physical inspection of the property is conducted.[140] The site inspection consists of a two-part process.[141] The first part involves a "screening site analysis" to determine the severity of the threat posed.[142] The second part involves the collection of information required for the hazard-ranking system (HRS), and is used for the remedial investigation/feasibility study (RI/FS).[143]

The RI/FS is utilized to identify site objectives according to a site-management strategy.[144] The site-management strategy is broken down into seven steps.[145] The initial step of the RI/FS is scoping.[146] During the scoping stage, data is

134. *Id.*
135. *See id.*
136. *Id.*
137. *See id.*
138. *See id.*
139. *See id.*
140. *See id.* (citation omitted).
141. *See id.*
142. *See id.*
143. *See id.*
144. *See id.* at 45.
145. *See id.* The seven steps include: "(1) scoping, (2) community relations, (3) site characterization, (4) baseline risk assessment, (5) treatability studies, (6) development and screening of remedial alternatives, and (7) detailed analysis of remedial alternatives." *Id.*
146. *See id.*

collected from the site, and an EPA or a PRP contractor prepares documentation addressing a variety of factors.[147]

Another step in the RI/FS stage is site characterization.[148] During this stage, EPA attempts to identify specific areas that "pose a threat to human health or the environment."[149] Site characterization involves the collection of information pertaining to the physical characteristics of both the subject site and the surrounding area.[150] Physiology, geology, and hydrology are studied to determine the projection of transport of contaminants.[151] Boundaries of contamination and potential releases are also identified.[152] If EPA decides to initiate a response action,[153] it can be either a removal action[154] or a remedial action.[155] "The national goal of the remedy selection process is to select remedies that are protective of the environment and human health, that main-

147. *See id.* at 46.

148. *See id.*

149. *Id.* (citation omitted).

150. *See id.*

151. *See id.*

152. *See id*

153. A response means "remove, removal, remedy, and remedial action; all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." 42 U.S.C. § 9601(25) (1994).

154. *See id.* § 9601(23). A removal action:

> means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. . . .

Id.

155. *See id.* § 9601(24). A remedial action:

> means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

Id.

tain protection over time . . . ."[156] Because remedy selection dictates the public and private costs of the Superfund Program,[157] it is important that EPA is well informed as to the consequences of proposed actions as well as available alternatives. The process of selecting an appropriate remedy takes, on average, eight years from the time the site is identified.[158] The physical clean-up itself takes approximately forty-three months.[159]

2. Access to Property

EPA has statutory authority under CERCLA to enter contaminated property or adjacent lands to effectuate its remedial purposes.[160] In addition, Congress has granted EPA authority to acquire real property through eminent domain for long-term access and response purposes.[161] Offsite access to property abutting an identified site is sometimes necessary to carry out required investigatory and remedial activities.[162] However, in some instances, EPA's activities have exceeded mere "access" to adjoining property.[163]

EPA's statutory authority to enter property does not interfere with a landowner's ability to establish a government

156. 40 C.F.R. § 300.430(a)(1)(i) (1997).

157. *See* Scott C. Whitney, *Superfund Reform: Clarification of Cleanup Standards to Rationalize the Remedy Selection Process*, 20 COLUM. J. ENVTL. L. 183, 188 (1995).

158. *See* Robert H. Abrams, *Using Experience to Improve Superfund Remedy Selection*, 29 U. RICH. L. REV. 581 (1995).

159. *See id.* (citing JEAN PAUL ACTON, UNDERSTANDING SUPERFUND: A PROGRESS REPORT 16 (1995)).

160. *See* 42 U.S.C. § 9604(e)(1), (3).

161. *See id.* § 9604(j).

162. *See, e.g.*, Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991).

163. *See, e.g.*, Outboard Marine Corp. v. Thomas, 773 F.2d 883 (7th Cir. 1985), *cert. granted*, 479 U.S. 811 (1986), *vacated and remanded*, 479 U.S. 1002 (1986). In *Outboard*, EPA wanted to perform a walk-through of the property, set markers, survey the property, and collect twenty-three soil borings. EPA needed 70 days to complete the project and would need over 1000 square feet of parking space for sixteen vehicles. Ultimately, the Court held that CERCLA failed to grant EPA authority to access property for remedial activities. The Superfund Amendment Reauthorization Act amendments explicitly gave EPA authority to compel the release of information and to enter property to undertake response activities. 42 U.S.C. § 9604(e)(2)-(3).

taking.[164] In *Hendler v. United States*,[165] owners of property adjacent to the Stringfellow Superfund Site sought just compensation as a result of EPA's continued use of their property.[166] In *Hendler*, EPA issued a unilateral administrative order granting access to Hendler's property in order to locate, construct, operate, maintain, and repair monitoring extraction wells.[167] At the time of trial, EPA had installed some twenty-two wells reaching nearly 100 feet into the ground.[168] The wells were lined with stainless steel and plastic and encased in cement and gravel.[169] They were individually capped and enclosed by a railing of steel pipe with a cement foundation.[170] The Federal Circuit Court of Appeals found that the wells constituted a permanent physical occupation.[171] Furthermore, the court stated, "[a] permanent physical occupation does not require that in every instance the occupation be continuous and uninterrupted."[172]

Recently, a New York court held that well casings and piezometers placed on the plaintiffs' property by a local waste management authority constituted a "permanent physical occupation."[173] In *Juliano v. Montgomery-Ostego-Schoharie Solid Waste Management Authority*,[174] the plaintiffs alleged that the placement of visual site inspection equipment on their property constituted a taking.[175] The Montgomery-Ostego-Schoharie Solid Waste Management Authority (MOSA), in seeking to establish a solid waste management facility, identified fourteen potential sites for the future erection of

164. *See Hendler*, 952 F.2d at 1378.

165. 952 F.2d 1364.

166. *See id.* at 1369. EPA had been using the Hendler's property since 1983.

167. *See* Hendler v. United States, 11 Cl. Ct. 91, 93 (1986), *rev'd in part* 952 F.2d 1364 (Fed. Cir. 1991).

168. *See Hendler*, 952 F.2d at 1376.

169. *See id.*

170. *See id.*

171. *See id.* at 1377.

172. *Id.*

173. *See* Juliano v. Montgomery-Ostego-Schoharie Solid Waste Management Auth., 983 F. Supp. 319, 328 (N.D.N.Y. 1997).

174. 983 F. Supp. 319.

175. *See id.* at 323.

the facility.[176] After obtaining permission from the fourteen property owners for visual site inspections, MOSA representatives narrowed the number of potential sites to three, of which the plaintiffs' property was one.[177] MOSA and the plaintiffs established an agreement that allowed MOSA to enter and test the plaintiffs' property for the payment of $1000.[178]

MOSA tested the plaintiffs' property, which included the "excavation of test pits, drilling and sampling of borings, installation of monitoring wells and piezometers, surface and bore hole geophysical survey, hydraulic conductivity testing, and pumping tests."[179] For almost three years MOSA tested the plaintiffs' property which included, at the time of trial, the presence of twenty-four monitoring wells and eight piezometers.[180]

The court identified two takings issues: (1) whether the presence of the twenty-four monitoring wells and eight piezometers[181] on the plaintiffs' property constituted a "permanent physical occupation" necessitating just compensation and (2) whether MOSA's classification of the plaintiffs' property as a possible waste management facility constituted a regulatory taking.[182] The court found that MOSA's undertakings had deprived the plaintiffs' of their right to possess the property and exclude others from it.[183] In addition, the court held that the plaintiffs would be unable to make use of their property where the site equipment still remained.[184] However, the court found that the plaintiffs were not deprived of their right to "forever deny [their] power to control

176. *See id.* at 322.

177. *See id.*

178. *See id.* The plaintiffs claimed that MOSA representatives coerced them into signing the agreement by alleging that if they did not sign it, MOSA would be allowed to test the property anyway. *See id.* at n.1.

179. *Id.* at 322.

180. *See id.*

181. The wells and piezometers were each four inches in diameter and nearly three feet above the ground. *See id.* at 325.

182. *See id.* at 323.

183. *See id.* at 325.

184. *See id.*

the use of the property."[185] Although the court considered the temporal aspects of physical occupations, it noted that in determining what constitutes a "permanent physical occupation," the term "permanent" should be defined as that which is "intended to exist or function for a long, indefinite period without regard to unforeseeable conditions."[186] In this case, the court found that the process necessary to decommission the wells and piezometers would constitute a permanent physical taking.[187] The court concluded that the plaintiffs' regulatory taking claim was not ripe for judicial review.[188]

III. Analysis

The *Loretto* court explicitly stated that not every physical invasion is a taking.[189] However, the distinction between physical occupations of private property and mere invasions is slight. As a result, courts frequently misapply the appropriate test in deciding whether the government has effected a taking. A primary example of this misapplication of tests can be found in *Hendler*,[190] where the court applied the per se physical occupation rule but predicated its holding on the rationale that the occupation of the property need not be permanent.[191] The *Hendler* court incorrectly stated that "[a] permanent physical occupation does not require that in every instance the occupation be exclusive, or continuous and uninterrupted."[192] These criteria identify the characteristics of invasion. As such, if the *Hendler* court found that EPA's intrusion was not exclusive, continuous, or uninterrupted, then

185. *Id.*

186. *Id.* at 327 (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1979)).

187. *See id.* at 328. MOSA's Decommissioning Protocol provides that the decommissioning of wells and piezometers consists of "removing or destroying the well casing and surface seal, and filling the hole by pressure injection of cement betonite grout. Grout from the upper five feet of the hole is then removed and the area is backfilled with compacted native materials." *Id.* (citations omitted).

188. *See id.* at 329.

189. *See supra* text accompanying note 78.

190. *See supra* text accompanying notes 164-172.

191. *See* Hendler v. United States, 952 F.2d 1364, 1377 (Fed. Cir. 1991).

192. *Id.*

it should have applied the balancing test used for regulatory takings. Had the court done this, EPA's invasion would only weigh as one of the three factors set forth in *Penn Central*.[193]

EPA's intrusion in *Hendler* clearly met the requisite level of permanence set forth in *Loretto*.[194] So, although the ultimate finding of the court was correct, the reasoning was not. Unfortunately, *Hendler* further muddles the distinction between invasions and occupations of private property.

The increased number of enacted environmental statutes has given rise to considerable constitutional challenges by landowners alleging that the government's application of the law effected a regulatory taking of private property.[195] These regulatory challenges should continue to be addressed by the courts in a manner consistent with the test articulated in *Penn Central*.[196] A physical invasion of property, under *Penn Central*, should continue to be considered by the court as the character of the government action. The character of the government's action is only one factor in the court's three prong ad hoc inquiry into an alleged regulatory taking.[197] As such, a mere physical invasion is not determinative. A *physical invasion* will need to be balanced with the economic impact on the property as well as the effect the regulation has on the landowner's reasonably backed economic expectations. A *physical occupation*, however, should not be subjected to a balancing test.

Support for the per se physical occupation rule can be traced back to the Revolutionary period.[198] Regulatory takings were an addition to the per se rule of physical expropriation. It was only after the courts began to recognize regulatory takings that the case-by-case inquiry came about. To subject physical occupations to this type of analysis would allow the exception to swallow the rule. Furthermore, doing

193. *See supra* text accompanying note 37.
194. *See supra* text accompanying note 78.
195. *See supra* text accompanying notes 31.
196. 438 U.S. 104 (1978).
197. *See supra* text accompanying note 40.
198. *See supra* text accompanying notes 79-81.

so would undermine long established principles of eminent domain.

The objective of CERCLA is to protect and maintain human health and the environment.[199] This is clearly a compelling government interest. The intrusion into offsite property when remediating a contaminated Superfund site is an unfortunate, yet necessary consequence of EPA action. Such action is necessary to accomplish the legislative intent of CERCLA. Whether EPA chooses to respond to a release of hazardous waste by way of remedial or removal action, the government's activities invariably affect adjoining landowners' property rights. The degree of effect, however, depends on the particular circumstances of the site, which are addressed throughout CERCLA's administrative process. The compelling government interest underlying CERCLA, and the absence of less intrusive alternatives to its access provisions, should not be considered by the courts in determining whether a taking has occurred. Instead, this type of analysis must be left for the courts' evaluation as to whether the particular government action violates due process.

The fact that the government's interest in enforcing CERCLA is inapplicable to the courts' determination as to whether a taking exists does not make the government's interest completely extraneous to the takings *clause*. The constitutional limitation placed on the government is not substantive. The federal government is free to enact any regulation provided it meets due process requirements. Because the appropriate remedy to a taking is either payment to the affected landowner or voluntary withdrawal by the government of the offending regulation,[200] there is no concern that a public imperative will go unaddressed due to the existence of the takings clause.

The government's interest, although irrelevant to the existence of a taking, can be a factor in proscribing the landowner's remedy. The history of the Fifth Amendment indicates that the framers wanted to ensure that an

199. *See supra* text accompanying notes 117-121.

200. *See supra* text accompanying notes 91-92.

uncompensated taking did not occur, yet nonetheless wished to grant legislatures and courts latitude in determining what constituted just compensation. At the time the Fifth Amendment was enacted, few state constitutions provided for any type of compensation.[201] The documents that did address compensation in exchange for property, stated that the deprived landowner should receive "an equivalent in money" in exchange for the taking of property.[202] The framers' of the Fifth Amendment refusal to adopt a specific procedure or even a medium of exchange in the event of a taking supports the contention that the government's interest should be considered in deciding what is "just" within the meaning of "just compensation."

Although federal courts have expressed a preferred method of computing just compensation, they have historically considered the interest of the public and the injustice that would occur if one method was absolute.[203] The courts' willingness to stray from the standard FMV formula is best illustrated by the physical expropriation cases that took place during World War II.[204] Access provisions under CERCLA serve to combat a similar threat to the health and welfare of our communities.

Adherence to the per se physical occupation rule advanced in *Loretto*[205] poses little threat to the environmentalists' agenda. In offering just compensation for a taking, courts must consider the benefit conferred to the affected landowner. Indeed, it is easy to imagine instances where an affected landowner derives a net benefit from the physical occupation of the government. A successful removal action undoubtedly increases the marketability of real estate adjoining the site. A similar comparison can be made to the Revolutionary Era when land was permanently appropriated without compensation for the establishment of roads and other public works projects.

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201. *See supra* text accompanying notes 83-85.
202. *See supra* text accompanying note 84.
203. *See supra* text accompanying notes 99-110.
204. *See supra* text accompanying notes 99-110.
205. 458 U.S. 419 (1982).

IV. Conclusion

Physical occupations of private property must continue to be ruled per se takings under the Fifth Amendment. The increasing number of environmental regulations that authorize access to private property must be subject to the same scrutiny that past regulations have been subjected to. However, environmentalists need not be alarmed by the potential implications of the rule. Entrance does not equal occupation, and in most instances EPA's activities will be deemed temporal and hence only an invasion. In addition, if a court determines that EPA's intrusion rises to the level of occupation, then the just compensation provision of the takings clause may significantly reduce the EPA's liability to the landowner.