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The Material Burden Test: The Better Method Of Determining Takings Issues Arising Under Section 621(A)(2) Of The Cable Communications Policy Act Of 1984

THE MATERIAL BURDEN TEST: THE BETTER METHOD OF DETERMINING TAKINGS ISSUES ARISING UNDER SECTION 621(a)(2) OF THE CABLE COMMUNICATIONS POLICY ACT OF 1984

Assume the owner of a planned development is considering what kind of television system to install for future residents. The owner may choose to forego the services of the typical cable system operator and instead select an alternative system. For example, the owner may be interested in installing a satellite master antenna television system (SMATV) on the premises. Such a system can provide the tenants with television programming that is equal in diversity and quality to a regular cable television system.[1] Furthermore, because SMATV systems traditionally are not franchised and, therefore, not required to pay a franchise fee, SMATV system operators may enter into contracts providing owners with a share of the revenues derived from the tenants.[2] What happens, however, if the local cable operator refuses to bow out gracefully? Does a cable franchisee have the right of access to the private premises even if the owner wishes to grant access only to the satellite system?

In an attempt to answer this question, Congress enacted the Cable Communications Policy Act of 1984 (Cable Act).[3] Section 621(a)(2) provides:

> Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses. . . .[4]

A dilemma lies in the judicial interpretations of section 621(a)(2).[5] No one disputes that section 621(a)(2) gives cable companies a right of access to some easements and rights-of-way.[6] The legislative history of the Cable Act

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1. *See* H.R. REP. No. 934, 98th Cong., 2d. Sess. 82 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4719 (stating how SMATV can be equivalent to cable television service).

2. *See id.* (stating that SMATV's are not required to pay franchise fees and, therefore, are willing to share revenues with landowners).

3. Cable Communications Policy Act of 1984, 47 U.S.C. §§521-59 (1988).

4. Cable Act §621(a)(2); 47 U.S.C. §541(a)(2).

5. *See infra* notes 6-10 and accompanying text (describing split among courts considering whether §621(a)(2) of Cable Act includes private easements).

6. *See* Centel Cable Television Co. v. Thos. J. White Dev. Corp., 902 F.2d 905, 909 (11th Cir. 1990) (citing H.R. REP. No. 98-934 stating that §621(a)(2) gives cable companies access to "compatible" easements including easements or rights-of-way dedicated for electric, gas, or other utility transmission); Centel Cable Television Co. v. Admiral's Cove Assoc., 835 F.2d 1359, 1362 n.5 (11th Cir. 1988) (same); Cable Holdings, Inc. v. McNeil Real Estate Fund VI, Ltd., 678 F. Supp. 871, 873 (N.D. Ga. 1986) (same); Mumaugh v. Diamond Lake Area Cable TV Co., 183 Mich. App. 597, 602, 456 N.W.2d 425, 428 (Mich. Ct. App. 1990) (same); *see also* Ferris, *Access to Premises: Legislation & Litigation*, 245-46, in CABLE TELEVISION LAW 1989 (Practicing Law Institute ed. 1989) (noting that all courts considering issue have found that §621(a)(2) of Cable Act provides some right of access).

describes the "compatible" easement of section 621(a)(2) as "an easement or right-of-way dedicated for electric, gas or other utility transmission."[7] The courts, however, disagree on whether "compatible" easements include private easements in addition to easements dedicated for public uses.[8] Several judicial opinions hold that section 621(a)(2) provides cable companies a right of access to private easements set aside for utilities.[9] Alternatively, other opinions provide that section 621(a)(2) authorizes no right of access to private easements.[10] Understanding why the courts disagree on this issue necessitates consideration of not only the judicial opinions themselves, but also the purposes of the Cable Act, the changes made in the Cable Act during the legislative process, the unfinished text of the legislative history released with the Cable Act, and a brief look at the law of eminent domain.[11]

Congress enacted the Cable Act to amend the Communications Act of 1934, a law written long before the advent of cable television.[12] Legislators feared the then-present repetitive and burdensome regulatory structure placed cable television at a competitive disadvantage in the marketplace.[13] One purpose of the Cable Act's national policy was the replacement of the miscellany of local, state and federal regulations.[14]

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7. H.R. REP. No. 98-934, *supra* note 1, at 59, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4696 (describing "compatible" easements as those dedicated for electric, gas or other utility transmission).

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

9. *See, e.g.*, Centel Cable Television Co. v. Thos. J. White Dev. Corp., 902 F.2d 905, 911 (11th Cir. 1990) (holding that "compatible easements" of Cable Act include private utility easements); Centel Cable Television Co. v. Admiral's Cove Assoc., 835 F.2d 1359, 1363 (11th Cir. 1988) (same); Centel Cable Television Co. v. Burg & DiVosta Corp., 712 F. Supp. 176, 178 (S.D. Fla. 1988) (same).

10. *See, e.g.*, Cable Investments, Inc. v. Woolley, 867 F.2d 151, 162 (3rd Cir. 1989) (holding that §621(a)(2) of Cable Act does not authorize access by cable companies to multi-unit dwellings); Media General Cable, Inc. v. Sequoyah Condominium Council of Co-Owners, 737 F. Supp. 903, 913 (E.D. Va. 1990) (holding cable company could not use §621(a)(2) to gain access to private utility easements); Cable Assocs., Inc. v. Town & Country Management Corp., 709 F. Supp. 582, 586 (E.D. Pa. 1989) (same).

11. *See infra* notes 12-77 and accompanying text (providing background material on purposes, legislative amendments and printed legislative history of Cable Act, as well as overview of law of eminent domain).

12. Cable Communications Policy Act of 1984, §601(1), 47 U.S.C. §§521(1) (1988).

13. *See* S. REP. No. 67, 98th Cong., 1st Sess. 17 (1983) (noting that unnecessary and burdensome regulations place cable companies at competitive disadvantage with other providers of similar services).

14. 130 CONG REC. H10,435 (daily ed. Oct 1, 1984) (statement of Rep. Wirth)(stating that Cable Act's national policy would replace "patchwork" of state, municipal and federal cable regulations); *see also* Meyerson, *The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires*, 19 GA. L. REV. 543, 545 (1985) (noting that, because cable systems cross public rights-of-way, local governments adopted their own cable regulations, resulting in regulations that varied depending on the municipality).

The Cable Act also emphasizes the concept that, as a First Amendment speaker, cable television should provide individuals with the ability to send and receive the widest possible spectrum of information from a diverse range of information sources.[15] Section 621(a)(3) of the Cable Act, which gives franchising authorities the power to require that cable operators provide access to certain channels for free public use on a nondiscriminatory basis, allows individuals to send information in a virtual free marketplace of ideas.[16] Believing that these public access channels were the equivalent to a speaker's soapbox or a printed leaflet,[17] the drafters of the Cable Act intended these channels to be free from any government editorial control except reasonable time, place, and manner restrictions.[18] One commentator views public access cable channels as the contemporary equivalent to a city street or a street in a company town where the owner cannot deny the right to exercise free speech.[19]

The right of citizens to receive information via cable television follows naturally from the First Amendment right of speakers to send that information.[20] The drafters of the Cable Act felt that cable operators' First Amendment rights to broadcast a free flow of information would be worthless if citizens could be denied cable access simply because they were

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15. *See* H.R. REP. No. 98-934, *supra* note 1, at 31, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4668 (citing First Amendment goal of "widest possible dissemination of information from diverse and antagonistic sources" described in Associated Press v. United States, 326 U.S. 1, 20 (1945)).

16. Cable Communications Policy Act of 1984, §611, 47 U.S.C. §531 (1988). *Compare* Cable Act §611(a), 47 U.S.C. §531(a) (granting franchising authorities power to require that cable operators provide public access channels) *with* Federal Communications Comm'n v. Midwest Video Corp., 440 U.S. 689, 708-09 (1979) (holding that FCC rule requiring cable systems to offer channels for public use went beyond Commission's regulatory powers).

17. *See* H.R. REP. No. 98-934, *supra* note 1, at 30, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4667 (describing cable television public access channels as equivalent to speaker's soapbox or printed leaflet).

18. *See id.* (noting public access channels will provide wide diversity of information to public without content based regulation); *see also* Meyerson, *supra* note 14, at 587 (noting how Cable Act rules concerning public access channels do not regulate specific content of programming, but apply only reasonable content-neutral time, place, and manner restrictions).

19. *See* Meyerson, *supra* note 14, at 585 (comparing public access channels to streets of company town in Marsh v. Alabama, 326 U.S. 501 (1946)). Meyerson analogizes public access channels as equivalent vehicle for communication and free expression as streets of company town in *Marsh*. *Id.* at 585. The *Marsh* court held that the owner of a company town could not abridge the First Amendment rights of citizens to speak and listen because the streets of the company town were equivalent to a public municipality as far as a place of communication. *Id.* (citing *Marsh*, 326 U.S. at 508-09).

20. *See* Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367, 390 (1969) (holding that it is "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial" when Court is considering First Amendment rights of broadcasters); City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986) (treating cable operators as First Amendment speakers); Cruz v. Ferre, 755 F.2d 1415, 1421 (11th Cir. 1985) (noting that regulation of obscene material on cable television represented balance between First Amendment rights of broadcasters *and willing adult listeners* against interests of city).

tenants subject to the editorial decisions of the landowner.[21] In this "information age,"[22] the Cable Act recognized that access to cable networks is not only important politically, but also socially, economically, and culturally.[23] Access is especially important considering that new interactive cable television technology provides two way communication.[24]

The drafters of the Cable Act promoted the citizen's right to receive information in several ways.[25] The first was a guarantee of universal cable television service to all neighborhoods of a cable service area, regardless of whether the neighborhood was a low income area.[26] A second step was the drafting of provisions that gave cable companies mandatory access to individual citizens living in certain buildings and developments.[27] As a bill reported out of the House Committee on Energy & Commerce, the cable legislation contained two different mandatory cable television access provisions.[28]

Section 621(a)(2) provided:

> Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses. . .[29]

Section 633 provided:

> (a) The owner of any multiple-unit residential or commercial building or manufactured home park may not prevent or interfere with

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21. *See* H.R. REP. No. 98-934, *supra* note 1, at 36, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4673 (noting how Cable Act's goal of diversity of cable programming would be at mercy of editorial decisions of landlords unless Cable Act also regulated consumer access to cable); *see also* Meyerson, *supra* note 14, at 603 n. 349 (stating that motive of promoting increased access to reception of cable television is inherent throughout Cable Act).

22. *See* 130 CONG REC. H10,435 (daily ed. Oct. 1, 1984) (statement of Rep. Wirth) (stating that Americans, standing on threshold of informational revolution, stood to benefit from delivery of cable television into their homes).

23. *See* H.R. REP. No. 98-934, *supra* note 1, at 36, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4673 (stating political, economic, social and cultural importance of cable television reception).

24. *See id.* at 29 (noting some cable systems have "two-way" capability); *see also* H. ZUCKMAN, M. GAYNES, T. CARTER, J. DEE, MASS COMMUNICATIONS LAW IN A NUTSHELL, 514-15 (West 1988)(describing advancements in cable technology that have produced two-way communication systems in which, for example, viewers are able to receive information about events and then order tickets to same events at touch of button).

25. *See infra* notes 26-31 and accompanying text (describing universal service and mandatory access requirements).

26. Cable Communications Policy Act of 1984, §621(a)(3), 47 U.S.C. §541(a)(3) (1988).

27. H.R. 4103, 98th Cong., 2d Sess. §621(a)(2), §633 (1984), *reprinted in* H.R. REP. No. 934, 98th Cong., 2d Sess. 13 (1984) (authorizing mandatory cable access to not only easements, but also to developments or buildings where resident requests cable service).

28. *Id.*

29. H.R. 4103, 98th Cong., 2d Sess. §621(a)(2) (1984), *reprinted in* H.R. REP. No. 934, 98th Cong., 2d Sess. 13 (1984).

> the construction or installation of facilities necessary for a cable system, consistent with this section, if cable service or other communications service has been requested by a lessee or owner . . . of a unit in such a building or park.
> (b)(1) A State or franchising authority may, and the Commission shall, prescribe regulations which provide—
> (A) that the safety, functioning, and appearance of the premises and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;
> (B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or both;
> (C) that the owner be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator;
> (D) methods for determining just compensation under this section.[30]

The provisions of section 633(d) read:

> (d) In prescribing methods under subsection (b)(1)(D) for determining just compensation, consideration shall be given to—
> (1) the extent to which the cable system facilities physically occupy the premises;
> (2) the actual long-term damage which the cable system facilities may cause to the premises;
> (3) the extent to which the cable system facilities would interfere with the normal use and enjoyment of the premises; and
> (4) the enhancement in value of the premises resulting from the availability of services provided over the system.[31]

At this stage in the legislative process, the cable bill represented a broad Congressional emphasis on the First Amendment rights of cable companies and tenants.[32] Before the bill could become law, however, legislators concerned with the protection of private property rights sponsored an amendment to the bill.[33] Adopted during the Senate-House Conference on the bill, the amendment deleted almost all of the text of section 633 and its broad grant of cable access to apartment buildings and residential units.[34] The

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30. H.R. 4103, 98th Cong., 2d Sess. §633 (1984), *reprinted in* H.R. REP. No. 934, 98th Cong., 2d Sess. 13 (1984).

31. *Id.*

32. *See* H.R. REP. No 98-934, *supra* note 1, at 36, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4673 (describing how consumer access to cable is integral to cable bill).

33. *See* 130 CONG. REC. S14,286 (daily ed. Oct. 11 1984) (statement of Sen. Packwood) (listing amendment No. 15 to cable bill); *see also* H.R. REP. No. 98-934, *supra* note 1, at 134-35, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4736-37 (statement of Rep. Fields) (fearing original §633 of Cable Act would have abrogated property rights of landowners).

34. *See* 130 CONG. REC. S14,286 (daily ed. Oct 11, 1984) (statement of Sen. Packwood) (describing changes to §§621(a)(2) and 633 in amendments to Cable Act).

amendment, however, retained the installation cost and damage compensation standards from sections 633(b)(1)(A), (B), & (C) by moving them to section 621(a)(2).[35] By deleting and re-drafting this section, Congress apparently backed down from a broad grant of access to a landlord's property for the First Amendment benefit of tenants to a more middle ground approach codified in section 621(a)(2).[36] The resulting section 621(a)(2) of the cable legislation still authorizes cable access, but limits it to certain areas:

> Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and *through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses*, except that in using such easements the cable operator shall ensure—
> (A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;
> (B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and
> (C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator. (emphasis added)[37]

Despite this middle ground approach, the question remains whether Congress intended private easements to be included as "compatible easements" under section 621(a)(2).[38] To answer the question, courts have relied on both the Cable Act's legislative history and the canons of statutory interpretation.[39] The text of the legislative history is of questionable value because Congress did not update it to reflect the re-drafting of the man-

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35. Cable Communications Policy Act of 1984, §621(a)(2), 47 U.S.C. §541(a)(2) (1988).

36. *See* HOUSE REPORT No. 98-934, *supra* note 1, at 134-35, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4736-37 (statement of Rep. Fields) (noting that his amendment to Cable Act §633 does not violate First Amendment, yet eliminates violation of private property rights).

37. Cable Act §621(a)(2), 47 U.S.C. §541(a)(2).

38. *See supra* notes 6-10 and accompanying text (discussing dispute whether compatible easements include private easements).

39. *See* Cable Investments, Inc. v. Woolley, 867 F.2d 151, 155-56 (3d Cir. 1989) (stating legislative history of §§621(a)(2) and 633 indicated that "compatible" easements of Cable Act did not include private easements); Mumaugh v. Diamond Lake Area Cable TV Co., 183 Mich. App. 597, 605, 456 N.W.2d 425, 428 (Mich. Ct. App. 1990) (stating legislative history suggested a broad reading of "compatible" easements); Media General Cable, Inc. v. Sequoyah Condominium Council of Co-Owners, 737 F. Supp. 903, 909 (E.D. Va. 1990) (using principles of statutory interpretation to gauge congressional intent behind changes made in cable bill during Senate House conference).

datory access provisions.[40] The legislative history, therefore, addresses the original section 633 and that section's emphasis on presenting broad cable access to tenants of apartment buildings.[41] Consequently, courts relying on the text of the legislative history reach different interpretations on whether section 621(a)(2) authorizes access through private easements.[42]

Some courts look beyond the legislative history and rely on the principles of statutory interpretation to gauge congressional intent.[43] Like the problem in many statutory interpretation situations, however, courts make opposite, but equally strong, arguments concerning the intent behind the same re-drafting of the cable legislation.[44] Convincing arguments exist that section

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40. *See* H.R. REP. No. 98-934, *supra* note 1, at 36-37, 79-83, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4673-74, 4716-20 (containing legislative history of §633 of Cable Act even though amendment to bill deleted §633 before bill became law).

41. *See id.* (containing legislative history of deleted mandatory cable access provision); *see also supra* note 32 and accompanying text (discussing §633's emphasis on broad cable access).

42. *Compare* Cable Investments, Inc. v. Woolley, 867 F.2d 151, 155-56 (3d Cir. 1989) (stating legislative history of §§621(a)(2) and 633 indicated that "compatible" easements of Cable Act did not include private easements) *with* Mumaugh v. Diamond Lake Area Cable TV Co., 183 Mich. App. 597, 605, 456 N.W.2d 425, 428 (Mich. Ct. App. 1990) (stating legislative history suggested broad reading of "compatible" easements).

43. *See* Cable Investments, Inc. v. Woolley, 867 F.2d 151, 156-58 (3d Cir. 1989) (using principles of statutory interpretation to gauge congressional intent behind changes made in Cable Act during Senate-House conference); Media General Cable, Inc. v. Sequoyah Condominium Council of Co-Owners, 737 F. Supp. 903, 909 (E.D. Va. 1990) (same); Cable Assocs., Inc. v. Town & Country Management Corp. 709 F. Supp. 582, 585 (E.D. Pa. 1989) (same); Cable Holdings, Inc. v. McNeil Real Estate Fund VI, Ltd., 678 F. Supp. 871, 874 (N.D. Ga. 1986) (same).

44. *Compare* Cable Investments, Inc. v. Woolley, 867 F.2d 151, 158 (3d Cir. 1989) (concluding re-drafting of §621(a)(2) indicates no congressional authorization for takings) *with* Cable Holdings, Inc. v. McNeil Real Estate Fund VI, Ltd., 678 F. Supp. 871, 874 (N.D. Ga. 1986) (concluding re-drafting of §621(a)(2) indicates Congress intended to compensate for takings).

Viewing the placement of cable wires in a private easement as a taking, *Woolley* and other cases reason that if the drafters of the Cable Act had intended it to authorize a taking, the drafters would have provided just compensation provisions for the taking of property in §621(a)(2). *See Woolley*, 867 F.2d at 158; Media General Cable, Inc. v. Sequoyah Condominium Council of Co-Owners, 737 F. Supp. 903, 910 (E.D. Va. 1990); Cable Assocs., Inc. v. Town & Country Management Corp., 709 F. Supp. 582, 585 (E.D. Pa. 1989). These cases view the provisions of the original §633(b)(1)(D) as sufficient just compensation measures. *Woolley*, 867 F.2d at 157; *Sequoyah*, 737 F. Supp. at 909; *Town & Country*, 709 F. Supp. at 585. Because Congress deleted the provisions in §633(b)(1)(D) rather than transferring them to §621(a)(2) along with §§633(b)(1)(A), (B), and (C), this line of cases concludes that Congress did not intend to authorize a taking. *Woolley*, 867 F.2d at 157-58; *Sequoyah*, 737 F. Supp. at 910; *Town & Country*, 709 F. Supp. at 585. These cases infer that the compensation for any damages language of §633(b)(1)(C), now incorporated in §621(a)(2), does not provide just compensation for any taking like the provisions in §633(b)(1)(D). *Woolley*, 867 F.2d at 157-58; *Sequoyah*, 737 F. Supp. at 910; *Town & Country*, 709 F. Supp. at 585. The basic premise of this line of cases is that, because §633(b)(1)(C) and §633(b)(1)(D) co-existed, they were not meant to compensate for the same thing. *Woolley*, 867 F.2d at 157-58; *Sequoyah*, 737 F. Supp. at 910; *Town & Country*, 709 F. Supp. at 585. The Cable Act, therefore, does not

621(a)(2) intends to convey a right of access to private easements and convincing arguments exist that no such intent is present.[45] Each argument mentions the same basic congressional actions as indicative of the intentions of Congress in drafting the Cable Act, but each argument's conclusion remains contradictory.[46]

A thorough analysis of the section 621(a)(2) disputes, therefore, requires something more than an assessment of each court's analysis of the legislative history and use of statutory interpretation.[47] Analysis of section 621(a)(2) disputes necessitates consideration of section 621(a)(2) as a compromise between two competing forces: legislators supporting the vindication of First Amendment rights through the advancement of cable television and legis-

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authorize a taking. *Woolley*, 867 F.2d at 157-58; *Sequoyah*, 737 F. Supp. at 910; *Town & Country*, 709 F. Supp. at 585.

Conversely, in *Cable Holdings*, the plaintiff cable company provided cable service to defendant's apartment complex until the defendant terminated the plaintiff's contract. *Cable Holdings*, 678 F. Supp. at 872. The plaintiff brought suit to determine whether the plaintiff had a right of access under §621(a)(2) of the Cable Act. *Id.* The *Cable Holdings* court agreed with the Third Circuit approach, that the granting of access to a private easement is a "taking *per se*". *Id.* at 874. The court in *Cable Holdings*, however, reasoned that the Cable Act authorizes a taking of private property because the compensation for damages provisions remaining in §621(a)(2)(C) are sufficient to provide just compensation. *Id.*

The *Cable Holdings* court used the following statutory interpretation: the deletion of §633(b)(1)(D) did not eliminate just compensation provisions from §621(a)(2) because the original §621(a)(2) cross-referenced the provisions of the original §633 and the amendment to the Cable Act transferred the majority of these provisions to §621(a)(2) when §633 was dropped. *Id.* Congress, therefore, intended §621(a)(2) to create the right of access to private easements while §633 merely contained the standards governing the exercise of that right. *Id.* Accordingly, *Cable Holdings* held that the plaintiff cable company had a right of access to private easements under §621(a)(2). *Id.* at 875.

In separate statutory interpretation, both the *Sequoyah* and *Town & Country* courts held that §621(a)(2)'s use of the word "dedicated" should be read in a legal sense because of the taking *per se* issue. The courts reasoned that Congress intended this language to cover only easements that already had been conveyed to the public, thus eliminating the need for any takings analysis. *Sequoyah*, 737 F. Supp. at 910; *Town & Country*, 709 F. Supp. at 585. *But see Cable Holdings*, 678 F. Supp. at 873 (stating in dicta that no requirement exists that §621(a)(2)'s "compatible" easements be publicly dedicated). *Cf.* Greater Worcester Cablevision, Inc. v. Carabetta Enters., Inc., 682 F. Supp. 1244, 1258 (D. Mass. 1985) (noting argument of owner that Congress set up §621(a)(2) only to stop inflexible utility companies from refusing to share easements with cable franchises).

45. *See* Meyerson, *Amending The Oversight: Legislative Drafting and The Cable Act*, 8 CARDOZO ARTS & ENT. L.J. 233, 242-43 (1990) (discussing how courts are uncertain when interpreting deletion of §633 during enactment of Cable Act). The author suggests that a re-draft of the Cable Act should address this confusion. *Id.* at 243.

46. *Compare* Cable Investments, Inc. v. Woolley, 867 F.2d 151, 156-58 (3d Cir. 1989) (noting that deletion of §633 and re-drafting of §621(a)(2) indicated Congress did not intend to convey right of access to private easements) *with* Greater Worcester Cablevision v. Carabetta Enters., 682 F. Supp. 1244, 1259 (D. Mass. 1985) (reasoning that §621(a)(2) which emerged from re-drafting indicates Congress meant to include private easements).

47. *See supra* notes 42-44 and accompanying text (discussing conflicting judicial results on "compatible" easement question from use of legislative history and statutory interpretation).

lators concerned with the protection of private property rights.[48] With this compromise in mind, one plausibly can read section 621(a)(2) as granting access to private easements.[49] This interpretation advances the First Amendment goal of providing wide public access to cable television that Congress enumerated in the Cable Act's stated purposes: encouraging the growth and development of cable systems[50], promoting competition in the cable industry[51], and creating an environment where cable will flourish.[52] At the same time, a reading that section 621(a)(2) provides access to private easements reflects Congress' concern for private property rights because section 621(a)(2) limits cable access to specified easements, rather than allowing virtually unrestricted cable access as the deleted Cable Act section 633 did in its provisions.[53]

The majority of courts that have considered section 621(a)(2) support the interpretation that section 621(a)(2) grants access to private easements.[54] A few courts, however, do not accept this interpretation because the courts reason that, if section 621(a)(2) authorized access to private easements, then that section would effectuate a taking of private property without provisions for just compensation.[55] The reasoning of these dissenting courts raises a

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48. *See* H.R. REP. No. 98-934, *supra* note 1 at 36-37, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4673-74 (stating how Cable Act reflects balance between First Amendment and property rights); *see* Meyerson, *supra* note 14, at 545 (noting that key to understanding Cable Act is to view it as compromise).

49. *See infra* notes 50-53 and accompanying text (proposing that including private easements as "compatible" easements reflects Congressional compromise of §621(a)(2)).

50. Cable Communications Policy Act of 1984, §601(2), 47 U.S.C. §521(2) (1988); *see also supra* notes 15-31 and accompanying text (describing Cable Act's emphasis on vindicating First Amendment rights of cable television speakers and listeners).

51. *Id.* at §601(6), 47 U.S.C. §521(6).

52. *See* H.R. REP. No. 98-934, *supra* note 1, at 20, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4657 (listing purposes of Cable Act, including creating environment in which cable will flourish).

53. *See supra* notes 29-31 and accompanying text (listing text of cable access provisions §621(a)(2) and §633); *see also* H.R. REP. No. 98-934, *supra* note 1, at 36-37, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4673-74 (stating that §633 recognized property rights of owners by assuring them full compensation for cable operators' use of their land). If the virtually unrestricted cable access of §633 recognized owner's property rights, then cable access restricted to certain easements under §621(a)(2) should recognize owner's property rights even more. Cable Act §621(a)(2); 47 U.S.C. §541(a)(2).

54. Centel Cable Television Co. v. Thos. J. White Dev. Corp., 902 F.2d 905, 911 (11th Cir. 1990) (holding §621(a)(2)'s "compatible" easements include private easements); Centel Cable Television Co. v. Admiral's Cove Assoc., 835 F.2d 1359, 1363 (11th Cir. 1988) (same); Centel Cable Television Co. v. Burg & DiVosta Corp., 712 F. Supp. 176, 178 (S.D. Fla. 1988) (same); Cable Holdings, Inc. v. McNeil Real Estate Fund VI, Ltd., 678 F. Supp. 871, 875 (N.D. Ga. 1986) (same); Greater Worcester Cablevision, Inc. v. Carabetta Enters., 682 F. Supp. 1244, 1259 (D. Mass. 1985) (same); Mumaugh v. Diamond Lake Area Cable TV Co., 183 Mich. App. 597, 604, 456 N.W.2d 425, 429 (Mich. Ct. App. 1990) (same).

55. *See* Cable Investments, Inc. v. Woolley, 867 F.2d 151, 162 (3d Cir. 1989)(holding that §621(a)(2) of Cable Act does not authorize access to private easements); Media General Cable Co. v. Sequoyah Condominium Council of Co-Owners, 737 F. Supp. 903, 913 (E.D. Va. 1990) (same); Cable Assocs., Inc. v. Town & Country Management Corp., 709 F. Supp. 582, 586 (E.D. Pa. 1989) (same).

crucial second issue: whether the exercise of section 621(a)(2) cable access in private easements causes a taking.[56] By comparing the courts' different applications of takings law to section 621(a)(2) disputes, however, it becomes evident that courts utilize a more reasoned approach when they analyze the takings issue according to the amount of burden that section 621(a)(2) cable access places on a landowner.[57] With this takings law approach in mind, it is possible to reconcile the dissenting courts with the interpretation that section 621(a)(2) provides access to private easements.[58] Consideration of any court's takings analysis, however, requires a brief introduction to takings law.

Courts use two basic theories in takings law today.[59] The first theory notes that, even when the government does not invade or take title to property, the government can regulate the use of property in such a way that the government effectively "takes" the property.[60] The seminal opinion comes from *Pennsylvania Coal Co. v. Mahon*[61] in which the United States Supreme Court considered a Pennsylvania statute that regulated the mining of coal.[62] The statute prohibited the mining of coal in such a way that caused the subsidence of any building used for human habitation, but failed to provide owners any compensation.[63] A mineral rights owner contested the statute's validity claiming that the regulation was so extensive that it effectively destroyed his use of the property, thus resulting in a taking requiring compensation.[64] In considering whether the application of the statute constituted a taking, Justice Holmes, writing for the majority, observed that the difference between a permissible governmental regulation and a taking was a matter of degree.[65] Holmes indicated that governments could not function properly if governments had to compensate citizens for every action that diminished property values.[66] Holmes also noted, however, that government interference could reach a certain degree at which the

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56. *See infra* note 78 and accompanying text (discussing methods courts use to determine whether §621(a)(2) cable access causes taking of private property).

57. *See infra* notes 78-193 and accompanying text (discussing and analyzing takings law application of each line of cases that considers §621(a)(2) disputes).

58. *See infra* notes 97-134 and accompanying text (distinguishing dissenting courts' use of *per se* takings analysis and reconciling dissenting courts with proposed interpretation of §621(a)(2)).

59. *See infra* notes 60-77 and accompanying text (discussing two main theories of takings law).

60. *See* R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, §15:12, at 130 (West 1986) (explaining that government action can "take" property even when no title passes to government).

61. 260 U.S. 393 (1922).

62. Pennsylvania Coal v. Mahon, 260 U.S. 393, 412-413 (1922); *see also* R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 60, §15.12, at 132 (describing Justice Holmes' observation that difference between taking and regulation is matter of degree).

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

64. *Id.* at 403-04.

65. *Id.* at 413.

66. *Id.*

diminution in value of the land required the government to compensate the citizen.[67] Finding that the regulation in *Pennsylvania Coal* destroyed the mineral rights owner's economic use of the property, Holmes held that the regulation went too far and, therefore, was a taking requiring compensation.[68] Accordingly, this "regulatory takings" theory, as explicated by Holmes in *Pennsylvania Coal*, holds that the government may regulate the use of property for a permissible purpose to a certain extent, but if the regulation of the use of the property lowers the value of the property too much, the regulation amounts to a taking.[69]

The second theory that courts apply to determine whether government action constitutes a taking relies on the concept of government-backed physical occupation of the land.[70] The United States Supreme Court developed this *per se* view in *Pumpelly v. Green Bay & Mississippi Canal Co.*[71] In *Pumpelly* a state-sponsored dam project flooded a farmer's bottomland.[72] The state-backed dam builders argued that the harm was not a taking, but rather a mere remote and consequential damage requiring no compensation.[73] To determine if the flooding constituted a taking, the Court considered whether the inundation of the flood waters had ruined the use of the farmer's land.[74] Finding that the flooding had ruined the use of the land, the *Pumpelly* Court held that the occupancy was a taking.[75] The "occupancy" takings theory, therefore, holds that a taking occurs when the government, or a government-backed entity, does not actually take title to the land, but sponsors a permanent, physical occupation of the land so as to effectively destroy the use of the property.[76] Under both *Pennsylvania Coal*'s "regulatory takings" theory and *Pumpelly*'s "occupancy" takings theory, the usual approach of courts is an *ad hoc* factual inquiry.[77]

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67. *Id.*

68. *Id.* at 415.

69. *Id.*; *see also* Miller v. Shoene, 276 U.S. 272 (1928) (using variation of Holmes' test by considering constitutionality of statute by weighing resulting value to public versus loss to private interest); *but see* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 HARV. L. REV. 1165, 1194-95 (1967) (discussing flaw in balancing test that loss to private interest is excluded from overall public interest and weighed against public interest when private interest is actually part of overall public interest).

70. *See infra* notes 71-76 and accompanying text (discussing "occupancy" theory of takings law).

71. 80 U.S. (13 Wall.) 166 (1871).

72. Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. (13 Wall.) 166, 167 (1871).

73. *Id.* at 172.

74. *Id.* at 181.

75. *Id.*

76. *Id.*; *see also* R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 60, §15.12 at 140 (stating takings usually result from permanent, physical occupation that effectively destroys use of property).

77. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§9-4, 9-5, at 596, 599 (2d ed. 1988) (stating usual approach to takings cases is *ad hoc*); R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 60, §15.12, at 131 (same); *but see* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (breaking with tradition by applying a *per se* takings approach);

Courts considering whether the exercise of section 621(a)(2) cable access in private easements would result in a taking apply either a "regulatory takings" or "occupancy" takings theory.[78] The first line of cases interpreting section 621(a)(2), originating from within the Third Circuit, and one opinion from the Eastern District of Virginia, (Third Circuit cases), holds that "compatible" easements do not include private easements because the permanent placement of cable wires in a private utility easement is an "occupancy" amounting to a taking *per se* for which the Cable Act provides no compensation.[79] For example, in *Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners,*[80] the United States District Court for the Eastern District of Virginia considered whether section 621(a)(2) gave a cable television franchisee the right to lay cable wires in private utility easements on an owner's development.[81] The defendants in *Sequoyah* were co-owners of a condominium development who had signed an exclusive contract with a satellite television supplier.[82] Media General, the local cable franchisee, sought access through four easements it claimed were compatible: the electric company easement, the telephone company easement, the satellite television company easement, and a blanket utility easement in the development's master deed.[83] The court reasoned that allowing the cable company to lay wires in such easements would be a permanent physical occupation of the easement space and therefore a taking *per se* under the "occupancy" theory of takings law.[84] Because the *Sequoyah* court reasoned that section 621(a)(2) did not authorize a taking of private property, the court held for the landowner.[85]

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see also L. TRIBE, *supra*, §9-5, at 602-04 (criticizing United States Supreme Court for rejecting *ad hoc* approach in favor of *per se* rule in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

78. *Compare* Media General Cable Co. v. Sequoyah Condominium Council of Co-Owners, 737 F. Supp. 903, 913 (E.D. Va. 1990) (using "occupancy" takings theory and applying *per se* test to hold that §621(a)(2)'s authorization of physical occupation of easement mandates taking of property) *with* Centel Cable Television Co. v. Thos. J. White Dev. Corp., 902 F.2d 905, 911 (11th Cir. 1990) (utilizing "regulatory takings" analysis, but reasoning that circumstances surrounding §621(a)(2) access indicate that no taking occurs *per se*) *with* Greater Worcester Cablevision, Inc. v. Carabetta Enters., 682 F. Supp. 1244, 1259 (D. Mass. 1985) (implementing "regulatory takings" analysis by determining whether right of access under §621(a)(2) results in taking by amount of additional burden on owner).

79. *See* Cable Investments, Inc. v. Woolley, 867 F.2d 151, 162 (3d Cir. 1989) (holding that §621(a)(2)'s "compatible" easements do not include private easements); Media General Cable, Inc. v. Sequoyah Condominium Council of Co-Owners, 737 F. Supp. 903, 913 (E.D. Va. 1990) (same); Cable Assocs., Inc. v. Town & Country Management Corp., 709 F. Supp. 582, 586 (E.D. Pa. 1989) (same).

80. 737 F. Supp. 903 (E.D. Va. 1990).

81. Media General Cable, Inc. v. Sequoyah Condominium Council of Co-Owners, 737 F. Supp. 903, 906 (E.D. Va. 1990).

82. *Id.* at 905.

83. *Id.*

84. *Id.* at 907.

85. *Id.* at 907; *see also* Cable Investments, Inc. v. Woolley, 867 F.2d 151, 162 (3d Cir.

The Third Circuit cases apply the "occupancy" theory of takings law to section 621(a)(2) disputes because of *Loretto v. Teleprompter Manhattan CATV Corp.*,[86] a case the United States Supreme Court decided before Congress enacted the Cable Act.[87] In *Loretto* the Court considered the constitutionality of a New York statute that required landlords to permit the installation of cable television facilities upon the landlords' property.[88] The New York statute also prohibited landlords from demanding payment from cable television companies in excess of the amount the State Commission on Cable Television determined reasonable.[89] The plaintiff in *Loretto*, a purchaser of an apartment building that had cable wires and boxes already attached to the roof and side, sued for damages and injunctive relief, claiming that the New York statute authorized a taking without just compensation.[90] The *Loretto* Court noted that the ordinary inquiry into the takings issue is based on the following criteria: the economic impact of the regulation, the extent of interference with investment-backed expectations, and the character of the governmental action.[91] The Court, however, observed that if a law authorizes a permanent physical occupation of an owner's property, the character of the governmental action pursuant to the law renders it a "taking *per se*."[92] The Court reasoned that New York's statutorily approved, permanent physical occupation of property destroyed not only the owner's right to possess the space and exclude others from it, but also the owner's right to control the space and his right to dispose of the space by transfer or sale.[93] Consequently, even though the cable wires and boxes occupied only minimal space, the *Loretto* Court held that the application of the New York statute constituted a taking.[94] The Court then

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1989)(holding that private easements were not "compatible" easements under §621(a)(2) of Cable Act). The *Woolley* court considered whether §621(a)(2) of Cable Act authorized access to the interior of an apartment building. *Id.* at 152. The cable system previously served the owner's premises, but the owner disconnected the wires in order to establish a SMATV on the premises. *Id.* at 152-53. The court noted that the legislative history of the Cable Act authorized cable systems to use easements dedicated for electric, gas, or other utilities. *Id.* at 155. The court, however, found it critical that this legislative history did not say whether these easements ran into, instead of just up to the buildings. *Id.* The court reasoned that granting access to private easements would be a taking under "occupancy" theory of takings law. *Id.* at 160. Because the court believed that §621(a)(2) did not authorize a taking, the court read the statute narrowly as denying access to private easements to avoid the constitutional question that would arise from a taking without just compensation. *Id.* at 159-60. Reasoning that Congress' deletion of §633 implied that the Cable Act authorized no access in apartment building access disputes, the court held for the owner. *Id.* at 162-63.

86. 458 U.S. 419 (1982).

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

88. *Id.* at 421.

89. *Id.*

90. *Id.* at 424.

91. *Id.* at 426.

92. *Id.*

93. *Id.* at 435-36.

94. *Id.* at 441.

remanded the case to the lower court to determine the amount of compensation the State of New York must pay the landlord.[95] The opinion, however, noted that its holding was very narrow and did not diminish a state's substantial authority to impose appropriate restrictions on an owner's use of his property.[96]

The Third Circuit cases' reliance on *Loretto*'s[97] *per se* takings analysis is problematical for two reasons.[98] First, *Loretto*'s "taking *per se*" holding is an unreasonable extension from the "occupancy" theory of takings law.[99] The "occupancy" theory, applied in *Pumpelly v. Green Bay & Mississippi Canal Co.*,[100] made the permanent physical occupation of land resulting in the *total loss of use* of the land one of the factors in determining the takings issue.[101] The *Pumpelly* Court noted that the takings analysis had leaned too far in favor of the government, holding that all kinds of significant injuries to landowners were only consequential and, therefore, not compensable.[102] The *Pumpelly* Court held that the Fourteenth Amendment protected a landowner's rights, even if there has been no shift in title, when the governmental action results in a permanent physical occupation of the land that effectively destroys or impairs the landowner's use of the property.[103] The Court's narrow holding required the physical occupation to be permanent and destructive of the usefulness of the land before the physical occupation would constitute a taking.[104]

The Court in *Loretto*, however, used the permanent physical occupation of land factor to expand takings liability, regardless of the effect on the usefulness of the land.[105] Consequently, despite the trivial effect of the occupation of cable boxes on Loretto's building, the Court found that the state action was a taking *per se*.[106] Justice Blackmun's dissent in *Loretto* noted that the Court long had avoided applying an "inherently suspect" *per se* takings analysis that depended on ancient distinctions between physical

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95. *Id.*

96. *Id.*

97. *See* Cable Investments, Inc. v. Woolley, 867 F.2d 151, 158 (3d Cir. 1989) (analyzing §621(a)(2)'s taking issue under Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)); Media General Cable, Inc. v. Sequoyah Condominium Council of Co-Owners, 737 F. Supp. 903, 906-09 (E.D. Va. 1990) (same); Cable Assocs. v. Town & Country Management Corp., 709 F. Supp. 582, 585 (E.D. Pa 1989) (same); *see also* Cable Holdings, Inc. v. McNeil Real Estate Fund VI, Ltd., 678 F. Supp. 871, 874 (N.D. Ga. 1986) (same).

98. *See infra* notes 99-130 and accompanying text (discussing problems in Third Circuit cases' approach to §621(a)(2) disputes).

99. *See supra* notes 71-76 and accompanying text (describing occupancy theory of takings law).

100. 80 U.S. (13 Wall.) 166 (1872).

101. Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. (13 Wall.) 166, 181 (1872).

102. *Id.* at 181.

103. *Id.*

104. *Id.*

105. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426-27 (1982).

106. *Id.* at 441.

and nonphysical occupation.[107] Blackmun further dismissed the majority's 19th century precedents as lacking any vitality in the "modern urban age".[108] As one commentator had noted several years before the Supreme Court decided *Loretto*, one of the troublesome flaws of the physical occupation test is that, when considering insignificant harms — such as those inherent in the installation of subterranean utility lines — courts mechanically deem the harm compensable if the harm involves governmental occupation of private property, contrary to the premise that the size of the private loss is a crucial factor.[109] The *Loretto* Court's "taking *per se*" analysis, therefore, is a questionable extension of the physical occupation test.[110]

A second flaw in the Third Circuit cases' *Loretto*-based "occupancy" takings analysis is that, even if one accepts *Loretto*'s extension of the "taking *per se*" analysis, *Loretto* is distinguishable from factual situations in which section 621(a)(2) is at issue.[111] The statute in *Loretto* prohibited the landlord from interfering with the installation of cable services regardless of which route the cable company took to enter the building, thus granting a very broad right of access.[112] Section 621(a)(2), unlike *Loretto*, involves a statute where access is limited to pre-existing "compatible" utility easements.[113] This distinction is important because the *Loretto* Court stressed that the New York statute destroyed the owner's right to possess, control or make non-possessory use of the occupied space.[114] Section 621(a)(2) disputes are different because the Cable Act limits cable access to pre-existing easements in which the owner's right to possess, control or make non-possessory use of the property already is subordinate to that of the

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107. *Id.* at 447 (Blackmun, J., dissenting); *see also* L. TRIBE, *supra* note 77, §9-5, at 603 (stating that *Loretto*'s use of *de minimis* permanent physical invasions "borders on fetishism").

108. *Id.* at 446-47 (Blackmun, J., dissenting); *see also* L. TRIBE, *supra* note 77, §9-5, at 604 (noting that *Loretto*'s holding is less fair and efficient than decision possibly could be because of Court's reliance on common law legacies from 1890's).

109. *See* Michelman, *supra* note 69, at 1226-27 (describing flaw in physical occupation test that many purely nominal harms become compensable merely because of resulting physical occupation and without regard to size of private loss).

According to Michelman, the second flaw in the physical occupation test is that private losses are deemed compensable or non-compensable according to the fortuitous circumstance of whether a physical invasion is involved. *Id.* at 1226, *see also* Batten v. United States, 306 F.2d 580, 585 (10th Cir. 1962) (finding no taking of property because airplane flights did not cross over plaintiffs' property, even though noise and smoke from idling and taxiing airplanes decreased property values of plaintiffs' homes by thousands of dollars) *cert. denied*, 371 U.S. 955, *reh'g denied*, 372 U.S. 925 (1963).

110. *See supra* notes 99-109 and accompanying text (describing distinguishing characteristics between *Loretto* and *Pumpelly*).

111. *See infra* notes 112-23 and accompanying text (describing differences between *Loretto* and §621(a)(2) disputes).

112. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 423 n.3. (1982)(construing constitutionality of NEW YORK EXEC. LAW §828 (McKinney Supp. 1981-82) which did not limit cable access to pre-existing easements).

113. Cable Communications Policy Act of 1984, §621(a)(2), 47 U.S.C. §541(a)(2) (1988).

114. *Loretto*, 458 U.S. at 435-36.

easement grantee.[115] For example, in *Sequoyah* the owner previously had relinquished the exclusive right to occupy the space in question because the space lay in one of the four easements.[116] Because the right to occupy the space was already divided among many entities, the cable company's placement of its wire in the easement was different from the state-backed imposition on the landowner in *Loretto*.[117] The *Loretto* Court stated that its narrow holding might have been different if the landowner had some control over the placement, manner, and use of the cable access.[118] Section 621(a)(2) provides this control by limiting access to easements that are "dedicated for electric, gas or other utility transmission".[119] If an owner still has room in the easement after the laying of the cable company's wires, the court could grant access to the cable company without infringing on the owner's rights.[120] An owner would not feel any substantial impact unless an extreme situation occurred, such as when the placement of the cable company's wire leaves no more room in the easement.[121] Another reason that *Loretto* is distinguishable from cases arising under section 621(a)(2) is because the *Loretto* Court worried about the regulation's effect on the owner's right to dispose of the property by transfer or sale.[122] In the section 621(a)(2) compatible easement situation, an owner's right to dispose of the space by transfer or sale is not affected because his right to the easement, and the right of his transferee, remains subordinate to the original grantee.[123]

Courts rely on *Loretto* because Congress addressed that case in the legislative history of the Cable Act.[124] The legislators' citation to *Loretto*,

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115. *See* G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY, §427 (replacement ed. 1980) (stating that landowner has control over use of land up to point where landowner's action interferes with grantee's use of easement); *see also* Mumaugh v. Diamond Lake Area Cable TV Co., 183 Mich. App. 597, 604, 456 N.W.2d 425, 429 (Mich. Ct. App. 1990) (distinguishing *Loretto* from §621(a)(2) disputes involving pre-existing easements).

116. *See* Media General Cable v. Sequoyah Condominium Council of Co-Owners, 737 F. Supp. 903, 905 (E.D. Va. 1990) (considering applicability of Cable Act §621(a)(2) access through pre-existing easements).

117. *See* Mumaugh v. Diamond Lake Area Cable TV Co., 183 Mich. App. 597, 604, 456 N.W.2d 425, 429 (Mich. Ct. App. 1990)(distinguishing *Loretto* situation from cases involving pre-existing easements).

118. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 n.19 (1982).

119. *See* H.R. REP. No. 98-934, *supra* note 1 at 59, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4696 (stating legislative history's definition of "compatible" easements).

120. *See* Greater Worcester Cablevision, Inc. v. Carabetta Enters., 682 F. Supp. 1244, 1259 (D. Mass. 1985) (holding §621(a)(2) placement of cable access in easements does not effectuate taking unless such access materially burdens owner's property).

121. Meyerson, *supra* note 14, at 611-12 (stating that one view of §621(a)(2) of Cable Act is that cable operator can gain access only if pre-existing user of easement leaves adequate room in easement).

122. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-36 (1982).

123. *See* G. THOMPSON, *supra* note 115, at §427 (stating that landowner has control over use of land up to point where landowner's action interferes with grantee's use of easement); *see also* Mumaugh v. Diamond Lake Area Cable TV Co., 183 Mich. App. 597, 604, 456 N.W.2d 425, 429 (Mich. Ct. App. 1990) (distinguishing *Loretto* from §621(a)(2) disputes involving pre-existing easements).

124. H.R. REP. No. 98-934, *supra* note 1, at 80, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4717.

however, is misleading.[125] Congress discussed *Loretto* in the portion of the legislative history regarding the then-present mandatory access to apartment buildings wording of section 633, not in the portion of the legislative history regarding section 621(a)(2)'s "compatible" easements.[126] Like the New York statute in *Loretto*, section 633 did not limit cable company access to pre-existing easements.[127] An owner who had complied with section 633 would not have had any control over the installation of the cable wires.[128] Just because the drafters of the Cable Act felt they needed to comply with *Loretto* when drafting section 633 does not necessarily mean that they would have felt the same way when drafting section 621(a)(2).[129] Section 633, therefore, presents takings issues different from section 621(a)(2) because section 621(a)(2) limits cable company access to pre-existing easements, while section 633 has no such limitation.[130]

Because the Third Circuit cases rely heavily on a taking *per se* theory that is distinguishable from the takings issue that arises when cable companies attempt to gain access through pre-existing easements, the Third Circuit cases' holding that section 621(a)(2) does not authorize access to private easements warrants some concern.[131] Using a different takings theory, the Third Circuit cases might have held that the exercise of section 621(a)(2) access did not amount to a taking.[132] If these courts had held that section 621(a)(2) did not result in a taking, the Third Circuit cases might have held that section 621(a)(2) authorizes access to private easements.[133] Consequently, if the Third Circuit cases had used a different takings theory, their holdings

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125. *See infra* notes 126-30 (noting that citation to *Loretto* is in legislative history of §633, not §621(a)(2)).

126. H.R. REP. No. 98-934, *supra* note 1, at 80, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4717.

127. *See supra* notes 30-31 and accompanying text (discussing text of §633).

128. *Id.*; *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) (construing constitutionality of New York statute similar to §633 of Cable Act). The *Loretto* statute, N.Y. EXEC LAW §828(1) (McKinney Supp. 1981-82), merely prohibited a landlord from interfering with the installation of cable facilities on his property. *Id.* at 423. The statute did not proscribe certain designated avenues of entry for the cable company. *Id.* The cable company could choose any route to install its wires, regardless of whether the owner had conveyed that property to a utility company for an easement. *Id.* The particular property used, therefore, may have been under the unitary ownership of the landlord. *Id.*

129. *See supra* notes 111-23 and accompanying text (distinguishing *Loretto* fact pattern from §621(a)(2) disputes).

130. *See* Mumaugh v. Diamond Lake Area Cable TV Co., 183 Mich. App. 597, 604, 456 N.W.2d 425, 429 (Mich. Ct. App. 1990) (distinguishing *Loretto*, which involved cable access statute similar to deleted §633 of Cable Act, from §621(a)(2) cases involving pre-existing easements).

131. *See supra* notes 97-130 and accompanying text (discussing problems in Third Circuit's reliance on *per se* takings analysis).

132. *See supra* notes 79-85 and accompanying text (noting that Third Circuit cases relied on *per se* takings analysis to hold that exercise of §621(a)(2) cable access "takes" private property).

133. *See supra* note 85 and accompanying text (describing Third Circuit cases' refusal to extend §621(a)(2) access to private easements because access would effectuate taking).

could be reconciled with the majority of courts which hold that section 621(a)(2)'s "compatible easements" do include private easements.[134]

The question remains, however, which takings analysis the Third Circuit cases should use in lieu of a taking *per se* test. The takings analyses used by the remaining two lines of cases that have considered section 621(a)(2) provide two possibilities.[135] The second of the three lines of cases interpreting section 621(a)(2) also used a *per se* analysis on the takings issue, but reached a different result than the Third Circuit cases.[136] This approach comes from a number of Eleventh Circuit opinions, (Eleventh Circuit cases), a representative case being *Centel Cable Television Co. v. Thos. J. White Development Corp.*[137] In *White* the plaintiff cable company sought access to the defendant's 18,000 unit residential complex.[138] The defendant sought to exclude the plaintiff because the defendant made an exclusive agreement with another cable company affiliated with the defendant.[139] Instead of reasoning that access to private easements was a taking *per se* like the Third Circuit cases' approach, the Eleventh Circuit in *White* reasoned that cable access to an easement under section 621(a)(2) never resulted in a taking.[140]

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134. Centel Cable Television Co. v. Thos. J. White Dev. Corp., 902 F.2d 905, 911 (11th Cir. 1990) (holding §621(a)(2)'s "compatible" easements include private easements); Centel Cable Television Co. v. Admiral's Cove Assoc., 835 F.2d 1359, 1363 (11th Cir. 1988) (same); Centel Cable Television Co. v. Burg & DiVosta Corp., 712 F. Supp. 176, 178 (S.D. Fla. 1988) (same); Cable Holdings, Inc. v. McNeil Real Estate Fund VI, Ltd., 678 F. Supp. 871, 875 (N.D. Ga. 1986) (same); Greater Worcester Cablevision, Inc. v. Carabetta Enters., 682 F. Supp. 1244, 1259 (D. Mass. 1985) (same); Mumaugh v. Diamond Lake Area Cable TV Co., 183 Mich. App. 597, 604, 456 N.W.2d 425, 429 (Mich. Ct. App. 1990) (same).

135. *See* Centel Cable Television Co. v. Thos. J. White Dev. Corp., 902 F.2d 905, 909-10 (11th Cir. 1990) (reasoning that circumstances surrounding §621(a)(2) access indicate that no taking *per se* occurs); Greater Worcester Cablevision v. Carabetta Enters., 682 F. Supp. 1244, 1259 (D. Mass. 1985)(determining whether right of access under §621(a)(2) results in taking by amount of additional burden on owner); *see also infra* notes 136-79 and accompanying text (describing takings approaches of second and third lines of cases that have interpreted §621(a)(2)).

136. *See* Centel Cable Television Co. v. Thos. J. White Dev. Corp., 902 F.2d 905, 909-10 (11th Cir. 1990) (holding that §621(a)(2)'s "compatible" easements include private easements); Centel Cable Television Co. v. Admiral's Cove Assoc., 835 F.2d 1359, 1363 (11th Cir. 1988) (same); *see also infra* notes 137-51 and accompanying text (discussing takings approach of Eleventh Circuit cases).

137. 902 F.2d 905 (11th Cir. 1990).

138. Centel Cable Television Co. v. Thos. J. White Dev. Corp., 902 F.2d 905, 907 (11th Cir. 1990).

139. *Id.* The defendant in *White* allowed the telephone and power companies access to private roads while prohibiting the same access to plaintiff. *Id.* at 909. The *White* court relied on the legislative history of the Cable Act which provides that any private agreements restricting a cable system's right to use easements or rights-of-way granted to other utilities are not enforceable. *Id.* at 909 (citing H.R. REP. No. 98-934, *supra* note 1 at 59, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4696, stating any private arrangements which restrict cable company's use of easements or rights-of-way are in violation of §621(a)(2)). The court found the agreement to be in violation of the Cable Act legislative history prohibition on private agreements that restrict cable access. *Id.*

140. *Id.* at 910 (holding that allowing cable company access under §621(a)(2) did not result in taking because owner voluntarily granted easement to utilities at earlier time).

In effect, the *White* court implied that the exercise of section 621(a)(2) was a regulation that never went "too far".[141] The court rationalized that, if an owner or developer *voluntarily* granted an easement to a utility, then Congress had the authority to grant access to any additional occupier without causing a taking of the property contained in that easement.[142] In holding that Cable Act section 621(a)(2) authorized access to private easements, the *White* court concluded that the district court properly enjoined the defendant landowner from denying access to the cable company.[143]

The Eleventh Circuit cases have dismissed any takings issues based on the fact that the owner had voluntarily granted an easement to a utility.[144] These cases extracted the "voluntary" rationale from *Federal Communications Commission v. Florida Power Corp.*[145] In *Florida Power* the United States Supreme Court considered the constitutionality of the Pole Attachments Act,[146] which gives the Federal Communications Commission (FCC) power to regulate the rates a utility charges cable companies for the use of

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141. *See supra* notes 60-69 and accompanying text (discussing "regulatory takings" approach to takings law).

142. *White*, 902 F.2d at 910.

143. *Id.*

The *White* court based its holding on an earlier Eleventh Circuit case. *Id. See* Centel Cable Television Co. v. Admiral's Cove Assocs., 835 F.2d 1359, 1363 n.7 (11th Cir. 1988) (reasoning that no taking occurred because owner voluntarily granted easement to utility). In *Admiral's Cove* the court considered whether the plaintiff had an implied right of action to move for a preliminary injunction under §621(a)(2) of the Cable Act. *Id.* at 1360. The defendant owned a developing residential community, and denied the cable company access to the community. *Id.* The defendant challenged the plaintiff's right to sue contending that the "compatible easements" of §621(a)(2) were only public easements. *Id.* at 1362-63. The defendant reasoned that a franchising agent such as the city usually owned these public easements and, therefore, that the cable company had to petition the city to sue on the cable company's behalf. *Id.* The defendant also contended that the Cable Act did not authorize the use of private easements because *Loretto* indicated that such authorization would be an unconstitutional taking. *Id.* at 1363 n.7. The court rejected the defendant's argument that the use of private utility easements would be a taking on the basis that most developers voluntarily grant easements to utilities. *Id.* Because the owner voluntarily had granted the easement, the court reasoned that Congress had the authority to allow a cable company also to use the easement without violating the takings clause. *Id.* The court stated further that a private right of action was consistent with the Cable Act's scheme of promoting the growth and development of cable television and, therefore, held that the plaintiff had an implied right of action. *Id.* at 1364.

144. *See* Centel Cable Television Co. v. Thos. J. White Development Corp., 902 F.2d 905, 910 (11th Cir. 1990) (dismissing any takings challenges to §621(a)(2) of Cable Act because owner "voluntarily" gave up his easement); Centel Cable Television Co. v. Admiral's Cove Assoc., 835 F.2d 1359, 1363 n.7 (11th Cir. 1988) (same).

The *White* and *Admiral's Cove* courts never reached the statutory interpretation question whether §621(a)(2)(C)'s provisions compensated for a taking because the courts reasoned that no taking resulted from the application of §621(a)(2). *White*, 902 F.2d at 910; *Admiral's Cove*, 835 F.2d at 1363 n.7.

145. 480 U.S. 245 (1987).

146. Pole Attachments Act of 1978, 47 U.S.C. §224 (1988).

the utility company's poles.[147] Three cable operators sued Florida Power under the Pole Attachments Act and won an FCC order reducing their rents from approximately $7.00 per pole to $1.79 per pole.[148] Florida Power appealed and the United States Court of Appeals for the Eleventh Circuit, following *Loretto*, held that the Pole Attachments Act mandated that the court find that the FCC had taken property without providing just compensation.[149] On appeal, the Supreme Court distinguished the New York statute in *Loretto* on the ground that the New York statute involved forced governmental access to a landlord's property while the Pole Attachments Act in *Florida Power* merely regulated commercial leases already "voluntarily" established between cable companies and the property owner.[150] The Supreme Court reversed the Eleventh Circuit and held that the Pole Attachments Act did not constitute a taking and was constitutionally valid.[151]

The Eleventh Circuit cases' use of the "voluntary" takings analysis does not consider adequately the takings issues that may arise in certain cases under section 621(a)(2).[152] For example, this analysis does not consider the circumstances under which the landowner originally granted the easement which the cable company claims is "dedicated for compatible uses".[153] Perhaps the "voluntary" grant of easements by the landowner was not voluntary at all but a necessary part of the zoning and building permit process.[154] If the landowner did not voluntarily grant the easement, section 621(a)(2)'s appropriation of the owner's land does not resemble *Florida Power*, in which the utility company willingly granted easements to the cable company.[155] The takings issue requires a more complex analysis.[156] Additionally, the "voluntary" analysis used by the Eleventh Circuit cases applies a blanket "no taking *per se*" test that does not allow for consideration of the unusual circumstances which may arise because of the application of section 621(a)(2).[157] In an extreme situation, the cable company's placement of one more wire in the easement may leave no more

147. Federal Communications Comm'n v. Florida Power Corp., 480 U.S. 245, 247-48 (1987).

148. *Id.* at 248-49.

149. *Id.* at 250.

150. *Id.* at 252-53.

151. *Id.* at 254.

152. *See infra* notes 153-60 and accompanying text (discussing flaws in Eleventh Circuit cases' "voluntary" takings analysis).

153. *See supra* notes 136-51 and accompanying text (discussing Eleventh Circuits cases' takings analysis).

154. *See* FERRIS, *supra* note 6, at 253 (noting problem may arise when "voluntary" granting of easement is not really voluntary).

155. *See* Federal Communications Comm'n v. Florida Power Corp., 480 U.S. 245, 248 (1987) (considering constitutionality of Pole Attachments Act which regulated existing landlord-tenant relationships between utilities and cable companies).

156. *See infra* notes 212-50 and accompanying text (discussing factors court should use to consider whether burden on landowner from §621(a)(2) cable access rises to level of taking).

157. *See infra* notes 158-60 and accompanying text (discussing extreme situation where cable company's placement of wire leaves no more room in easement).

room in the easement.[158] In such a case, allowing the cable company access under the Cable Act effectively destroys the owner's right to add any more wires to his easement.[159] An *ad hoc* analysis would provide a safety valve for these situations, and would be more consistent with the general approach that courts use in takings cases when the impairment of the owner's use of his land is at issue.[160]

Contrary to both the "taking *per se*" approach of the Third Circuit cases and the Eleventh Circuit cases' "voluntary" takings analysis, the third of the three lines of cases interpreting section 621(a)(2)'s takings issue uses an *ad hoc* analysis.[161] This "regulatory takings" approach, consistent with most approaches to the takings clause, is flexible enough to consider adequately the takings issue in the fact specific cases arising under the Cable Act.[162] This line of cases determines whether section 621(a)(2) cable company access results in a taking according to the degree the access materially burdens the owner's property rights, (material burden cases).[163] In *Greater Worcester Cablevision, Inc. v. Carabetta Enterprises, Inc.*,[164] the plaintiff sought injunctive and equitable relief to allow him access to an apartment complex through telephone, natural gas, and electric easements.[165] The United States District Court for the District of Massachusetts reasoned that whether allowing the cable company access under section 621(a)(2) constituted a taking depended on whether the use of these easements amounted to an *additional burden* on the underlying property.[166] The district court found that granting access did not amount to an additional burden and, therefore, held that granting access would not result in a taking.[167]

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158. *See* Meyerson, *supra* note 14, at 611-12 (stating that one view of §621(a)(2) of Cable Act is that cable operator can gain access only if pre-existing user of easement leaves adequate room).

159. *See supra* notes 136-51 and accompanying text (describing Eleventh Circuit's takings analysis in which court gives no consideration to size of easement at issue).

160. *See supra* note 77 and accompanying text (stating that courts usually use *ad hoc* approach when considering impairment of use of property).

161. *See infra* notes 162-79 and accompanying text (describing material burden cases' approach to §621(a)(2) disputes).

162. *See supra* note 77 and accompanying text (stating that courts usually use *ad hoc* approach when considering impairment of use of property).

163. *See* Greater Worcester Cablevision, Inc. v. Carabetta Enters., Inc., 682 F. Supp. 1244, 1259 (D. Mass. 1985) (determining whether or not right of access under §621(a)(2) results in a taking by amount of additional burden on owner); Mumaugh v. Diamond Lake Area Cable TV Co., 183 Mich. App. 597, 605, 456 N.W.2d 425, 430 (Mich Ct. App. 1990) (same).

164. 682 F. Supp. 1244 (D. Mass. 1985).

165. Greater Worcester Cablevision, Inc. v. Carabetta Enters., Inc., 682 F. Supp. 1244, 1246 (D. Mass. 1985).

166. *Id.* at 1259.

167. *Id.* Despite finding that §621(a)(2) did not result in a taking of the owner's property, the *Greater Worcester* court never fully reached the issue of congressional intent behind the deletion of §633 because the plaintiff could not access the defendants building solely through compatible easements. *Id.*

In *Mumaugh v. Diamond Lake Area Cable TV Co.*[168] the Michigan Court of Appeals also applied the material burden test in considering whether section 621(a)(2) applied to private easements.[169] The plaintiffs were property owners holding their land subject to a pole line easement by Indiana & Michigan Electric Company (I & M).[170] When the cable company attached wires to I & M's utility poles over the plaintiffs' land, the plaintiffs brought a trespass and quantum meruit suit.[171] The defendant cable company contended that section 621(a)(2) granted the defendant a right of access.[172] The court reasoned that the original easement grantee presumably had compensated the owner already for the use of the owner's property because the cable company was using an existing pole line easement.[173] Finding that the plaintiffs failed to show a material increase of the burden on their property, the court determined that a grant of cable access under section 621(a)(2) caused no taking.[174] Consequently, the court allowed the cable

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168. 183 Mich. App. 597, 456 N.W.2d 425 (Mich. Ct. App. 1990).

169. Mumaugh v. Diamond Lake Area Cable TV Co., 183 Mich. App. 597, 606, 456 N.W.2d 425, 430 (Mich Ct. App. 1990).

170. *Id.* at 597, 456 N.W.2d at 427.

171. *Id.* at 599, 456 N.W.2d at 427.

172. *Id.* at 600, 456 N.W.2d at 427.

173. *Id.* at 606, 456 N.W.2d at 430.

174. *Id.*, 456 N.W.2d at 430. The court in *Mumaugh* went so far as to speculate that Congress' enactment of §621(a)(2) may rise to a legislative determination that the use of preexisting utility easements by cable television companies do not materially overburden the owner's easements. *Id.* at 607-08, 456 N.W.2d at 431.

A Federal District court in Delaware took an interesting approach to a mandatory cable access statute in Rollins Cablevue, Inc. v. Saienni Enters. 633 F. Supp. 1315, 1320 (D. Del 1986). The Delaware statute, DEL. CODE ANN. tit. 26, §613 (1974), provides that, wherever a public utility owns or maintains poles, wires, cables, conduits or other facilities in or on a property, a cable franchisee may acquire an easement, for the purpose of erecting and maintaining a cable system, "by a taking . . . if the easement should impose any additional burden on the property interest of the utilities or any other concern or person." *Rollins* at 1321. When considering the issue of mandatory access to an apartment building, the court construed both the Delaware statute and §621(a)(2) of the Cable Act. *Id.* The cable company in *Rollins* sought to enjoin the owner of apartments from removing its cable system to set up a SMATV. *Id.* at 1315-16. The court reasoned that the Delaware law gives cable companies a greater right of access than §621(a)(2) of the Cable Act because the Delaware law permits access via the construction of the cable company's own poles and wires, not just through compatible easements. *Id.* at 1322 n.2. This right of access applies to all apartment buildings because its impossible to conceive of a building not served by electric, telephone, water or sewer easements. *Id.* at 1322. The *Rollins* court stated that a taking would occur when the access put any burden on the owner. *Id.* The court declared that the statute provided sufficient compensation for any taking that occurred. *Id.* Because the Delaware statute's compensation provisions are similar to those under the Cable Act, the court held that the two statutes were compatible. *Id.* Finding that a right of access did not violate either law, the court enjoined the owner from denying access to this apartment building. *Id.*

Subsequently, in a memorandum opinion, the court granted the cable company's motion for a partial summary judgment on the question of right of access. Rollins Cablevue, Inc. v. Saienni Enters., Civ-A 86-139-JRR (D. Del Apr. 28, 1987) (WESTLAW, 1987 WL 54378). Whether the owner had been compensated for the use of the easement was a question of fact not decided at that time. *Id.*

company access to the private pole line easement.[175] The court's decision limited compensation to the amount of damages resulting from installation as provided under section 621(a)(2)(C).[176]

Under this approach, if an owner can show that access amounts to a material burden, the access will result in a taking.[177] These courts reason that, if access is granted to a private easement that does not amount to an additional burden on the owner's land, then no taking occurs because the original grantee presumably had compensated the owner for the use of the easement at an earlier time.[178] The only compensation that may be necessary is for damages incurred at the time of installation, and section 621(a)(2)(C) provides such compensation.[179]

The approaches of the Third Circuit cases, the Eleventh Circuit cases, and the material burden cases all provide plausible interpretations of the takings issues arising under section 621(a)(2).[180] The material burden cases' approach, however, is preferential for several reasons.[181] First, the material burden test's *ad hoc* approach is consistent with the courts' usual approach to takings issues.[182] An *ad hoc* approach, while less predictable than the application of a definite test, is the best approach that courts have been able to develop when deciding whether a regulation imposes enough of an imposition on a landowner that it goes "too far".[183] Courts hardly are justified to abandon the history of successful balancing tests for the arithmetical application of common-law *per se* tradition merely because some government action imposes a trivial burden on a landowner.[184]

Second, the material burden test is more consistent with the compromise of the Cable Act.[185] The ability of the material burden test to analyze the

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175. Mumaugh v. Diamond Lake Area Cable TV Co., 183 Mich. App. 597, 606, 456 N.W.2d 425, 430 (Mich Ct. App. 1990).

176. *Id.*; 456 N.W.2d at 430.

177. *See* Greater Worcester Cablevision, Inc., v. Carabetta Enters., Inc., 682 F. Supp. 1244, 1259 (D. Mass. 1985) (determining whether or not right of access under §621(a)(2) results in taking by amount of additional burden on owner); *Mumaugh*, 183 Mich. App. at 605, 456 N.W.2d at 430 (same).

178. *See Mumaugh*, 183 Mich. App. at 606, 456 N.W.2d at 427 (reasoning that original grantee presumably compensated landowner already).

179. *See id.* (reasoning that cable operator owes landowner no just compensation when cable access places no material burden on landowner's property).

180. *See supra* notes 6-10 and accompanying text (describing lack of judicial consensus on interpretation of term "compatible" easements in Cable Act §621(a)(2)).

181. *See infra* notes 182-210 and accompanying text (comparing material burden cases' approach to §621(a)(2) of Cable Act with Third and Eleventh Circuits' approaches).

182. *See* L. TRIBE, *supra* note 77, §§9-4, 9-5, at 596, 599 (2d ed. 1988) (stating usual approach to takings cases is *ad hoc*); R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 60, §15.12, at 131 (same).

183. *See* L. TRIBE, *supra* note 77, §9-4, at 595-96 (conceding that distinguishing permissible regulation from taking is most difficult problem that courts face in modern land-use law).

184. L. TRIBE, *supra* note 77, §9-5, at 604-05 (criticizing *per se* approaches to takings issue).

185. *See infra* notes 186-93 and accompanying text (describing consistency between material burden test's consideration of burden on landowner and Cable Act §621(a)(2)'s compromise between First Amendment and property rights).

takings issue on an *ad hoc* basis enables courts to consider the complex property and free speech interests involved in section 621(a)(2) disputes.[186] The drafters of the Cable Act did not intend section 621(a)(2)'s advancement of First Amendment rights to trump a landowner's Fifth and Fourteenth Amendment property rights.[187] Conversely, Congress did not intend for a landowner to use his property rights to edit his tenant's access to information.[188] Approaches that use a *per se* takings analysis sway the balance too far in favor of either free speech or property rights.[189] For example, the Third Circuit cases' approach denies access to all private easements, regardless of the possible trivial effect of cable access on an owner's already burdened easements, thereby frustrating the free speech rights enshrined in the First Amendment.[190] The Eleventh Circuit cases' approach does the opposite because, in extreme cases, this approach would trample the owner's Fifth Amendment protections for the vindication of First Amendment rights.[191] Keeping in mind the apparent middle ground approach between property rights and First Amendment rights taken in the legislative re-

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186. *See supra* notes 32-38 and 47-53 and accompanying text (discussing competing First Amendment and property rights involved in §621(a)(2) disputes).

187. *See* H.R. REP. No. 98-934, *supra* note 1 at 36-37, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4673 (noting that Cable Act represents careful balance between First Amendment rights of tenants and property rights of landowners).

188. *See* H.R. REP. No. 98-934, *supra* note 1 at 36-37, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4673 (noting that regulation of consumer access to cable television was necessary to prevent landlords from becoming electronic editors for their tenants, but also implying that Cable Act access provisions must consider property rights of landlords).

189. *See supra* notes 79-85 and accompanying text (describing Third Circuit cases' approach denying cable access to all easements that are not dedicated for public uses); *see also supra* notes 158-60 and accompanying text (describing how, in extreme cases, Eleventh Circuit's "no taking *per se*" approach can fail to find taking even though owner faces substantial hardship).

190. *See* Michelman, *supra* note 69, at 1226-27 (describing flaw in physical occupation test that many purely nominal harms become compensable merely because of resulting physical occupation and without regard to size of private loss); *compare supra* notes 15-24 and accompanying text (discussing Cable Act's concern about First Amendment rights of broadcasters and listeners) *with* Cable Investments, Inc. v. Woolley, 867 F.2d 151, 161 (3d Cir. 1989) (holding that refusal to grant cable company access to private easements did not violate cable company's First Amendment right because development was not equivalent of "company town" in Marsh v. Alabama, 326 U.S. 501 (1946)) [*and*] Cox Cable San Diego, Inc. v. Bookspan, 195 Cal. App. 3d 22, 28-30, 240 Cal. Rptr. 407, 411 (Cal. Ct. App. 1987) (holding that owner's exclusion of cable company from apartment building did not violate cable company's First Amendment rights).

In *Cox Cable*, the court denied the cable company's First Amendment argument because the owner was a private citizen, and the apartment building was not analogous to *PruneYard* as the public was not invited to gather there. 195 Cal. App. 3d at 28-30, 240 Cal. Rptr. at 411. Rather, tenants could exclude the public by retreating to their apartments and locking their doors. *Id.* at 29, 240 Cal. Rptr. at 411. The court compared cable company's First Amendment right to access request to that of a newspaper cutting slots in apartment doors so that it could deliver its papers directly. *Id.* at 30, 240 Cal. Rptr. at 411.

191. *See supra* notes 158-60 and accompanying text (describing how, in extreme cases, Eleventh Circuit's "no taking *per se*" approach can fail to find taking even though owner faces substantial hardship).

drafting of section 621(a)(2)[192], the material burden test more effectively meets this compromise because the material burden test offers courts the ability to grant access to cable companies on a case-by-case basis, depending on the hardships present in each case.[193]

The Supreme Court case of *PruneYard Shopping Center v. Robins*[194] supports the proposition that courts should apply a "regulatory takings" analysis to cases in which free speech rights conflict with property rights.[195] In *PruneYard* the Supreme Court considered whether state restrictions on an owner's right to exclude others from his property amounted to a taking.[196] The owner of a shopping center sought to exclude students seeking signatures for a political petition but the students challenged the owner under the free speech provisions of the California Constitution.[197] Although the students sought access to the owner's property, the Court used a "regulatory takings" analysis rather than an "occupancy" takings analysis.[198] The Court reasoned that not every physical occupation of property amounts to a taking in the Constitutional sense.[199] The *PruneYard* Court noted that, when the occupation of property by persons exercising First Amendment rights does not unreasonably impair the value or use of the property, the grant of access would not result in a taking.[200] The Court implied that a regulation only goes "too far" when it is inequitable for the property owner to bear the public burden of the regulation alone.[201] The Court noted that the shopping center owner had not shown that the right to exclude others was essential to the use or economic value of his property.[202] Because allowing the citizens to exercise their freedom of speech on the owner's property, subject to reasonable time, place, and manner restraints, did not unreasonably impair the value or use of the shopping center, the *PruneYard* Court held that the state restrictions on the owner's right to exclude others from his property did not rise to the level of a taking.[203]

Applying *PruneYard* to section 621(a)(2) disputes, a court should determine whether the laying of one more cable line in the easement would

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192. *See supra* notes 32-42 and accompanying text (describing effect of Cable Act amendment 15 on balance of First Amendment and property rights).

193. *See* H.R. REP. No. 98-934, *supra* note 1 at 36-37, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4673 (stating how Cable Act reflects balance between First Amendment and property rights); *see* Meyerson, *supra* note 14, at 545 (noting that key to understanding Cable Act is to view it as compromise).

194. 447 U.S. 74 (1980); *see also supra* notes 60-69 and accompanying text (describing "regulatory takings" analysis).

195. PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

196. *Id.* at 79-80.

197. *Id.* at 77-79.

198. *Id.* at 83 (citing Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922)).

199. *Id.* at 82-83.

200. *Id.*

201. *Id.*

202. *Id.* at 84.

203. *Id.* at 83.

unreasonably impair the economic value or use of the property to the owner.[204] If not, the cable line's physical appropriation of land would not rise to the level of a taking.[205] The court also should remember that access disputes under section 621(a)(2) involve easements in which the owner's right to exclude others is already subordinate to outside parties.[206] The owner would have difficulty demonstrating how a grant of access to an already burdened easement unreasonably would impair the economic value of his property.[207] The owner, however, should be afforded this opportunity.[208] The material burden test, unlike the Third and Eleventh Circuit approaches, grants the owner an opportunity to prove that the addition of one more cable line in an easement may cause the owner sufficient hardship to render the application of section 621(a)(2) a taking.[209]

As shown, the material burden test provides an analysis that is both consistent with the Supreme Courts' usual approach to takings issues and is flexible enough to consider the competing interests at stake in section 621(a)(2) disputes.[210] Returning to the proposed interpretation of section 621(a)(2) and updating it accordingly, it now is possible to conclude that section 621(a)(2) provides access to private easements *and* that courts should decide, using the material burden test on an *ad hoc* basis, whether a grant of access under section 621(a)(2) amounts to a taking.[211] The question remains how to measure whether an owner has suffered a material burden and specifically, what factors a court should consider when applying the material burden test.

The *PruneYard* Court noted three factors relevant to the determination of when a government regulation amounted to a taking: the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.[212] The Court determined that

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204. *See id.* at 82-83 (deciding whether landowner must allow access to his property for exercise of free speech by analyzing impairment of use of his property).

205. *See* R. ROTUNDA, J. NOWAK, & J. YOUNG, *supra* note 60, at §15.12 (concluding permanent physical occupation usually results in taking, but noting that court may have difficulty determining when government action transfers traditional property rights in some cases like *PruneYard*).

206. *See* Mumaugh v. Diamond Lake Area Cable TV Co., 183 Mich. App. 597, 604, 456 N.W.2d 425, 429 (Mich. Ct. App. 1990) (distinguishing *Loretto* from §621(a)(2) disputes involving pre-existing easements).

207. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434 (1982) (noting that important factor in *PruneYard*'s holding that occupation did not constitute taking was that owner had not exhibited interest in excluding all persons from his property).

208. *See supra* notes 158-60 and accompanying text (noting that in extreme cases, placement of one more wire in easement may leave no room for owner).

209. *See supra* notes 161-79 and accompanying text (describing material burden cases' approach to §621(a)(2) disputes).

210. *See supra* notes 181-93 and accompanying text (listing two reasons why material burden test provides better takings approach than those used by Third and Eleventh Circuits).

211. *See supra* notes 48-58 and accompanying text (proposing that §621(a)(2) authorizes access to private easements).

212. PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980).

the character of the governmental action in *PruneYard* — allowing access to a shopping mall — was not determinative of a taking because the access was subject to reasonable time, place, and manner restraints.[213] As shown above, section 621(a)(2) also has a restraint because that section limits cable access solely to "compatible" easements.[214] Because both the section 621(a)(2) and *PruneYard* restraints limit free speech access in such a way that the access does not interfere with the owner's use of the property, the character of section 621(a)(2) access is similar enough to the character of the governmental action in *PruneYard* that it also should not be determinative of a taking.[215] Landowners, however, may argue that the character of governmental action under section 621(a)(2) is a permanent, physical invasion and, therefore, the character of governmental action is determinative of a taking under the reasoning in *Loretto*.[216] Courts should reject this argument because the situation in *Loretto* is distinguishable from section 621(a)(2) disputes.[217] The only instance in which the character of the governmental action may be determinative occurs when the cable system access interferes with the normal use of the easement.[218] If the cable company's use of the easement

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213. *Id.* at 83-84.

214. Cable Communications Policy Act of 1984, §621(a)(2), 47 U.S.C. §541(a)(2) (1988).

215. *See PruneYard*, 447 U.S. at 83-84 (reasoning that "physical occupation" nature of governmental action does not result in taking when owner can limit access to minimize interference with property's function).

216. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (holding that when state action involves permanent physical invasion of land, character of governmental action is determinative of taking issue).

217. *See supra* notes 111-23 and accompanying text (contending §621(a)(2)'s limitation on cable access to "compatible" easements distinguishes §621(a)(2) from *per se* rule of *Loretto*); *see also supra* notes 108-11 and accompanying text (noting criticism of *Loretto*'s *per se* test).

The reader also should note the owner's possible claim that he is suffering a material burden because his First Amendment rights are violated by a statute allowing others access to his property for free speech purposes. *See* Greater Worcester Cablevision, Inc. v. Carabetta Enters., Inc., 682 F. Supp. 1244 (D. Mass. 1985). In *Greater Worcester*, the court also considered the issue of a cable company's right of access under MASS. GEN. LAWS ANN. ch. 166A, §22 (1976), a Massachusetts statute similar to the now discarded Cable Act section 633. *Id.* The owner claimed that the statute forced him to allow a government sponsored speaker access to his property, thus violating his First Amendment rights. *Id.* at 1247. The court reasoned that *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), governed the case. *Greater Worcester*, 682 F. Supp. at 1255. The *PruneYard* Court held that the governmental action did not rise to the level of a taking because the mall owner had invited the public onto his property and allowing the citizens to exercise their freedom of speech, subject to reasonable time, place, and manner restraints, did not unreasonably impair the value or use of the shopping center. *PruneYard*, 447 U.S. at 83. In *Greater Worcester*, the court found that the owner also decided to invite the public onto his property — he even leased property to the public. *Greater Worcester*, 682 F. Supp. at 1255. The court further found that the state, like the state in *PruneYard*, did not dictate what message a speaker must convey. *Id.* Additionally, following *PruneYard*, the *Greater Worcester* court found no reason why persons would assume that the owner endorsed the messages of the speaker. *Id.* Consequently, the *Greater Worcester* court held that the Massachusetts statute did not violate the owner's First Amendment rights. *Id.*

218. *See supra* notes 158-60 and accompanying text (describing extreme situation where

leaves no room for the owner, the character of the governmental action is different and may rise to a material burden.[219] Because this only occurs in extreme cases, the character of governmental action factor seldom adds much to the material burden analysis.[220]

The second factor that courts should consider is the economic impact of section 621(a)(2) access on the owner.[221] Courts should consider many variables under this factor.[222] One variable is the amount of money that a landowner will lose as a result of cable access.[223] For example, an owner may lose some wealth if the owner has a contract with a satellite company that pays the owner a proportional share of revenues generated from the owner's property.[224] This loss could be substantial in some very large developments like the 18,000 residence development in *White*.[225] Courts, however, should consider two details before determining that an owner's revenue sharing loss rises to the level of a material burden.[226] First, cable company access only may prevent the owner from gaining a monopoly profit via the SMATV system revenue sharing arrangement.[227] Because Congress noted that revenue sharing practices between system operators and landowners could undermine the purposes of the Cable Act, the loss of the owner's revenue sharing profits should not weigh heavily in the owner's favor.[228] Second, the owner's land may rise in value due to the condomi-

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cable company's placement of wire fills up easement so that owner may not "effectively" use easement).

219. *See* H.R. No. 4103, 98th Cong., 2d Sess. §633(b)(1)(D) (1984), *reprinted in* H.R. REP. No. 98-934, *supra* note 1, at 13 (1984) (including consideration of extent to which facilities actually occupied the premises among just compensation factors in deleted §633 of Cable Bill).

220. *See supra* notes 158-60 and accompanying text (noting that interference with owner's use of easement occurs only in extreme situations).

221. *See supra* note 212 and accompanying text (noting Supreme Court test's three factors to measure whether regulation amounts to taking).

222. *See infra* notes 223-34 and accompanying text (describing possible ways §621(a)(2)'s mandatory access may interfere with owner's economic situation).

223. *See* H.R. REP. No. 98-934, *supra* note 1, at 82, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4719 (noting landlords often have revenue sharing contracts with SMATV's).

224. *See id.* (implying that cable access to premises would reduce SMATV revenues, thus reducing landowner's share of those revenues).

225. *See* Centel Cable Television Co. v. Thos. J. White Dev. Corp., 902 F.2d 905, 907 (11th Cir. 1990) (considering cable access to huge development capable of accommodating 18,000 homes).

226. *See infra* notes 227-30 and accompanying text (discussing circumstances that moderate economic impact of §621(a)(2) cable access on landowner).

227. *See* H.R. REP. No. 98-934, *supra* note 1, at 82, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4719 (expressing concern over revenue sharing agreements because they are one of main reasons why landlords deny cable company requests to serve landlord's property); *see also* Andrus v. Allard, 444 U.S. 51, 66 (1979) (stating that courts view loss of future profits as less compelling factor than loss of other property interests when considering takings issues).

228. *See* H.R. REP. No. 98-934, *supra* note 1, at 82, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4719 (noting revenue sharing contracts may undermine purposes of Cable Act).

nium's increased attractiveness to a prospective tenant because the tenant now has a choice of television systems.[229] If the land value increases due to cable access, courts should balance this rise in value with any negative economic impact on the owner resulting from cable access.[230]

In determining the economic impact of section 621(a)(2) access, courts also should consider whether the original grantee compensated the owner for the use of the easement.[231] If the original grantee already paid the owner for the use of the easement, the owner's task of showing that his burden is material would be more difficult.[232] Another variable courts should consider is whether cable access would cause any long-term damage to the facilities.[233] If section 621(a)(2) cable access does cause long-term damage, such damage may effectuate a material burden.[234]

A third factor courts should consider is whether the granting of cable access would interfere with the owner's reasonable investment-backed expectations.[235] If the owner can prove that cable access through compatible easements changes the investment value of his property, he may be able to show a material burden.[236] Two United States Supreme Court cases provide guidance for application this factor.[237] In *Kaiser Aetna v. United States*[238] the Court considered whether the United States Corps of Engineers constitutionally could compel the public use of a private marina.[239] The landowners in *Kaiser* invested considerable amounts of money turning a pond into an exclusive marina.[240] The Corps of Engineers sought public access to the

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229. *See* H.R. No. 4103, 98th Cong., 2d Sess. §633(b)(1)(D) (1984), *reprinted in* H.R. REP. No. 98-934, *supra* note 1, at 13 (1984) (including rise in value of property resulting from availability of cable system among factors in deleted §633 measuring amount of just compensation due to owner because of cable access).

230. *See id.* (considering rise in value of owner's land due to cable access).

231. *See* Mumaugh v. Diamond Lake Area Cable TV Co., 183 Mich. App. 597, 605, 456 N.W.2d 425, 430 (Mich. Ct. App. 1990) (noting that, in situation of utility pole line easements, where previous grantee already compensated owner, court raises presumption that cable access did not burden property).

232. *See id.* (stating that owner faces presumption that cable access does not burden property when previous grantee compensated owner for use of easement).

233. *See* H.R. No. 4103, 98th Cong., 2d Sess. §633(b)(1)(D) (1984), *reprinted in* H.R. REP. No. 98-934, *supra* note 1, at 13 (1984) (including actual long term damage that cable access may cause to premises among just compensation factors in deleted §633).

234. *See id.* (listing long-term damage as factor in determining amount of just compensation due to landowner).

235. *See supra* note 212 and accompanying text (noting Supreme Court test's three factors to measure whether regulation goes so far as to be taking).

236. *See* PruneYard Shopping Center v. Robins, 447 U.S. 74, 83-84 (1980) (stating that if government's attempt to create public right of access interferes with owner's reasonable investment-backed expectations then government action "takes" owner's property).

237. *Compare PruneYard*, 447 U.S. at 84 (holding that "interference with reasonable investment-backed expectations" did not result in a taking) *with* Kaiser Aetna v. United States, 444 U.S. 164, 178-80 (1979) (holding that "interference with reasonable investment-backed expectations" did rise to level of taking).

238. 444 U.S. 164 (1979).

239. Kaiser Aetna v. United States, 444 U.S. 164 (1979).

240. *Id.* at 167-68.

marina because the landowners dredged a channel connecting the pond to a nearby ocean, which technically created navigable waters.[241] The Court reasoned that compelling public access to this property would cause a substantial devaluation of the owner's property and would amount to a taking.[242] Consequently, the Court held that the United States must compensate the owner if it classified the pond as navigable waters.[243]

In the second illustrative case, *PruneYard Shopping Center v. Robins*,[244] the Court distinguished *Kaiser Aetna*.[245] The owner in *PruneYard* had not based his investment on the fact that the land would be exclusive and private like the marina owner in *Kaiser*.[246] In fact, the owner had counted on the property being extensively used by the public.[247] The Court determined that the owner did not prove how granting a right of access for students seeking petition signatures would interfere with the owner's investment-backed expectations.[248] Accordingly, the Court held that the owners reasonable investment-backed expectations were not a dispositive factor in the case.[249] Under *PruneYard* and *Kaiser Aetna*, a court facing a section 621(a)(2) cable access issue should examine whether forced cable access would affect the property's investment value.[250]

The material burden test provides the more reasoned analysis than either the Third Circuit or Eleventh Circuit approaches for several reasons.[251] First, the material burden test's *ad hoc* approach follows the approach courts usually employ in takings analysis.[252] Second, the material burden test closely follows the compromise of section 621(a)(2) and the deletion of section 633.[253] The material burden test requires that a court not look at the trivial impact of the access, but rather at the economic burdens on the owner to develop a better compromise between the owner's loss and the First Amendment rights to maintain a free flow of a diversity of information between cable companies and tenants.[254] Consequently, courts should apply a material

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241. *Id.* at 167.

242. *Id.* at 178-80.

243. *Id.* at 180.

244. 447 U.S. 74 (1980).

245. PruneYard Shopping Center v. Robins, 447 U.S. 74, 84 (1980).

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *See supra* notes 237-49 and accompanying text (describing applications of "interference with reasonable investment-backed expectations" factor).

251. *See infra* notes 252-55 and accompanying text (summarizing attributes of material burden test).

252. *See supra* notes 59-77 and accompanying text (describing two basic approaches to takings issue and noting that usual analysis under both takings approaches is *ad hoc*).

253. *See supra* notes 185-93 and accompanying text (contending that middle ground approach of material burden test reflects compromise in Cable Act better than *per se* approaches of Third and Eleventh Circuits).

254. *See supra* notes 212-50 and accompanying text (describing application of the material burden test).

burden test to section 621(a)(2) disputes.[255] If the dissenting courts in the Third Circuit cases' had employed a material burden test to the circumstances of those cases, these courts might have held that the exercise of section 621(a)(2) access did not result in a taking.[256] In the future, courts such as the Third Circuit should hold that section 621(a)(2) authorizes access to private easements.[257] Such a finding would reconcile the Third Circuit cases with the majority of courts' holdings that section 621(a)(2) authorizes access to private easements.[258]

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255. *See supra* notes 180-93 and accompanying text (concluding that material burden test applies more reasoned approach to takings issues in §621(a)(2) disputes).

256. *See supra* notes 79-85 and accompanying text (noting that Third Circuit courts applied *per se* takings analysis and held that exercise of §621(a)(2) cable access "takes" private property).

257. *See supra* note 85 and accompanying text (describing Third Circuit's refusal to authorize §621(a)(2) access to private easements because such access would effectuate a taking).

258. *See, e.g.*, Centel Cable Television Co. v. Thos. J. White Dev. Corp., 902 F.2d 905, 911 (11th Cir. 1990) (holding that "compatible easements" of Cable Act include private utility easements); Centel Cable Television Co. v. Admiral's Cove Assoc., 835 F.2d 1359, 1363 (11th Cir. 1988) (same); Centel Cable Television Co. v. Burg & DiVosta Corp., 712 F. Supp. 176, 178 (S.D. Fla. 1988) (same).