10-1981

Loretto v. Teleprompter

Lewis F. Powell Jr.

Inclined to Affirm

dfl 09/30/81

RESPONSE Received Still AFFIRM

N.Y. C/App upheld a statute that compelled ~~to~~ landlord owners of leased prop. (apartments) to allow installation of cable TV at a regulated price (nominal) to landlord.

Held valid police power regulation of landlord/tenant relationship. Not a taking

PRELIMINARY MEMORANDUM

October 9, 1981 Conference
List 3, Sheet 1

No. 81-244

Appeal to N.Y. Court of Appeals (Meyer for the court; Garrielli concurring, Cooke dissenting)

Loretto, et al

v.

Teleprompter Manhattan CATV Corp., et al State/Civil Timely

1. SUMMARY: App argues that a state statute authorizing private cable television companies to install cables and other equipment on private property without compensation violates the fifth and fourteenth amendments.

Interesting Case But I tend to ~~Reverse~~ Affirm

DL

2. FACTS AND DECISION BELOW: Section 828 of New York State's Executive Law provides in part that:

> "No landlord shall (a) interfere with the installation of cable television facilities upon his property or premises. . . (b) [d]emand or accept payment from any tenant, in any form in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission, shall, by regulation, determine to be reasonable."

By regulation the State Commission on Cable Television has fixed at $1 the normal fee to which a landlord is entitled under §822(b)'s compensation provision.

In February, 1972, app purchased a five-story apartment building. In February, 1976, she began a class action against appees, two cable television companies, on behalf of a class of all owners of real property in New York on which the companies had placed cable tv components. She asked for herself and for each member of the class damages for trespass and an injunction against its continuance. She sought damages in the amount of five percent of defendants' gross revenues from the invaded premises. Anticipating the companies' defense, she alleged as well that §822 was invalid as purporting to authorize a taking without just compensation and a deprivation of property without due process of law. The City of New York was granted leave to intervene as a defendant.

The opinion by the court of appeals fills 100 pages of the cert petition. After finding that app had standing to sue and that she did not need to exhaust administrative remedies, the Court of Appeals held that §822 was a valid exercise of the

wow!

police power rather than a taking requiring compensation. First, the court found that the section should be analyzed as an exercise of the police power and not as an exercise of the power of eminent domain. Had the section been an exercise of the power of eminent domain, it would have required the cable companies to compensate landlords rather than limiting their power to demand compensation. Even as an exercise of the police power, however, the section could survive only if reasonable and if not such an interferance with app's property as to constitute a "taking."

The court concluded that the section was a reasonable exercise of the police power. The legislative purpose was to achieve the rapid development of a means of communication which has important educational and community aspects. And if the purpose is legitimate, so, too, the provisions of the section are reasonably and substantially related to that purpose. The history of cable tv prior to the enactment reveals that landlords were greatly inhibiting its development by exacting onerous fees and conditions. Moreover, the statute can also be seen as part of the regulation of the landlord-tenant relationship. Certainly, that is a well recognized area of police power regulation.

As to whether the regulation was yet such an interference as to amount to a taking depends on the character of the governmental action, its economic impact, and its interference with reasonable investment expectations. PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980). Here the government is acting not in its enterprise capacity--taking private resources for use in the common good--but rather in its arbitral capacity--it seeks to

intervene to resolve a conflict over land use. The mere fact that there is a physical invasion of the property does not mean that the regulation must be viewed as a taking. See PruneYard, supra. The destruction of one strand of the bundle of property rights does not require the conclusion that a taking has occurred. Andrus v. Allard, 444 U.S. 51, 65-66. As to economic impact, when a regulation leaves but a bare residue of value to a property, a taking may be said to have occurred. But here app makes no claim that she is not receiving a fair return from her property. Rather she seeks to keep the companies from using a portion of her property for which she has no use herself. Finally, the court found that app had made no investment which the statute had frustrated as in Kaiser Aetna v. United States, 444 U.S. 164 (1979). There is no indication that app made any investment in the expectation of cable tv fees.

In concurring, Judge Garrielli argued that the statute did work a taking but that the legislative scheme provided for just compensation by the State Commission on Cable Television.

In dissent, Chief Judge Cooke argued that the legislation was not a valid exercise of the police power but authorized an unconsitutional taking without just compensation. The statute does not involve a limitation on the uses to which a landlord can put a building, rather it involves a "State-authorized physical appropriation of a portion of the landlord's property." A78-79. Such appropriations of property have traditionally been considered per se cases of compensable takings without need to resort to balancing tests. Although courts and commentators have struggled with the question of when a regulation becomes a taking,

there has been no question that physical appropriation of property for public use is a taking requiring compensation. The instant case is not one where a landlord is prevented from evicting tenants or where a shopping center owner is forced to permit certain members of the public onto the premises as in PruneYard. Rather it is the traditional case involving the physical appropriation of the building for the use of another.

By treating the traditional case of physical appropriation as just another police power regulation the court shifts the burden to the property owner to show that the regulation is unreasonable. Yet traditionally even an actual appropriation of only a minimal amount of property entitled the owner to compensation. "The majority in effect reasons that because excessive and improper regulation under the police power is sometimes termed a de facto taking, police power analysis can therefore be applied to all takings, even those clearly falling into the traditional public appropriation category. This turns the de facto taking concept, originally an expansion of the traditional protection of the right to compensation, into a tool to sharply curtail that right." A90-91. There is no reason why cable tv companies should be treated any differently from telegraph, telephone, and other utility companies for whom eminent domain proceedings and appropriate compensation have been the method of development.

3. CONTENTIONS: App repeats the arguments advanced by the dissent that the statute authorizes a taking without compensation. The rule that a physical appropriation of real

property for an easement is a per se taking requiring compensation is well established. In Kaiser Aetna, supra, the Court stated that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." Accord Michelman, "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation" Law," 80 Harv. L. Rev. 1165, 1184-86.

App argues that PruneYard is distinguishable because there the property was not appropriated by the state to a particular use. Rather the Court simply held that once the owner had opened up his property to the general public, the state could regulate the owner's right to prohibit exercises of free speech commonly conducted in similar public plazas. The Court did not hold that the state might permit uninvited persons to make a permanent installation on property which is not open to the general public. Finally, app argues that even if the statute here is not found to be a per se taking, it amounts to a taking all the same as an unreasonable exercise of the police power.

In response appee city argues that the regulation seeks to balance the competing interests of landlords and tenants so that tenants have the same access to cable service as do individual homeowners. This Court has recognized that there is no set formula for determining when there has been a taking. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). In PruneYard the Court held that "the fact that [the appellees] may

have 'physically invaded' appellants' property cannot be viewed as determinative." 477 U.S. at 84.

Appee cable tv companies argue that recent decisions by this Court in Penn Central, PruneYard, and Kaisner Aetna indicate that there are no per se rules in deciding whether a state regulation of property is a taking.

The amicus brief by the State Attorney General repeats the arguments advanced by the Court of Appeals majority

4. DISCUSSION: I recommend affirm. Although as a historical matter courts have probably treated physical appropriations as per se takings, there would not appear to be a federal constitutional requirement that they do so. In PruneYard the Court held that a state constitutional requirement that a property owner permit certain persons to enter on his property did not necessarily amount to a taking. Noting that "one of the essential sticks in the bundle of property rights is the right to exclude others" the Court nonetheless held that "the determination whether a state law unlawfully infringes a landowner's property in violation of the Taking Clause . . . entails inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." 447 U.S. at 82-83.

Certainly the fact that a state law authorizes a physical invasion will be considered in the balance. But it would seem odd to adopt a rule that while the state may regulate to whom app may rent and at what price, regulations that may cost app a great deal of money, the state may not authorize the placement of a

1/2 inch cable on the outside of the building without compensation. Moreover, there is considerable strength to the state's argument that what is being adjusted in this instance are the competing property rights of tenants and landlords. Finally, the Court of Appeals' argues persuasively that, if not a per se taking, nor does the statute here amount to a taking under the more general inquiry described above by the Court in PruneYard.

There are two responses and one amicus brief.

09/30/81 Levi Op. in petn.

October 9, 1981

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 81-244

LORETTO

vs.

TELEPROMPTER MANHATTAN

Noted
Relisted
for BRW
to take second
look.

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.				✓	&	Rev.							
Brennan, J.						✓							
~~Stewart, J.~~													
White, J.				✓									
Marshall, J.					join 3								
Blackmun, J.							✓						
Powell, J.						✓							
Rehnquist, J.						✓							
Stevens, J.				✓									
O'Connor, J.							Pass						

October 16, 198

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 81-24

LORETTO

vs.

TELEPROMPTER MANHATTAN

Byron Heinlen
in supp. case

Noted

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.				✓									
Brennan, J.						✓							
~~Stewart, J.~~													
White, J.				✓									
Marshall, J.					Jurn 3								
Blackmun, J.						✓							
Powell, J.						✓							
Rehnquist, J.				✓									
Stevens, J.				✓									
O'Connor, J.						✓							

1-244 LORETTO v. TELEPROMPTER Argued 3/31/82

Installation of cable TV wiring on apt. bldgs.

Gruswald characterizes the N.Y. act as "use dependent" regulation.

Gruen (Appellant)

N.Y. Statute makes no distinction bet. residential & commercial prop.

There is an exception for single family residences.

In N.Y., landlord is not required to provide or allow telephone connections.

~~Board to~~

Gorswold (appellee)

After landlord "leases" an apt., he no longer has exclusive property interests - there are shared.

Relies on power of legislature to regulate "landlord/tenant" relationship.

Two kinds of ~~#~~ "cross-overs":

1. Short (4 to 6 ft - de minimus) Not a taking.
2. Pure crossing - where TV Co wants to extend a line across a single resident told to connect two apt. houses.

Grimwald (cont.)

Many cases have diluted prop. rights:

Labor cases: many of them - e.g. Babcock, Republic Aviation, ~~Broadcast~~ ~~Case~~ (involving both statutory & const rights)

Pruneyard

Seventeen examples of permanent intrusions on prop. rights - e.g. sprinklers, smoke detectors; also -

Airplane cases - Cosby case

Rent Control case - tenant may continue to occupy premises,

N.Y. law requires mail-receptacle (mail boxes).

Also relies on Penn Central - precluded use of air space Permanent occupation of their air space w/o compensation.

Zoning ordinances

Law goes back to Munn v. Ill.

Rev 5-4

No. 81-244, Loretto v. Teleprompter Conf. 4/2/82

The Chief Justice Para. Then Rev as was bound.
Case different. N.Y. Leg. has put this under the "police power" – but doubts it has Const. power to do this.

Justice Brennan Affm as to non-cross over. Rev as to cross-over
Police power does permit reg. of landlord/tenant relationship – e.g. telephone service, etc
Only the "cross-over" issue is different, as no tenants here
Map shows extent of cross-over of bldgs

Justice White Affm at least as non-cross over; affm as was bound
Also will try to sustain "cross-over" also
Do not agree that any physical invasion of premises
BRW says statute was construed to apply to "cross over". (I must check this)

Justice Marshall

Rev. - across board.
State has no right to do this.

Justice Blackmun

With Bryon
Emphasize education feature

Justice Powell

Aff in part, & probably Rev. in part
Agree with WJB.
I'm not sure statute authorizes
cross-over
State may regulate landlord/tenant
relationship.

Justice Rehnquist Rev.

Agree with dissent.
"Cross-over" are more flagrant violations
- but old cases are good law &
require compensation

Justice Stevens Rev,

Police power that regulates all
landlords & requires is OK

This is entirely different exercise
of police power. U.S. delegates to
private TV co. the right to take
property.

Outrageous statute.

Prior cases

Justice O'Connor Rev.

Agree with John.

Decision in this case will be applied
across country - to 5 acre lots in
Ariz

Akins
Hodel

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

L.F.P.

I'll probably join this.

From: **Justice Marshall**

MAY 1 1982

Circulated: _____

Recirculated: _____

Renewed 5/16/82

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-244

JEAN LORETTO, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, APPELLANT, *v.* TELEPROMPTER MANHATTAN CATV CORP. ET AL.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

[May ——, 1982]

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a "taking" of property for which just compensation is due under the Fifth Amendment of the Constitution. New York law provides that a landlord must permit a cable television company to install its cable facilities upon his property. N.Y. Exec. Law § 828 (1) (McKinney). In this case, the cable installation occupied portions of appellant's roof and the side of her building. The New York Court of Appeals ruled that this appropriation does not amount to a taking. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 53 N.Y. 2d 124, —— N.E. 2d —— (1981). Because we conclude that such a physical occupation of property is a taking, we reverse.

I

Appellant Jean Loretto purchased a five-story apartment building located at 303 West 105th Street, New York, in 1971. The previous owner had granted appellees Teleprompter Corporation and Teleprompter Manhattan CATV ("Teleprompter")[1] permission to install a cable on the build-

[1] Teleprompter Manhattan CATV was formerly a subsidiary, and is now a division, of Teleprompter Corporation.

I voted at Conference to Affirm. The opinion, however, is written narrowly. It recognizes a valid public purpose (police power right to regulate landlord-tenant relations), and holds only that a physical intrusion is a compensable taking. Remands for determination of fair compensation

ing and the exclusive privilege of furnishing cable television ("CATV") services to the tenants. The New York Court of Appeals described the installation as follows:

> "On June 1, 1970 TelePrompter installed a cable slightly less than one-half inch in diameter and of approximately 30 feet in length along the length of the building about 18 inches above the roof top, and directional taps, approximately 4 inches by 4 inches by 4 inches, on the front and rear of the roof. By June 8, 1970 the cable had been extended another 4 to 6 feet and cable had been run from the directional taps to the adjoining building at 305 West 105th Street." *Id.*, at 135.

Teleprompter also installed two large silver boxes along the roof cables. The cables are attached by screws or nails penetrating the masonry at approximately two foot intervals, and other equipment is installed by bolts.

Initially, Teleprompter's roof cables did not service appellant's building. They were part of what could be described as a cable "highway" circumnavigating the city block, with service cables periodically dropped over the front or back of a building in which a tenant desired service. Crucial to such a network is the use of so-called "crossovers"—cable lines extending from one building to another in order to reach a new group of tenants.[2] Two years after appellant purchased the building, Teleprompter connected a "noncrossover" line—

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[2] The Court of Appeals defined a "crossover" more comprehensively as occurring:

> "when (1) the line servicing the tenants in a particular building is extended to adjacent or adjoining buildings, (2) an amplifier which is placed on a building is used to amplify signals to tenants in that building and in a neighboring building or buildings, and (3) a line is placed on a building, none of the tenants of which are provided CATV services, for the purpose of providing service to an adjoining or adjacent building." 53 N.Y. 2d, at 133, n. 6, —— N.E. 2d, at ——, n. 6.

i. e., one that provided CATV service to appellant's own tenants—by dropping a line to the first floor down the front of appellant's building.

Prior to 1973, Teleprompter routinely obtained authorization for its installations from property owners along the cable's route, compensating the owners at the standard rate of 5% of the gross revenues that Teleprompter realized from the particular property. To facilitate tenant access to CATV, the State of New York enacted § 828 of the Executive Law, effective January 1, 1973. Section 828 provides that a landlord may not "interfere with the installation of cable television facilities upon his property or premises," and may not demand payment from any tenant for permitting CATV, or demand payment from any CATV company "in excess of any amount which the [State Commission on Cable Television] shall, by regulation, determine to be reasonable."[3] The

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[3] N.Y. Exec. Law § 828 (McKinney) provides in part:

> 1. No landlord shall
> a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require:
> i. that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants;
> ii. that the cable television company or the tenant or a combination thereof bear the entire cost of the installation, operation or removal of such facilities; and
> iii. that the cable television company agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities.
> b. demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable; or
> c. discriminate in rental charges, or otherwise, between tenants who receive cable television and those who do not.

landlord may, however, require the CATV company or the tenant to bear the cost of installation and to indemnify for any damage caused by the installation. Pursuant to § 828(1)(b), the State Commission has ruled that a one-time $1 payment is the normal fee to which a landlord is entitled. In the Matter of Implementation of Section 828 of the Executive Law, New York State Commission on Cable Television, Statement of General Policy (Jan. 15, 1976) (Statement of General Policy), App. 51–52; Clarification of General Policy (Aug. 27, 1976), App. 68–69. The Commission ruled that this nominal fee, which the Commission concluded was equivalent to what the landlord would receive if the property were condemned pursuant to New York's Transportation Corporations Law, satisfied constitutional requirements "in the absence of a special showing of greater damages attributable to the taking." Statement of General Policy, App. 52.

Appellant did not discover the existence of the cable until after she had purchased the building. She brought a class action against Teleprompter in 1976 on behalf of all owners of real property in the state on which Teleprompter has placed CATV components, alleging that Teleprompter's installation was a trespass and, insofar as it relied on § 828, a taking without just compensation. She requested damages and injunctive relief.[4] Appellee the City of New York, which has granted Teleprompter an exclusive franchise to provide CATV within certain areas of Manhattan, intervened. The Supreme Court, Special Term, granted summary judgment to Teleprompter and the City, upholding the constitutionality of § 828 in both crossover and noncrossover situations. 98 Misc. 2d 944, 415 N.Y.S. 2d, —— N.E. 2d —— (1979). The Appellate Division affirmed without opinion. 73 A.D. 2d 849, —— N.E. 2d —— (1979).

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[4] Class action status was granted in accordance with appellant's request, except that owners of single family dwellings on which a CATV component had been placed were excluded. Notice to the class has been postponed, however, by stipulation.

On appeal, the Court of Appeals, over dissent, upheld the statute. 53 N.Y. 2d 124, —— N.E. 2d —— (1981). The court concluded that the law requires the landlord to allow both crossover and noncrossover installations but permits him to request payment from the CATV company under § 828(1)(b), at a level determined by the State Cable Commission, only for noncrossovers. The court then ruled that the law serves a legitimate police power purpose—eliminating landlord fees and conditions that inhibit the development of CATV, which has important educational and community benefits. Rejecting the argument that a physical occupation authorized by government is necessarily a taking, the court stated that the regulation does not have an excessive economic impact upon appellant when measured against her aggregate property rights, and that it does not interfere with any reasonable investment-backed expectations. Accordingly, the court held that § 828 does not work a taking of appellant's property. Chief Judge Cooke dissented, reasoning that the physical appropriation of a portion of appellant's property is a taking without regard to the balancing analysis courts ordinarily employ in evaluating whether a regulation is a taking.

In light of its holding, the Court of Appeals had no occasion to determine whether the $1 fee ordinarily awarded for a noncrossover installation was adequate compensation for the taking. Judge Gabrielli, concurring, agreed with the dissent that the law works a taking but concluded that the $1 presumptive award, together with the procedures permitting a landlord to demonstrate a greater entitlement, afford just compensation. We noted probable jurisdiction. —— U. S. —— (1981).

II

The Court of Appeals determined that § 828 serves the legitimate public purpose of "rapid development of and maximum penetration by a means of communication which has important educational and community aspects," 53 N.Y. 2d, at

143–144, —— N.E. 2d, at ——-, and thus is within the State's police power. We have no reason to question that determination. It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid. See *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 127–128 (1978); *Delaware, L.& W.R. Co.* v. *Morristown*, 276 U. S. 182, 193 (1928). We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention.

A

In *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104 (1978), the Court surveyed some of the general principles governing the Takings Clause. The Court noted that no "set formula" existed to determine, in all cases, whether compensation is constitutionally due for a government restriction of property. Ordinarily, the Court must engage in "essentially ad hoc, factual inquiries." *Id.*, at 124. But the inquiry is not standardless. The economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance. "So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* (citation omitted).

As *Penn Central* affirms, the Court has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest. At the same time, we have long considered a physical intrusion by government to be a property restriction of an unusually

serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" is not only an important factor in resolving whether the action works a taking but is determinative.

When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking.[5] As early as 1871, in *Pumpelly* v. *Green Bay Company*, 13 Wall. 166 (1871), this Court held that the defendant's construction, pursuant to state author-

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[5] Professor Michelman has accurately summarized the case law concerning the role of the concept of physical invasions in the development of takings jurisprudence:

> "At one time it was commonly held that, in the absence of explicit expropriation, a compensable 'taking' could occur *only* through physical encroachment and occupation. The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, *never* deny compensation for a physical takeover. The one incontestable case for compensation (short of formal expropriation) seems to occur when the government brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership." Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1184 (1967) (emphasis original).

See also 2 J. Sackman, Nichols' Law of Eminent Domain 6–50–6-51 (rev. 3d ed. 1980); L. Tribe, American Constitutional Law 460 (1978).

For historical discussions, see *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 53 N.Y. 2d, at 157–158, —— N.E. 2d, at —— (Chief Judge Cooke, dissenting); F. Bosselman, D. Callies, & J. Banta, The Taking Issue 51 (1973); Stoebuck, A General Theory of Eminent Domain, 47 Wash. L. Rev. 553, 600–601 (1972); Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Sup. Ct. Rev. 63, 82; Cormack, Legal Concepts in Cases of Eminent Domain, 41 Yale L. J. 221, 225 (1931).

ity, of a dam which permanently flooded plaintiff's property constituted a taking. A unanimous Court stated, without qualification, that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution." *Id.*, at 181. Seven years later, the Court reemphasized the importance of a physical occupation by distinguishing a regulation that merely restricted the use of private property. In *Northern Transportation Co.* v. *Chicago*, 99 U. S. 635 (1878), the Court held that the city's construction of a temporary dam in a river to permit construction of a tunnel was not a taking, even though the plaintiffs were thereby denied access to their premises, because the obstruction only impaired the use of plaintiffs' property. The Court distinguished earlier cases in which permanent flooding of private property was regarded as a taking, *e. g.*, *Pumpelly*, *supra*, as involving "a physical invasion of the real estate of the private owner, and a practical ouster of his possession." In this case, by contrast, "[n]o entry was made upon the plaintiffs' lot." *Id.*, at 642.

Since these early cases, this Court has consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other. A taking has always been found only in the former situation. See *United States* v. *Lynah*, 188 U. S. 445, 468–470 (1903); *Bedford* v. *United States*, 192 U. S. 217, 225 (1904); *United States* v. *Cress*, 243 U. S. 316, 327–328 (1917); *Sanguinetti* v. *United States*, 264 U. S. 146, 149 (1924) (to be a taking, flooding must "constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property"); *United States* v. *Kansas City Life Insurance Co.*, 339 U. S. 799, 809–810 (1950).

In *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92 (1893), the Court applied the principles enunciated in *Pumpelly* to a situation closely analogous to the one presented today. In that case, the Court held that the city of St. Louis could exact reasonable compensation for a telegraph company's placement of telegraph poles on the city's public streets. The Court reasoned:

> "The use which the [company] makes of the streets is an exclusive and permanent one, and not one temporary, shifting and in common with the general public. The ordinary traveler, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation thereof are temporary and shifting. The space he occupies one moment he abandons the next to be occupied by any other traveler. . . . *But the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive.* It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of highway and personal travel, wholly lost to the public. . . . It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the state may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated." *Id.*, at 98–99, 101–102 (emphasis added).[6]

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[6] The City of New York objects that this case only involved a city's right to charge for use of its streets, and not the power of eminent domain; the city could have excluded the company from any use of its streets. But the physical occupation principle upon which the right to compensation was based has often been cited as authority in eminent domain cases. See,

Similarly, in *Western Union Telegraph Co.* v. *Penn. R. Co.*, 195 U. S. 540 (1904), a telegraph company constructed and operated telegraph lines over a railroad's right of way. In holding that federal law did not grant the company the right of eminent domain or the right to operate the lines absent the railroad's consent, the Court assumed that the invasion of the telephone lines would be a compensable taking. *Id.*, at 570 (the right of way "cannot be appropriated in whole or in part except upon the payment of compensation"). Later cases, relying on the character of a physical occupation, clearly establish that permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land. See, *e. g.*, *Lovett* v. *West Va. Central Gas Co.*, —— W.Va. ——, 65 S.E. 196 (1909); *Southwestern Bell Telephone Co.* v. *Webb*, 393 S.W. 2d 117, 121 (Mo. App. 1965). *Cf. Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327 (1922). See generally 2 J. Sackman, Nichols' Law of Eminent Domain § 6.21 (rev. 3d ed. 1980).[7]

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e. g., *Western Union Telegraph Co.* v. *Penn. R. Co.*, 195 U. S. 540, 566–567 (1904); *California* v. *United States*, 395 F. 2d 261, 263, n. 4 (CA9 1968). Also, the Court squarely held that insofar as the company relied on a federal statute authorizing its use of post roads, an appropriation of state property would require compensation. *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 101 (1893).

[7] Early commentators viewed a physical occupation of real property as the quintessential deprivation of property. See, *e. g.*, 1 W. Blackstone, Commentaries *139; J. Lewis, A Treatise on the Law of Eminent Domain in the United States 197 (1888) ("Any invasion of property, except in case of necessity . . . , either upon, above or below the surface, and whether temporary or permanent, is a *taking:* as by constructing a ditch through it, passing under it by a tunnel, laying gas, water or sewer pipes in the soil, or extending structures over it, as a bridge or telephone wire." (footnote omitted; emphasis original)); P. Nichols, 1 The Law of Eminent Domain 282 (2d ed. 1917).

More recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property. In *United States* v. *Causby*, 328 U. S. 256 (1946), the Court ruled that frequent flights immediately above a land owner's property constituted a taking, comparing such overflights to the quintessential form of a taking:

> "If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it." *Id.*, at 261 (footnote omitted).

As the Court further explained,

> "We would not doubt that, if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land. The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it." *Id.*, at 264–265.

The Court concluded that the damages to the respondents "were not merely consequential. They were the product of a direct invasion of respondents' domain." *Id.*, at 265–266. See also *Griggs* v. *Allegheny County*, 369 U. S. 84 (1962).

Two war-time takings cases are also instructive. In *United States* v. *Pewee Coal Co.*, 341 U. S. 114 (1951), the Court unanimously held that the Government's seizure and direction of operation of a coal mine to prevent a national strike of coal miners constituted a taking, though members of the Court differed over which losses suffered during the period of Government control were compensable. The plurality had little difficulty concluding that because there had

been an "actual taking of possession and control," the taking was as clear as if the Government held full title and ownership. *Id.*, at 116 (plurality opinion of Justice Black, with whom Justice Frankfurter, Justice Douglas, and Justice Jackson joined; no other Justice challenged this portion of the opinion). In *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155 (1958), by contrast, the Court found no taking where the Government had issued a war-time order requiring nonessential gold mines to cease operations for the purpose of conserving equipment and manpower for use in mines more essential to the war effort. Over dissenting Justice Harlan's complaint that "as a practical matter the Order led to consequences no different from those that would have followed the temporary acquisition of physical possession of these mines by the United States," *id.*, at 181, the Court reasoned that "the Government did not occupy, use, or in any manner take physical possession of the gold mines or the equipment connected with them." *Id.*, at 165–166. The Court concluded that the temporary though severe restriction on *use* of the mines was justified by the exigency of war.[8] *Cf. YMCA* v. *United States*, 395 U. S. 85 (1969) ("Ordinarily, of course, government occupation of private property deprives the private owner of his use of the property, and it is this deprivation for which the Constitution requires compensation." *Id.*, at 92.)

Although this Court's most recent cases have not addressed the precise issue before us, they have emphasized that physical *invasion* cases are special and have not repudiated the rule that any permanent physical *occupation* is a taking. The cases state or imply that a physical invasion is subject to a balancing process, but they do not suggest that a permanent physical occupation would ever be exempt from the Takings Clause.

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[8] Indeed, although dissenting Justice Harlan would treat the restriction as if it were a physical occupation, it is significant that he relies on physical appropriation as the paradigm of a taking. See *id.*, at 181, 183–184.

Penn Central Transportation Co. v. *New York City*, as noted above, contains one of the most complete discussions of the Takings Clause. The Court explained that resolving whether public action works a taking is ordinarily an ad hoc inquiry in which several factors are particularly significant—the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action. 438 U. S., at 124. The opinion does not repudiate the rule that a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine.[9]

In *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979), the Court held that the government's imposition of a navigational servitude requiring public access to a pond was a taking where the land owner had reasonably relied on government consent in connecting the pond to navigable water. The Court emphasized that the servitude took the land owner's right to exclude, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.*, at 176. The Court explained:

> "This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioner's private property; rather, the imposition of the navigational servitude in this context will result in an *actual physical invasion* of

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[9] The City of New York and the opinion of the Court of Appeals place great emphasis on *Penn Central*'s reference to a physical invasion "by government," 438 U. S., at 124, and argue that a similar invasion by a private party should be treated differently. We disagree. A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant. See, *e. g.*, *Pumpelly*, *supra*. *Penn Central* simply holds that in cases of physical invasion short of permanent appropriation, the fact that the government itself commits an invasion from which it directly benefits is one relevant factor in determining whether a taking has occurred. 438 U. S., at 124, 128.

> the privately owned marina. . . . And even if the Government physically invades only an easement in property, it must nonetheless pay compensation. See *United States* v. *Causby*, 328 U. S. 256, 265 (1946); *Portsmouth Co.* v. *United States*, 260 U. S. 327 (1943)." *Id.*, at 180 (emphasis added).

Although the easement of passage, not being a permanent occupation of land, was not considered a taking *per se*, *Kaiser Aetna* reemphasizes that a physical invasion is a government intrusion of an unusually serious character.[10]

Another recent case underscores the constitutional distinction between a permanent occupation and a temporary physical invasion. In *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), the Court upheld a state constitutional requirement that shopping center owners permit individuals to exercise free speech and petition rights on their property, to which they had already invited the general public. The Court emphasized that the state constitution does not prevent the owner from restricting expressive activities by imposing reasonable time, place, and manner restrictions to minimize interference with the owner's commercial functions. Since the invasion was temporary and limited in nature, and since the owner had not exhibited an interest in excluding all persons from his property, "the fact that [the solicitors] may have 'physically invaded' [the owners'] property cannot be viewed as determinative." *Id.*, at 84.[11]

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[10] See also *Andrus* v. *Allard*, 444 U. S. 51 (1979). That case held that the prohibition of the sale of eagle feathers was not a taking as applied to traders of bird artifacts. "The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. . . . In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds. . . . [L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim." *Id.*, at 65–66.

[11] Teleprompter's reliance on labor cases requiring companies to permit

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

B

The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, *cf. Andrus* v. *Allard*, 444 U. S., at 65–66, the government does not simply take a single "strand" from the "bundle" of property rights: it chops through the bundle, taking a slice of every strand.

Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." *United States* v. *General Motors Corp.*, 323 U. S. 373, 378 (1945). To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First,

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access to union organizers, see, *e. g.*, *Hudgens* v. *NLRB*, 424 U. S. 507 (1976); *Central Hardware Co.* v. *NLRB*, 407 U. S. 539 (1972); *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956), is similarly misplaced. As we recently explained:

> "[T]he allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' § 7 rights [to organize under the National Labor Relations Act]. After the requisite need for access to the employer's property has been shown, the access is limited to (i) union organizers; (ii) prescribed nonworking areas of the employer's premises; and (iii) the duration of the organization activity. In short, the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and limited." *Central Hardware Co.*, 407 U. S., at 545.

the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.[12] See *Kaiser Aetna*, 444 U. S., at 179–180; see also Restatement of Property § 7 (1936). Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no non-possessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, see *Andrus* v. *Allard*, 444 U. S., at 66, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Moreover, an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property. As section IIA, *supra*, indicates, property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1228, and n. 110 (1967). Furthermore, such an occupa-

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[12] The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical *invasion* is a taking. As *PruneYard Shopping Center*, *Kaiser Aetna* and the intermittent flooding cases reveal, such temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.

tion is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion. See *infra*, at ——.

The traditional rule also avoids otherwise difficult line-drawing problems. Few would disagree that if the State required landlords to permit third parties to install swimming pools on the landlords' rooftops for the convenience of the tenants, the requirement would be a taking. If the cable installation here occupied as much space, again, few would disagree that the occupation would be a taking. But constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.[13] Indeed, it is possible that in the future, additional cable installations that more significantly restrict a landlord's use of the roof of his building will be made. Section 828 requires a landlord to permit such multiple installations.[14]

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[13] In *United States* v. *Causby*, *supra*, the Court approvingly cited *Butler* v. *Frontier Telephone Co.*, 186 N.Y. 486, 79 N.E. 716 (1906), holding that ejectment would lie where a telephone wire was strung across the plaintiff's property without touching the soil. The Court quoted the following language:

> ". . . an owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath. If the wire had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam supported by posts standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam into a bridge, and yet space only would be occupied. Erect a house upon the bridge, and the air above the surface of the land would alone be disturbed." *United States* v. *Causby*, 328 U. S., at 265 n. 10, quoting *Butler* v. *Frontier Tel. Co.*, 186 N.Y., at 491–492, 79 N.E., at ——.

[14] Although the City of New York has granted an exclusive franchise to Teleprompter, it is not required to do so under state law, see N.Y. Exec. Law, § 811 *et seq.* (McKinney), and future changes in technology may cause

Finally, whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute. Once the fact of occupation is shown, of course, a court should consider the *extent* of the occupation as one relevant factor in determining the compensation due.[15] For that reason, moreover, there is less need to consider the extent of the occupation in determining whether there is a taking in the first instance.

C

Teleprompter's cable installation on appellant's building constitutes a taking under the traditional test. The installation involved a direct physical attachment of plates, boxes, wires, bolts and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall.[16]

In light of our analysis, we find no constitutional difference between a crossover and a noncrossover installation. The portions of the installation necessary for both crossovers and noncrossovers permanently appropriate appellant's property. Accordingly, each type of installation is a taking.

Appellees raise a series of objections to application of the traditional rule here. Teleprompter notes that the law ap-

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the City to reconsider its decision. Indeed, at present some communities apparently grant nonexclusive franchises. Brief for National Satellite Cable Ass'n et al as *Amici Curiae* 21.

[15] In this case, the Court of Appeals noted testimony preceding the enactment of § 828 that the landlord's interest in excluding cable installation "consists entirely of insisting that some negligible unoccupied space remain unoccupied." *Loretto*, 53 N.Y. 2d, at 141 (emphasis omitted). The State Cable Commission referred to the same testimony in establishing a $1 presumptive award. Statement of General Policy (Jan. 15, 1976), App. 48.

[16] It is constitutionally irrelevant whether appellant (or her predecessor in title) had previously occupied this space, since a "landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land." *United States* v. *Causby*, 328 U. S., at 264.

plies only to buildings used as rental property, and draws the conclusion that the law is simply a permissible regulation of the use of real property. We fail to see, however, why a physical occupation of one type of property but not another type is any less a physical occupation. Insofar as Teleprompter means to suggest that this is not a permanent physical invasion, we must differ. So long as the property remains residential and a CATV company wishes to retain the installation, the landlord must permit it.[17]

Teleprompter also asserts the related argument that the State has effectively granted a tenant the property right to have a CATV installation placed on the roof of his building, as an appurtenance to the tenant's leasehold. The short answer is that § 828(1)(a) does not purport to give the *tenant* any enforceable property rights with respect to CATV installation, and the lower courts did not rest their decisions on this ground.[18] Of course, Teleprompter, not appellant's tenants, actually owns the installation. Moreover, the government does not have unlimited power to redefine property rights. See *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 164 (1980) ("a State, by *ipse dixit*, may not transform private property into public property without compensation"); see generally *PruneYard Shopping Center*, 447 U. S., at 91–95 (JUSTICE MARSHALL, concurring).

Finally, we do not agree with appellees that application of the physical occupation rule will have dire consequences for the government's power to adjust landlord-tenant relation-

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[17] It is true that the landlord could avoid the requirements of § 828 by ceasing to rent the building to tenants. As appellant points out, however, such an argument would permit the government to place telephone poles in the back yards of homeowners who desired telephone service without paying compensation. The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated.

[18] We also decline to hazard an opinion as to the respective rights of the landlord and tenant under state law *prior* to enactment of § 828 to use the space occupied by the cable installation, an issue over which the parties sharply disagree.

ships. This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails. See, *e. g.*, *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241 (1964) (discrimination in places of public accommodation); *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80 (1946) (fire regulation); *Bowles* v. *Willingham*, 321 U. S. 503 (1944) (rent control); *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398 (1934) (mortgage moratorium); *Edgar A. Levy Leasing Co.* v. *Siegel*, 258 U. S. 242 (1922) (emergency housing law); *Block* v. *Hirsh*, 256 U. S. 135 (1921) (rent control). In none of these cases, however, did the government authorize the permanent occupation of the landlord's property by a third party. Consequently, our holding today in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multi-factor inquiry generally applicable to non-possessory governmental activity. See *Penn Central*, *supra*.[19]

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[19] If § 828 required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the installation. Ownership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation. The *landlord* would decide how to comply with applicable government regulations concerning CATV and therefore could minimize the physical, aesthetic, and other effects of the installation. Moreover, if the landlord wished to repair, demolish, or construct in the area of the building where the installation is located, he need not incur the burden of obtaining the CATV company's cooperation in moving the cable.

In this case, by contrast, appellant suffered injury that might have been obviated if she had owned the cable and could exercise control over its in-

III

Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains an historically-rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property.

Furthermore, our conclusion that § 828 works a taking of a portion of appellant's property does not presuppose that the substantial fee which many landlords had obtained from Teleprompter prior to the law's enactment is a proper measure of the value of the property taken.[20] A court may appropriately consider additional factors beyond the price that landlords actually obtained in the past in determining the fair market value of the property. See generally *United States* v. *564.54 Acres of Land*, 441 U. S. 506 (1979). The New York State Cable Commission, after considering evidence with respect to the ordinary value of the space occupied by CATV installa-

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stallation. The drilling and stapling that accompanied installation apparently caused physical damage to appellant's building. App. 83, 95–96, 104. Appellant, who resides in her building, further testified that the cable installation is "ugly." App. 99. Although § 828 provides that a landlord may require "reasonable" conditions that are "necessary" to protect the appearance of the premises and may seek indemnity for damage, these provisions are somewhat limited. Even if the provisions are effective, the inconvenience to the landlord of initiating the repairs remains a cognizable burden.

[20] For example, if the 5% fee would have been exacted without regard to the amount of space occupied, then that fee might not be considered the fair market value of the occupied *space* at all, but instead the value to the CATV company of access to tenants.

We also note that appellant apparently did not obtain such a fee from Teleprompter. Her predecessor in title granted Teleprompter permission to install a cable for a flat fee of $50 for a five year term.

tions, has established a presumptive $1 award for noncrossover takings, and permits the landlord to establish that actual damages are greater. Whether this procedure of valuation is adequate, and whether the absence of an award specifically designated for crossover takings is permissible in light of the level of compensation awarded for noncrossovers, are questions for the lower courts to address on remand.[21]

The judgment of the New York Court of Appeals is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[21] In light of our disposition of appellant's takings claim, we do not address her contention that § 828 deprives her of property without due process of law.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 11, 1982

No. 81-244 Loretto v. Teleprompter
Manhattan CATV Corp.

Dear Thurgood,

Please join me in your opinion.

Sincerely,

Sandra

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 13, 1982

Re: No. 81-244 - Loretto v. Teleprompter Manhattan CATV Corp.

Dear Thurgood:

I shall be writing a dissent in this case in due course.

Sincerely,

H.A.B.

Justice Marshall

cc: The Conference

May 17, 1982

TO: John Wiley

FROM: LFP, JR.

SUBJECT: 81-244 - Loretto v. Teleprompter Corp.

I agree with you that TM's opinion is "quite persuasive", and I am now inclined to join him. He meets most of my concerns by recognizing that the police power encompasses the right to regulate landlord-tenant relationships, and holds only that where there has been a physical intrusion - as here - fair compensation must be paid. The opinion also leaves the determination of this to the New York Commission.

As you know from what I have written (the shopping center case - my first Term here - Central Hardware; Akins; dissent in Pruneyard; concurring opinion in Hodel), I generally support the Taking Clause.

You might advise TM's clerk that I am impressed by the opinion and may join it, but probably will await the dissent.

L.F.P., Jr.

LFP/vde

May 17, 1982

TO: John Wiley

FROM: LFP, JR.

SUBJECT: 81-244 - Loretto v. Teleprompter Corp.

I agree with you that TM's opinion is "quite persuasive", and I am now inclined to join him. He meets most of my concerns by recognizing that the police power encompasses the right to regulate landlord-tenant relationships, and holds only that where there has been a physical intrusion - as here - fair compensation must be paid. The opinion also leaves the determination of this to the New York Commission.

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You might advise TM's clerk that I am impressed by the opinion and may join it, but probably will await the dissent.

L.F.P., Jr.

LFP/vde

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 17, 1982

Re: 81-244 - Loretto v. Teleprompter
Manhattan CATV Corp.

Dear Thurgood,

I shall await the dissent.

Sincerely yours,

Justice Marshall

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 20, 1982

Re: 81-244 - Loretto v. Teleprompter
Manhattan CATV

Dear Thurgood:

Please join me.

Respectfully,

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 7, 1982

Re: 81-244 - Loretto v. Teleprompter Manhattan CATV Corp.

Dear Thurgood:

I join.

Regards,

WEB

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 7, 1982

Re: No. 81-244 Loretto v. Teleprompter Manhattan CATV Corp.

Dear Thurgood:

Please join me in your most recent circulation.

Sincerely,

WHR

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 22, 1982

RE: No. 81-244 Loretto v. Teleprompter Manhattan, etc.

Dear Harry:

Please join me in your dissent in the above.

Sincerely,

Bill

Justice Blackmun

Copies to the Conference

June 22, 1982

81-244 Loretto v. Teleprompter

Dear Thurgood:

Please join me.

Sincerely,

Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 22, 1982

Re: 81-244 - Loretto v. Teleprompter Manhattan CATV Corp.

Dear Harry,

I join your dissent.

Sincerely yours,

Justice Blackmun

Copies to the Conference

cpm

THE C. J.	W. J. B.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.	S. D. O'C.
			4/2/82					
Join TM 6/7/82	Join HAB 6/22/82	await dissent 5/17/82	1st draft 5/11/82	will dissent 5/13/82	Join TM 6/22/82	Join TM 6/7/82	Join TM 5/20/82	Join TM 5/11/82
		Join HAB 6/22/82	2nd draft 5/20/82	typed Draft 6/21/82				
			3rd draft 6/7/82	circulated				
			4th draft 6/21/82	Draft 6/22/82				
			5th draft 6/24/82					

81-244 Loretto v. Teleprompter