458 US 419

102 SCt 3164

73 LEd2d 868

Jean LORETTO, on behalf of Herself and all Others Similarly Situated, Appellant

v

TELEPROMPTER MANHATTAN CATV CORP et al

No 81-244

Argued March 30, 1982

Decided June 30, 1982

Syllabus

A New York statute provides that a landlord must permit a cable television (CATV) company to install its CATV facilities upon his property and may not demand payment from the company in excess of the amount determined by a State Commission to be reasonable Pursuant to the statute, the Commission ruled that a one-time $1 payment was a reasonable fee After purchasing a five-story apartment building in New York City, appellant landlord discovered that appellee CATV companies had installed cables on the building, both "crossovers" for serving other buildings and "noncrossovers" for serving appellant's tenants Appellant then brought a class action for damages and injunctive relief in a New York state court, alleging, *inter alia*, that installation of the cables insofar as appellee companies relied on the New York statute constituted a taking without just compensation Appellee New York City, which had granted the companies an exclusive franchise to provide CATV within certain areas of the city, intervened Upholding the New York statute, the trial court granted summary judgment to appellees The Appellate Division of the New York Supreme Court affirmed, and on further appeal the New York Court of Appeals also upheld the statute, holding that it serves the legitimate police power purpose of eliminating landlord fees and conditions that inhibit the development of CATV, which has important educational and community benefits Rejecting appellant's argument that a physical occupation authorized by government is necessarily a taking, the court further held that the statute did not have an excessive economic impact upon appellant when measured against her aggregate property rights, did not interfere with any reasonable investment-backed expectations, and accordingly did not work a taking of appellant's property

Held : The New York statute works a taking of a portion of appellant's property for

which she is entitled to just compensation under the Fifth Amendment, as made applicable to the States by the Fourteenth Amendment Pp 425-441

(a) When the "character of the governmental action," *Penn Central Transportation Co v New York City*, 438 US 104, 124, 98 SCt 2646, 2659, 57 LEd2d 631, is a permanent physical occupation of real property, there is a takingto the extent

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of the occupation without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner Pp 426-435

(b) To the extent that the government permanently occupies physical property, it effectively destroys the owner's rights to possess, use, and dispose of the property Moreover, the owner suffers a special kind of injury when a *stranger* invades and occupies the owner's property Such an invasion is qualitatively more severe than a regulation of the *use* of property, since the owner may have no control over the timing, extent, or nature of the invasion And constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied Pp 435-438

(c) Here, the cable installation on appellant's building constituted a taking under the traditional physical occupation test, since it 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 There is no constitutional difference between a crossover and noncrossover installation, since portions of the installation necessary for both types of installation permanently appropriated appellant's property The fact that the New York statute applies only to buildings used as rental property does not make it simply a regulation of the use of real property Physical occupation of one type of property but not another is no less a physical occupation The New York statute does not purport to give the *tenant* any enforceable property rights with respect to CATV installation, and thus cannot be construed as merely granting a tenant a property right as an appurtenance to his leasehold Application of the physical occupation rule in this case will not have dire consequences for the government's power to adjust landlord-tenant relationships, since it in no way alters the usual analysis governing a State's power to require landlords to comply with building codes Pp 438-440

53 NY2d 124, 440 NYS2d 843, 423 NE2d 320, reversed and remanded

Michael S Gruen, New York City, for appellant

Erwin N Griswold, Washington, D C, for appellees

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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 propertyfor which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution New York law provides that a landlord must permit a cable television company to install its cable facilities upon his property NYExecLaw § 828(1) (McKinney Supp 1981-1982) 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 53 NY2d 124, 440 NYS2d 843, 423 NE2d 320 (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 City, in 1971 The previous owner had granted appellees Teleprompter Corp and Teleprompter Manhattan CATV (collectively Teleprompter) [1] permission to install a cable on the building and the exclusive privilege of furnishing cable

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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, 440 NYS2d, at 847, 423 NE2d, at 324

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—*ie*, 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

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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 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

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is the normal fee to which a landlord is entitled *In the Matter of Implementation of Section 828 of the Executive Law*, No 90004, Statement of General Policy (New York State Commission on Cable Television, 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 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 Misc2d 944, 415 NYS2d 180 (1979) The Appellate Division affirmed without opinion 73 AD2d 849, 422 NYS2d 550 (1979)

On appeal, the Court of Appeals, over dissent, upheld the statute 53 NY2d 124, 440 NYS2d 843, 423 NE2d 320 (1981) The court concluded that the law requires the landlord to allow both crossover and noncrossover installations but permits him to

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request payment from the CATV companyunder § 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, affords just compensation We noted probable jurisdiction 454 US 938, 102 SCt 472, 70 LEd2d 246 (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 NY2d, at 143-144, 440 NYS2d, at 852, 423 NE2d, at 329, 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 Transporta-*

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tion *Co v New York City*, 438 US 104, 127-128, 98 SCt 2646, 2660-2661, 57 LEd2d 631 (1978); *Delaware, L & W R Co v Morristown*, 276 US 182, 193, 48 SCt 276, 278, 72 LEd 523 (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*, *supra*, 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 compensationis constitutionally due for a government restriction of property Ordinarily, the Court must engage in "essentially ad hoc, factual inquiries" *Id*, at 124, 98 SCt, at 2659 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" *Ibid* (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" not only is an important factor in resolving whether the action works a taking but also is determinative

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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 1872, in *Pumpelly v Green Bay Co*, 13 Wall (80 US) 166, 20 LEd 557, this Court held that the defendant's construction, pursuant to state authority, 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*, 13 Wall (80 US) 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 US 635, 25 LEd 336 (1879), the Court held that the city's construc-

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tion 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, *eg, Pumpelly, supra*, as involving "a physical invasion of the real estateof the private owner, and a practical ouster of his possession" In this case, by contrast, "[n]o entry was made upon the plaintiffs' lot" 99 US, 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 US 445, 468-470, 23 SCt 349, 356-357, 47 LEd 539 (1903); *Bedford v United States*, 192 US 217, 225, 24 SCt 238, 240, 48 LEd 414 (1904); *United States v Cress*, 243 US 316, 327-328, 37 SCt 380, 384-385, 61 LEd 746 (1917); *Sanguinetti v United States*, 264 US

146, 149, 44 SCt 264, 265, 68 LEd 608 (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 Ins Co*, 339 US 799, 809-810, 70 SCt 885, 890-891, 94 LEd 1277 (1950)

In *St Louis v Western Union Telegraph Co*, 148 US 92, 13 SCt 485, 37 LEd 380 (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

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thereof are temporary and shifting The space he occupies one moment he abandons the next to be occupied by any other traveller *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, 13 SCt, at 488-489 (emphasis added)[6]

Similarly, in *Western Union Telegraph Co v Pennsylvania R Co*, 195 US 540, 25 SCt 133, 49 LEd 312 (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

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the invasion of the telephone lines would be a compensable taking *Id*, at 570, 25 SCt, at 141 (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, *eg, Lovett v West Va Central Gas Co*, 65 WVa 739, 65 SE 196 (1909); *Southwestern Bell Telephone Co vWebb*, 393 SW2d 117, 121 (MoApp1965) Cf *Portsmouth Harbor Land & Hotel Co v United States*, 260 US 327, 43 SCt 135, 67 LEd 287 (1922) See generally 2 J Sackman, Nichols' Law of Eminent Domain § 621 (rev 3d ed 1980)[7]

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 US 256, 66 SCt 1062, 90 LEd 1206 (1946), the Court ruled that frequent flights immediately above a landowner'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, 66 SCt, at 1065 (footnote omitted)

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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, 66 SCt, at 1067

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, 66 SCt, at 1067-1068 See also *Griggs v Allegheny County*, 369 US 84, 82 SCt 531, 7 LEd2d 585 (1962)

Two wartime takings cases are also instructive In *United States v Pewee Coal Co*, 341 US 114, 71 SCt 670, 95 LEd 809 (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 fulltitle and ownership *Id*, at 116, 71 SCt, at 671 (plurality opinion of Black, J, with whom Frankfurter, Douglas, and Jackson, JJ, joined; no other Justice challenged this portion of the opinion) In *United States v Central Eureka Mining Co*, 357 US 155, 78 SCt 1097, 2 LEd2d 1228 (1958), by contrast, the Court found no taking where the Government had issued a wartime 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, 78 SCt, at 1110; the Court reasoned that "the Government did not oc-

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cupy, use, or in any manner take physical possession of the gold mines or of the equipment connected with them" *Id*, at 165-166, 78 SCt, at 1102-1103 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 US 85, 92, 89 SCt 1511, 1515, 23 LEd2d 117 (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")

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

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 US, at 124, 98 SCt, at 2659 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]

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In *KaiserAetna v United States*, 444 US 164, 100 SCt 383, 62 LEd2d 332 (1979), the Court held that the Government's imposition of a navigational servitude requiring public access to a pond was a taking where the landowner had reasonably relied on Government consent in connecting the pond to navigable water The Court emphasized that the servitude took the landowner's right to exclude, "one of the most essential sticks in the bundle of rights that are commonly characterized as property" *Id*, at 176, 100 SCt, at 391 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 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 US 256, 265 [66 SCt 1062, 1067, 90 LEd 1206] (1946); *Portsmouth Co v United States*, 260 US 327 [43 SCt 135, 67 LEd 287] (1922)" *Id*, at 180, 100 SCt, at 393 (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]

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Another recent case underscores the constitutional distinction between a permanent occupation and a temporary physical invasion In *PruneYard Shopping Center v Robins*, 447 US 74, 100 SCt 2035, 64 LEd2d 741 (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, 100 SCt, at 338[11]

In short, when the "character of the governmental action," *Penn Central*, 438 US, at 124, 98 SCt, at 2659, is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regardto

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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 US 51, 65-66, 100 SCt 318, 326-327, 62 LEd2d 210 (1979), 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 US 373, 378, 65 SCt 357, 359, 89 LEd 311 (1945) To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights First, 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*,

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444 US, at 179-180, 100 SCt, at 392-393; 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 nonpossessory 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*, *supra*, at 66, 100 SCt, at 327, 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 Part II-A, *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 HarvLRev 1165, 1228, and n 110 (1967) Furthermore, such an occupation 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 n 19, *infra*

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 occu-

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pied[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]

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

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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 applies only to buildings used as rental property, and draws the

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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 US 155, 164, 101 SCt 446, 452, 66 LEd2d 358 (1980) ("a State, by *ipse dixit*, may not transform private property into public property without compensation")

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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

relationships 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, *eg, Heart of Atlanta Motel, Inc v United States*, 379 US 241, 85 SCt 348, 13 LEd2d 258 (1964) (discrimination in places of public accommodation); *Queenside Hills Realty Co v Saxl*, 328 US 80, 66 SCt 850, 90 LEd 1096 (1946) (fire regulation); *Bowles v Willingham*, 321 US 503, 64 SCt 641, 88 LEd 892 (1944) (rent control); *Home Building & Loan Assn v Blaisdell*, 290 US 398, 54 SCt 231, 78 LEd 413 (1934) (mortgage moratorium); *Edgar A Levy Leasing Co v Siegel*, 258 US 242, 42 SCt 289, 66 LEd 595 (1922) (emergency housing law); *Block v Hirsh*, 256 US 135, 41 SCt 458, 65 LEd 865 (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 Solong 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 multifactor inquiry generally applicable to nonpossessory governmental activity See *Penn Central Transportation Co v New York City*, 438 US 104, 98 SCt 2646, 57 LEd2d 631 (1978)[19]

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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 a 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 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 The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand[20]

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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

Justice BLACKMUN, with whom Justice BRENNAN and Justice WHITE join,

dissenting

If the Court's decisions construing the Takings Clause state anything clearly, it is that "[t]here is no set formula to determine where regulation ends and taking begins" *Goldblatt v Town of Hempstead*, 369 US 590, 594, 82 SCt 987, 990, 8 LEd2d 130 (1962)[1]

In a curiously anachronistic decision, the Court today acknowledges its historical disavowal of set formulae in almost the same breath as it constructs a rigid *per se* takings rule:"a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve" *Ante*, at 426 To sustain its rule against our recent precedents, the Court erects a strained and untenable distinction between "temporary physical invasions," whose constitutionality concededly "is subject to a balancing process," and "permanent physical occupations," which are "taking[s] without regard to other factors that a court might ordinarily examine" *Ante*, at 432

In my view, the Court's approach "reduces the constitutional issue to a formalistic quibble" over whether property has been "permanently occupied" or "temporarily invaded" Sax, Takings and the Police Power, 74 Yale LJ 36, 37

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(1964) The Court's application of its formula to the facts of this case vividly illustrates that its approach is potentially dangerous as well as misguided Despite its concession that "States have broad power to regulate the landlord-tenant relationship without paying compensation for all economic injuries that such regulation entails," *ante*, at 440, the Court uses its rule to undercut a carefully considered legislative judgment concerning landlord-tenant relationships I therefore respectfully dissent

I

Before examining the Court's new takings rule, it is worth reviewing what was "taken" in this case At issue are about 36 feet of cable one-half inch in diameter and two 4" x 4" x 4" metal boxes Jointly, the cable and boxes occupy only about one-eighth of a cubic foot of space on the roof of appellant's Manhattan apartment building When appellant purchased that building in 1971, the "physical invasion" she now challenges had already occurred[2] Appellant did not bring this action until about five years later, demanding 5% of appellee Teleprompter's gross revenues from her building, and claiming that the operation of NYExecLaw § 828 (McKinney

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Supp 1981-1982) "took" her property The New York Supreme Court, the Appellate Division, and the New York Court of Appeals all rejected that claim, upholding § 828 as a valid exercise of the State's police power

The Court of Appeals held that

"the State may proscribe a trespass action by landlords generally against a cable TV company which places a cable and other fixtures on the roof of any landlord's building, in order to protect the right of the tenants of rental property, who will ultimately have to pay any charge a landlord is permitted to collect from the cable TV company, to obtain TV service in their respective apartments" 53 NY2d 124, 153, 440 NYS2d 843, 858, 423 NE2d 320, 335 (1981)

In so ruling, the court applied the multifactor balancing test prescribed by this Court's recent Takings Clause decisions Those decisions teach that takings questions should be resolved through "essentially ad hoc, factual inquiries," *Kaiser Aetna v United States*, 444 US 164, 175, 100 SCt 383, 390, 62 LEd2d 332 (1979), into "such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations" *PruneYard Shopping Center v Robins*, 447 US 74, 83, 100 SCt 2035, 2042, 64 LEd2d 741 (1980) See 53 NY2d, at 144-151, 440 NYS2d, at 853-858, 423 NE2d, at 330-334

The Court of Appeals found, first, that § 828 represented a reasoned legislative effort to arbitrate between the interests of tenants and landlords and to encourage development of an important educational and communications medium[3] *Id*, at

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143-145, 440 NYS2d, at 852-853, 423 NE2d, at 329-330 Moreover, under *PruneYard Shopping Center v Robins*, 447 US, at 83-84, 100 SCt, at 2042, the fact that § 828 authorized Teleprompter to make a minor physical intrusion upon appellant's property was in no way determinative of the takings question 53 NY2d, at 146-147, 440 NYS2d, at 854, 423 NE2d, at 331[4]

Second, the court concluded that the statute's economic impact on appellant was *de minimis* because § 828 did not affect the fair return on her property 53 NY2d, at 148-150, 440 NYS2d, at 855-856, 423 NE2d, at 332-333 Third, the statute did not interfere with appellant's reasonable investment-backed expectations *Id*, at 150-151, 440 NYS2d, at 856-857, 423 NE2d, at 333-334 When appellant purchased the building, she was unaware of the existence of the cable See n 2, *supra* Thus, she could not have invested in the building with any reasonable expectation that the one-eighth cubic foot of space occupied by the cable television installment would become income-productive 53 NY2d, at 155, 440 NYS2d, at 859, 423 NE2d, at 336

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II

Given that the New York Court of Appeals' straightforward application of this Court's balancing test yielded a finding of no taking, it becomes clear why the Court now constructs a *per se* rule to reverse The Court can escape the result dictated by our recent takings cases only by resorting to bygone precedents and arguing that "permanent physical occupations" somehow differ qualitatively from all other forms of

government regulation

The Court argues that a *per se* rule based on "permanent physical occupation" is both historically rooted, see *ante*, at 426-435, and jurisprudentially sound, see *ante*, at 435-438 I disagree in both respects The 19th-century precedents relied on by the Court lack any vitality outside the agrarian context in which they were decided[5] But if, by chance, they

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have any lingering vitality, then, in my view, those cases stand for a constitutional rule that is uniquely unsuited to the modern urban age Furthermore, I find logically untenable the Court's assertion that § 828 must be analyzed under a *per se* rule because it "effectively destroys" three of "the most treasured strands in an owner's bundle of property rights," *ante*, at 435

The Court's recent Takings Clause decisions teach that *nonphysical* government intrusions on private property, such as zoning ordinances and other land-use restrictions, have become the rule rather than the exception Modern government regulation exudes intangible "externalities" that may diminish the value of private property far more than minor physical touchings Nevertheless, as the Court recognizes, it has "often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest" *Ante*, at 426 See, *eg, Agins v City of Tiburon*, 447 US 255, 100 SCt 2138, 65 LEd2d 106 (1980); *Penn Central Transportation Co v New York City*, 438 US 104, 124-125, 98 SCt 2646, 2659, 57 LEd2d 631 (1978); *Village of Euclid v Ambler Realty Co*, 272 US 365, 47 SCt 114, 71 LEd 303 (1926)

Precisely because the extent to which the government may injure private interests now depends so little on whether or not it has authorized a "physical contact," the Court has avoided *per se* takings rules resting on outmoded distinctions between physical and nonphysical intrusions As one commentator has observed, a takings rule based on such a distinction is inherently suspect because "its capacity to distinguish, even crudely, between significant and insignificant losses is too puny to be taken seriously" Michelman, Property, Utility, and Fairness:Comments on the Ethical Foundations of "Just Compensation" Law, 80 HarvLRev 1165, 1227 (1967)

Surprisingly, the Court draws an even finer distinction today between "temporary physical invasions" and "perma-

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nent physical occupations" When the government authorizes the latter type of intrusion, the Court would find "a taking without regard to the public interests" the regulation may serve *Ante*, at 426 Yet an examination of each of the three words in the Court's "permanent physical occupation" formula illustrates that the newly-created distinction is even less substantial than the distinction between physical and

nonphysical intrusions that the Court already has rejected

First, what does the Court mean by "permanent"? Since all "temporary limitations on the right to exclude" remain "subject to a more complex balancing process to determine whether they are a taking," *ante*, at 435, n 12, the Court presumably describes a government intrusion that lasts forever But as the Court itself concedes, § 828 does not require appellant to permit the cable installation forever, but only "[s]o long as the property remains residential and a CATV company wishes to retain the installation" *Ante*, at 439 This is far from "permanent"

The Court reaffirms 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" *Ante*, at 440 Thus, § 828 merely defines one of the many statutory responsibilities that a New Yorker accepts when she enters the rental business If appellant occupies her own building, or converts it into a commercial property, she becomes perfectly free to exclude Teleprompter from her one-eighth cubic foot of roof space But once appellant chooses to use her property for rental purposes, she must comply with all reasonable government statutes regulating the landlord-tenant relationship[6] If § 828 authorizes a "permanent" occupation,

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and thus works a taking "without regard to the public interests that it may serve," then all other New York statutes that require a landlord to make physical attachments to his rental property also must constitute takings, even if they serve indisputably valid public interests in tenant protection and safety[7]

The Court denies that its theory invalidates these statutes, because they "do not require the landlord to suffer the physical occupation of a portion of his building by a third party" *Ante*, at 440 But surely this factor cannot be determinative, since the Court simultaneously recognizes that tem-

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porary invasions by third parties are not subjectto a *per se* rule Nor can the qualitative difference arise from the incidental fact that, under § 828, Teleprompter, rather than appellant or her tenants, owns the cable installation Cf *ante*, at 440, and n 19 If anything, § 828 leaves appellant better off than do other housing statutes, since it ensures that her property will not be damaged esthetically or physically, see n 4, *supra*, without burdening her with the cost of buying or maintaining the cable

In any event, under the Court's test, the "third party" problem would remain even if appellant herself owned the cable So long as Teleprompter continuously passed its electronic signal through the cable, a litigant could argue that the second element of the Court's formula—a "physical touching" by a stranger—was satisfied and that § 828 therefore worked a taking[8] Literally read, the Court's test opens the door to endless metaphysical struggles over whether or not an individual's property has been

"physically" touched It was precisely to avoid "permit[ting] technicalities of form to dictate consequences of substance," *United States v Central Eureka Mining Co*, 357 US 155, 181, 78 SCt 1097, 1110, 2 LEd2d 1228 (1958) (Harlan, J, dissenting), that the Court abandoned a "physical contacts" test in the first place

Third, the Court's talismanic distinction between a continuous "occupation" and a transient "invasion" finds no basis in either economic logic or Takings Clause precedent In the landlord-tenant context, the Court has upheld against takings challenges rent control statutes permitting "tempo-

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rary" physical invasions of considerable economic magnitude See, *eg, Block v Hirsh*, 256 US 135, 41 SCt 458, 65 LEd 865 (1921) (statute permitting tenants to remain in physical possession of their apartments for two years after the termination of their leases) Moreover, precedents record numerous other "temporary" officially authorized invasions by third parties that have intruded into an owner's enjoyment of property far more deeply than did Teleprompter's long-unnoticed cable See, *eg, PruneYard Shopping Center v Robins*, 447 US 74, 100 SCt 2035, 64 LEd2d 741 (1980) (leafletting and demonstrating in busy shopping center); *Kaiser Aetna v United States*, 444 US 164, 100 SCt 383, 62 LEd2d 332 (1979) (public easement of passage to private pond); *United States v Causby*, 328 US 256, 66 SCt 1062, 90 LEd 1206 (1946) (noisy airplane flights over private land) While, under the Court's balancing test, some of these "temporary invasions" have been found to be takings, the Court has subjected none of them to the inflexible *per se* rule now adapted to analyze the far less obtrusive "occupation" at issue in the present case Cf *ante*,at 430-431, 432-435

In sum, history teaches that takings claims are properly evaluated under a multifactor balancing test By directing that all "permanent physical occupations" automatically are compensable, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner," *ante*, at 434-435, the Court does not further equity so much as it encourages litigants to manipulate their factual allegations to gain the benefit of its *per se* rule Cf n 8, *supra* I do not relish the prospect of distinguishing the inevitable flow of certiorari petitions attempting to shoehorn insubstantial takings claims into today's "set formula"

B

Setting aside history, the Court also states that the permanent physical occupation authorized by § 828 is a *per se* taking because it uniquely impairs appellant's powers to dispose of, use, and exclude others from, her property See *ante*, at 435-438

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In fact, the Court's discussion nowhere demonstrates how § 828 impairs these private rights in a manner *qualitatively* different from other garden-variety landlord-tenant legislation

The Court first contends that the statute impairs appellant's legal right to dispose of cable-occupied space by transfer and sale But that claim dissolves after a moment's reflection If someone buys appellant's apartment building, but does not use it for rental purposes, that person can have the cable removed, and use the space as he wishes In such a case, appellant's right to dispose of the space is worth just as much as if § 828 did not exist

Even if another landlord buys appellant's building for rental purposes, § 828 does not render the cable-occupied space valueless As a practical matter, the regulation ensures that tenants living in the building will have access to cable television for as long as that building is used for rental purposes, and thereby likely increases both the building's resale value and its attractiveness on the rental market[9]

In any event, § 828 differs little from the numerous other New York statutory provisions that require landlords to install physical facilities "permanently occupying" common spaces in or on their buildings As the Court acknowledges, the States traditionally—and constitutionally—have exercised their police power "to require landlords to provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building" *Ante*, at 440 Like § 828, these provisions merely ensure tenants accessto services the legislature deems important, such as water, electricity, natural light, telephones, intercommunication systems, and mail service See n 7, *supra* A landlord's dispositional rights are affected no more ad-

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versely when he sells a building to another landlord subject to § 828, than when he sells that building subject only to these other New York statutory provisions

The Court also suggests that § 828 unconstitutionally alters appellant's right to control the *use* of her one-eighth cubic foot of roof space But other New York multiple dwelling statutes not only oblige landlords to surrender significantly larger portions of common space for their tenants' use, but also compel the *landlord*—rather than the tenants or the private installers—to pay for and to maintain the equipment For example, New York landlords are required by law to provide and pay for mailboxes that occupy more than five times the volume that Teleprompter's cable occupies on appellant's building See Tr of Oral Arg 42-43, citing NYMultDwellLaw § 57 (McKinney 1974) If the State constitutionally can insist that appellant make this sacrifice so that her tenants may receive mail, it is hard to understand why the State may not require her to surrender less space, *filled at another's expense*, so that those same tenants can receive television signals

For constitutional purposes, the relevant question cannot be solely *whether* the State has interfered in some minimal way with an owner's use of space on her building Any intelligible takings inquiry must also ask whether the *extent* of the State's interference is so severe as to constitute a compensable taking in light of the owner's alternative uses for the property[10] Appellant freely admitted that she would have

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had no other use for the cable-occupied space, were Teleprompter's equipment not on her building See App 97 (Deposition of Jean A Loretto)

The Court's third and final argument is that § 828 has deprived appellant of her "power to exclude the occupier from possession and use of the space" occupied by the cable *Ante*, at 435 This argument has two flaws First, it unjustifiably assumes that appellant's tenants have no countervailing property interest in permitting Teleprompter to use that space[11] Second, it suggests that the New York Legislature may not exercise its police power to affect appellant's common-law right to exclude Teleprompter even from one-eighth cubic foot of roof space But this Court long ago recognized that new social circumstances can justify legislative modification of a property owner'scommon-law rights, without compensation, if the legislative action serves sufficiently important public interests See *Munn v Illinois*, 94 US 113, 134, 24 LEd 77 (1877) ("A person has no property, no vested interest, in any rule of the common law Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstance"); *United States v Causby*, 328 US, at 260-261, 66 SCt, at 1065 (In the modern world, "[c]ommon sense revolts at the idea" that legislatures cannot alter common-law ownership rights)

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As the Court of Appeals recognized, § 828 merely deprives appellant of a common-law trespass action against Teleprompter, but only for as long as she uses her building for rental purposes, and as long as Teleprompter maintains its equipment in compliance with the statute Justice MARSHALL recently and most aptly observed:

"[Appellant's] claim in this case amounts to no less than a suggestion that the common law of trespass is not subject to revision by the State If accepted, that claim would represent a return to the era of *Lochner v New York*, 198 US 45 [25 SCt 539, 49 LEd 937] (1905), when common-law rights were also found immune from revision by State or Federal Government Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development It would allow no room for change in response to changes in circumstance The Due Process Clause does not require such a result" *PruneYard Shopping Center v Robins*, 447 US, at 93, 100 SCt, at 2047 (concurring opinion)

III

In the end, what troubles me most about today's decision is that it represents an archaic judicial response to a modern social problem Cable television is a new and growing, but somewhat controversial, communications medium See Brief for New York State Cable Television Association as *Amicus Curiae* 6-7 (about 25% of American homes with televisions—approximately 20 million families—currently subscribe to cable television, with the penetration rate expected to double by 1990) The New York

Legislature not only recognized, but also responded to, this technological advance by enacting a statute that sought carefully to balance the interests of all private parties See nn 3 and 4, *supra* New York's courts in this litigation, with only one jurist in dissent, unanimously upheld the constitutionality of that considered legislative judgment

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This Court now reaches back in time for a *per se* rule that disrupts that legislative determination[12] Like Justice Black, I believe that "the solution of the problems precipitated by technological advances and new ways of living cannot come about through the application of rigid constitutional restraints formulated and enforced by the courts" *United States v Causby*, 328 US, at 274, 66 SCt, at 1072 (dissenting opinion) I would affirm the judgment and uphold the reasoning of the New York Court of Appeals

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

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

"[W]hen (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 service, for the purpose of providing service to an adjoining or adjacent building" 53 NY2d, at 133, n 6, 440 NYS2d, at 846, n 6, 423 NE2d, at 323, n 6

[3] New York ExecLaw § 828 (McKinney Supp 1981-1982) 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 service and those who do not"

[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

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

"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 deliberately 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 HarvLRev 1165, 1184 (1967) (emphasis in original; footnotes omitted)

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 53 NY2d, at 157-158, 440 NYS2d, at 860-861, 423 NE2d, at 337-338 (Cooke, CJ, dissenting); F Bosselman, D Callies, & J Banta, The Taking Issue 51 (1973); Stoebuck, A General Theory of Eminent Domain, 47 WashLRev 553, 600-601 (1972); Dunham, Griggs v Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 SCtRev 63, 82; Cormack, Legal Concepts in Cases of Eminent Domain, 41 Yale LJ 221, 225 (1931)

[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, *eg, Western Union Telegraph Co v Pennsylvania R Co*, 195 US 540, 566-567, 25 SCt 133, 139-140, 49 LEd 312 (1904); *California v United States*, 395 F2d 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 US, at 101, 13 SCt, at 489

[7] Early commentators viewed a physical occupation of real property as the quintessential deprivation of property See, *eg*, 1 W Blackstone, Commentaries *139; J Lewis, 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 in original)); 1 P Nichols, Law of Eminent Domain 282 (2d ed1917)

[8] Indeed, although dissenting Justice Harlan would have treated the restriction as if it were a physical occupation, it is significant that he relied on physical appropriation as the paradigm of a taking See *United States v Central Eureka Mining Co*, 357 US, at 181, 183-184, 78 SCt, at 1110, 1111-1112

[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 US, at 124, 98 SCt, at 2659, 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, *eg, Pumpelly v Green Bay Co*, 13 Wall (80 US) 166, 20 LEd 557 (1872) *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 US, at 124, 128, 98 SCt, at 2659, 2661

[10] See also *Andrus v Allard*, 444 US 51, 100 SCt 318, 62 LEd2d 210 (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, 100 SCt, at 326-327

[11] Teleprompter's reliance on labor cases requiring companies to permit access to union organizers, see, *eg, Hudgens v NLRB*, 424 US 507, 96 SCt 1029, 47 LEd2d 196 (1976); *Central Hardware Co v NLRB*, 407 US 539, 92 SCt 2238, 33 LEd2d 122 (1972); *NLRB v Babcock & Wilcox Co*, 351 US 105, 76 SCt 679, 100 LEd 975 (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 non-working 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*, *supra*, at 545, 92 SCt, at 2242

[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 v Robins*, 447 US 74, 100 SCt 2035, 64 LEd2d 741 (1980); *Kaiser Aetna v United States*, 444 US 164, 100 SCt 383, 62 LEd2d 332 (1979), 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

The dissent objects that the distinction between a permanent physical occupation and a temporary invasion will not always be clear *Post*, at 448 This objection is overstated, and in any event is irrelevant to the critical point that a permanent physical occupation *is* unquestionably a taking In the antitrust area, similarly, this Court has not declined to apply a *per se* rule simply because a court must, at the boundary of the rule, apply the rule of reason and engage in a more complex balancing analysis

[13] In *United States v Causby*, 328 US 256, 66 SCt 1062, 90 LEd 1206 (1946), the Court approvingly cited *Butler v Frontier Telephone Co*, 186 NY 486, 79 NE 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:

" '[A]n 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' " 328 US, at 265, n 10, 66 SCt, at 1067, n 10, quoting *Butler Frontier Telephone Co, supra*, at 491-492, 79 NE, at 718

[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 NYExecLaw § 811 *et seq* (McKinney Supp 1981-1982), and future changes in technology may cause the city to reconsider its decision Indeed, at present some communities apparently grant nonexclusive franchises Brief for National Satellite Cable Association 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" 53 NY2d, at 141, 440 NYS2d, at 851, 423 NE2d, at 328 (emphasis omitted) The State Cable Commission referred to the same testimony in establishing a $1 presumptive award Statement of General Policy, App 48

A number of the dissent's arguments—that § 828 "likely increases both the building's resale value and its attractiveness on the rental market," *post*, at 452, and that appellant might have no alternative use for the cable-occupied space, *post*, at 453-454 may also be relevant to the amount of compensation due It should be noted, however, that the first argument is speculative and is contradicted by appellant's testimony that she and "the whole block" would be able to sell their buildings for a higher price absent the installation App 100

[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*, *supra*, at 264, 66 SCt, at 1067

The dissent asserts that a taking of about one-eighth of a cubic foot of space is not of constitutional significance *Post*, at 443 The assertion appears to be factually incorrect, since it ignores the two large silverboxes that appellant identified as part of the installation App 90; Loretto Affidavit in Support of Motion for Summary Judgment (Apr 21, 1978), Appellants' Appendix in No 8300/76 (NYApp), p 77 Although the record does not reveal their size, appellant states that they are approximately 18" x 12" x 6", Brief for Appellant 6 n*, and appellees do not dispute this statement The displaced volume, then, is in excess of 11/2 cubic feet In any event, these facts are not critical: whether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox

[17] It is true that the landlord could avoid the requirements of § 828 by ceasing to rent the building to tenants But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation Teleprompter's broad "use-dependency" argument proves too much For example, it would allow the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space It would even allow the government to requisition a certain number of apartments as permanent government offices 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

[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 fact of ownership is, contrary to the dissent, not simply "incidental," *post*, at 450; it would give a landlord (rather than a CATV company) full authority over the installation except only as government specifically limited that authority The *landlord* would decide how to comply with applicable government regulations concerning CATV and therefore could minimize the physical, esthetic, 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 installation The drilling and stapling that accompanied

installation apparently caused physical damage to appellant's building App83, 95-96, 104 Appellant, who resides in her building, further testified that the cable installation is "ugly" *Id*, at 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] 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

[1] See *Kaiser Aetna v United States*, 444 US 164, 175, 100 SCt 383, 390, 62 LEd2d 332 (1979); *Andrus v Allard*, 444 US 51, 65, 100 SCt 318, 326, 62 LEd2d 210 (1979) ("There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate"); *Penn Central Transportation Co v New York City*, 438 US 104, 124, 98 SCt 2646, 2659, 57 LEd2d 631 (1978); *United States v Caltex, Inc*, 344 US 149, 156, 73 SCt 200, 203, 97 LEd 157 (1952) ("No rigid rules can be laid down to distinguish compensable losses from noncompensable losses"); *Pennsylvania Coal Co v Mahon*, 260 US 393, 416, 43 SCt 158, 160, 67 LEd 322 (1922) (a takings question "is a question of degree—and therefore cannot be disposed of by general propositions")

[2] In January 1968, appellee Teleprompter signed a 5-year installation agreement with the building's previous owner in exchange for a flat fee of $50 Appellee installed both the 30-foot main cable and its 4- to 6-foot "crossover" extension in June 1970 For two years after taking possession of the building and the appurtenant equipment, appellant did not object to the cable's presence Indeed, despite numerous inspections, appellant had never even noticed the equipment until Teleprompter first began to provide cable television service to one of her tenants 53 NY2d 124, 134-135, 440 NYS2d 843, 847, 423 NE2d 320, 324 (1981) Nor did appellant thereafter ever specifically ask Teleprompter to remove the components from her building App 107, 108, 110

Although the Court alludes to the presence of "two large silver boxes" on appellant's roof, *ante*, at 438, n 16, the New York Court of Appeals' opinion nowhere mentions them, nor are their dimensions stated anywhere in the record

[3] The court found that the state legislature had enacted § 828 to "prohibit gouging and arbitrary action" by "landlords [who] in many instances have imposed extremely onerous fees and conditions on cable access to their buildings" 53 NY2d, at 141, 440 NYS2d, at 851, 423 NE2d, at 328, citing testimony of Joseph C Swidler, Chairman of the Public Service Commission, before the Joint Legislative Committee consideringthe CATV bill

Given the growing importance of cable television, the legislature decided that urban tenants' need for access to that medium justified a minor intrusion upon the landlord's interest, which

"consists entirely of insisting that some negligible unoccupied space remain unoccupied The tenant's interest clearly is more substantial, consisting of a right to receive (and perhaps send) communications from and to the outside world In the electronic age, the landlord should not be able to preclude a tenant from obtaining CATV service (or to exact a surcharge for allowing the service) any more than he could preclude a tenant from receiving mail or telegrams directed to him" *Ibid*, citing Regulation of Cable Television by the State of New York, Report to the New York Public Service Commission by Commissioner William K Jones 207 (1970)

[4] Section 828 carefully regulates the cable television company's physical intrusion onto the landlord's property If the landlord requests, the company must conform its installations "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" NYExecLaw § 828(1)(a)(i) (McKinney Supp1981-1982) Furthermore, the company must "agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities" § 828(1)(a)(iii) Finally, the statute authorizes the landlord to require either "the cable television company or the tenant or a

combination thereof [to] bear the entire cost of the installation, operation or removal" of any equipment § 828(1)(a)(ii)

[5] The Court properly acknowledges that none of our recent takings decisions have adopted a *per se* test for either temporary physical invasions or permanent physical occupations See *ante*, at 432-435, and 435 n 12 While the Court relies on historical dicta to support its *per se* rule, the only holdings it cites fall into two categories:a number of cases involving flooding, *ante*, at 427-428, and *St Louis v Western Union Telegraph Co*, 148 US 92, 13 SCt 485, 37 LEd 380 (1893), cited *ante*, at 428

In 1950, the Court noted that the first line of cases stands for "the principle that the destruction of privately owned land by flooding is 'a taking' to the extent of the destruction caused," and that those rulings had already "been limited by later decisions in some respects" *United States v Kansas City Life Ins Co*, 339 US 799, 809-810, 70 SCt 885, 890-891, 94 LEd 1277 Even at the time of its decision, *St Louis v Western Union Telegraph Co* addressed only the question "[w]hether the city has power to collect rental for the use of streets and public places" when a private company seeks exclusive use of land whose "use is common to all members of the public, and [is] open equally to citizens of other States with those of the State in which the street is situate" 148 US, at 98-99, 13 SCt, at 487-488 On its face, that issue is distinct from the question here: whether appellant may extract from Teleprompter a fee for the continuing use of her roof space above and beyond the fee set by statute, namely, "any amount which the commission shall, by regulation, determine to be reasonable" NYExecLaw § 828(1)(b) (McKinney Supp1982)

[6] In my view, the fact that § 828 incidentally protects so-called "crossover" wires that do not currently serve tenants, see *ante*, at 422, n 2, does not affect § 828's fundamental character as a piece of landlord-tenant legislation As the Court recognizes, *ante*, at 422, crossovers are crucial links in the cable "highway," and represent the simplest and most economical way to provide service to tenants in a group of buildings in close proximity Like the Court, I find "no constitutional difference between a crossover and a noncrossover installation," *ante*, at 438 Even assuming, *arguendo*, that the crossover extension in this case works a taking, I would be prepared to hold that the incremental governmental intrusion caused by that 4- to 6-foot wire, which occupies the cubic volume of a child's building block, is a *de minimis* deprivation entitled to no compensation

[7] See, *eg*, NYMultDwellLaw § 35 (McKinney 1974) (requiring entrance doors and lights); § 36 (windows and skylights for public halls and stairs); § 50-a (Supp1982) (locks and intercommunication systems); § 50-c (lobby attendants); § 51-a (peepholes); § 51-b (elevator mirrors); § 53 (fire escapes); § 57 (bells and mail receptacles); § 67(3) (fire sprinklers) See also *Queenside Hills Realty Co v Saxl*, 328 US 80, 66 SCt 850, 90 LEd 1096 (1946) (upholdingconstitutionality of New York fire sprinkler provision)

These statutes specify in far greater detail than § 828 what types of physical facilities a New York landlord must provide his tenants and where he must provide them See, *eg*, NYMultDwellLaw § 75 (McKinney 1974) (owners of multiple dwellings must provide "proper appliances to receive and distribute an adequate supply of water," including "a proper sink with running water and with a two-inch waste and trap"); § 35 (owners of multiple dwellings with frontage exceeding 22 feet must provide "at least two lights, one at each side of the entrance way, with an aggregate illumination of one hundred fifty watts or equivalent illumination"); § 50-a(2) (Supp1981-1982) (owners of Class A multiple dwellings must provide intercommunication system "located at an automatic self-locking door giving public access to the main entrance hall or lobby")

Apartment building rooftops are not exempted See § 62 (landlords must place parapet walls and guardrails on their roofs "three feet six inches or more in height above the level of such area")

[8] Indeed, appellant's counsel made precisely this claim at oral argument Urging the rule which the Court now adopts, appellant's counsel suggested that a taking would result even if appellant owned the cable "[T]he precise location of the easement [taken by Teleprompter changes] from the surface

of the roof to inside the wire [T]he wire itself is owned by the landlord, but the cable company has the right to pass its signal through the wire without compensation to the landlord, for its commercial benefit" Tr of Oral Arg 15

[9] In her pretrial deposition, appellant conceded not only that owners of other apartment buildings thought that the cable's presence had enhanced the market value of their buildings, App 102-103, but also that her own tenants would have been upset if the cable connection had been removed *Id*, at 107, 108, 110

[10] For this reason, the Court provides no support for its *per se* rule by asserting that the State could not require landlords, without compensation, "to permit third parties to install swimming pools," *ante*, at 436, or vending and washing machines, *ante*, at 439, n 17, for the convenience of tenants Presumably, these more intrusive government regulations would create difficult takings problems even under our traditional balancing approach Depending on the character of the governmental action, its economic impact, and the degree to which it interfered with an owner's reasonable investment-backed expectations, among other things, the Court's hypothetical examples might or might not constitute takings These examples hardly prove, however, that a permanent physical occupation that works a *de minimis* interference with a private property interest is a taking *per se*

[11] It is far from clear that, under New Yorklaw, appellant's tenants would lack all property interests in the few square inches on the exterior of the building to which Teleprompter's cable and hardware attach Under modern landlord-tenant law, a residential tenancy is not merely a possessory interest in specified space, but also a contract for the provision of a package of services and facilities necessary and appurtenant to that space See R Schoshinski, American Law of Landlord and Tenant § 3:14 (1980) A modern urban tenant's leasehold often includes not only contractual, but also statutory rights, including the rights to an implied warranty of habitability, rent control, and such services as the landlord is obliged by statute to provide Cf n 7, *supra*

[12] Happily, the Court leaves open the question whether § 828 provides landlords like appellant sufficient compensation for their actual losses See *ante*, at 441 Since the State Cable Television Commission's regulations permit higher than nominal awards if a landlord makes "a special showing of greater damages," App 52, the concurring opinion in the New York Court of Appeals found that the statute awards just compensation See 53 NY2d, at 155, 440 NYS2d, at 859, 423 NE2d, at 336 ("[I]t is obvious that a landlord who actually incurs damage to his property or is restricted in the use to which he might put that property will receive compensation commensurate with the greater injury") If, after the remand following today's decision, this minor physical invasion is declared to be a taking deserving little or no compensation, the net result will have been a large expenditure of judicial resources on a constitutional claim of little moment