Approved: February 2, 2000 Carl Dean Holmes
Date

MINUTES OF THE HOUSE COMMITTEE ON UTILITIES.

The meeting was called to order by Chairman Carl D. Holmes at 9:12 a.m. on January 27, 2000 in Room 522-S of the Capitol.

All members were present.

Committee staff present: Lynne Holt, Legislative Research Department
Mary Torrence, Revisor of Statutes
Jo Cook, Committee Secretary

Conferees appearing before the committee: Jay Allbaugh, Multimedia Cablevision
Martha Neu Smith, Kansas Manufactured Housing Assn.
Karen France, Kansas Association of Realtors
Robert Hanson, Weigand-Omega Management, Inc.
Tony Catanese, Key Management Company
Eric Sartorius, Johnson County Board of Realtors

Others attending: See Attached Guest List

SB 54 **Tenant access to television service**.

Chairman Holmes welcomed Jay Allbaugh, who testified in support of **SB 54** on behalf of the Kansas Cable Telecommunications Association and Multimedia Cablevision (Attachment 1). Mr. Allbaugh stated that the bill allows the cable company to deliver service to residents when such service is requested by either the landlord or the resident free from any access fee or profit sharing and deliverable under the terms of the franchise agreement.

Mr. John Federico, also on behalf of the Kansas Cable Telecommunications Association, provided written testimony as a proponent of **SB 54** (Attachment 2).

Mr. Allbaugh responded to questions from Rep. Alldritt, Rep. Loyd, Rep. Vining and Rep. Myers.

Kansas Manufactured Housing Association Executive Director, Martha Neu Smith, presented testimony in opposition to **SB 54** (Attachment 3). She stated that the most compelling reason for this was a 1982 US Supreme Court decision which stated that landlords could not restrict cable television access to tenants and could receive compensation for that access. Their second reason for opposition is that they feel this issue will be determined at the federal level. Thirdly, they question if there is evidence that substantiates a problem.

Karen France, Director of Governmental Affairs for the Kansas Association of Realtors, testified next as an opponent of **SB 54** (Attachment 4). She stated that the first reason is that the legislation is unconstitutional and constitutes a taking of private property without compensation. She provided a copy of the Supreme Court decision know as the Loretto case (Attachment 5). She also explained that the bill should be rejected because the state should not be in the business of allowing tenants to force property owners to alter their contractual lease agreement in the name of consumer choice.

Appearing as the next opponent to **SB 54** was Robert Hanson, President of Weigand-Omega Management, Inc. Mr. Hanson explained he felt the current provisions in the Landlord Tenant Law adequately cover what is included in **SB 54**. He addressed the issue of easements and access agreements and included with his testimony (Attachment 6) a copy of an Easement Access Compensation Agreement and two letters from a law firm about mandatory building access.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

MINUTES OF THE HOUSE COMMITTEE ON UTILITIES in Room 522-S at 9:12 a.m. on January 27, 2000.

Mr. Tony Catanese, Vice-President of Key Management Company, presented testimony in opposition to **SB 54** (Attachment 7). Mr. Catanese expressed his belief that this bill was inappropriate and probably unconstitutional. He believes that some special interests wish to take away the rights of property owners for their own benefit and that any forced access would take away constitutionally protected rights of property owners.

Johnson County Board of Realtors Governmental Affairs Director Eric Sartorius appeared next as an opponent to **SB 54** (Attachment 8). Mr. Sartorius explained that they believe this bill tramples on private property rights, it will stifle competition and limit choice, and it is a policy in search of a problem.

Written testimony from William J. Burhop, Executive Director of the Independent Cable & Telecommunications Association in opposition to **SB 54** (Attachment 9) was provided to the committee.

Conferees appearing as opponents to **SB 54** responded to questions from Rep. Holmes, Rep. O'Brien, Rep. Loyd, Rep. Sloan and Rep. Krehbiel.

Chairman Holmes reminded the committee that the joint Education and Utilities Sub-committee on KAN-ED would be meeting on Monday, January 31 in Room 313-S at 9:00 a.m.

The meeting was adjourned at 10:56 a.m.

The next Utilities Committee meeting will be Tuesday, February 1, 2000 at 9:00 a.m.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

HOUSE UTILITIES COMMITTEE GUEST LIST

DATE: January 27, 2000

NAME	REPRESENTING
Don K Miles	KEC
Kim Gulley	LKM
Jennifer Crows	Federico Consulting
Martha Lee Smith	KMHA
Mike Mooney	Sprint
BRUCE GRAHAM	KEPCo
Ron Hein	KCTA
John Federico	KCTA
Janette Luehring	KCC
Ann Dinkles	DOB
[illegible]	Hein/Weir Chrtd
Sandy Braden	McGill Gaches Assoc
TOM KREWSON	COMCAST
Erik Sartorius	Johnson Co. Board of Realtors
KAREN FRANCE	Ks. ASSN OF REALTORS

HOUSE UTILITIES COMMITTEE GUEST LIST

DATE: JAN 27, 2000

NAME	REPRESENTING
BILL YANEK	KS ASSN OF REALTORS
WALKER HENDRIX	CURB
Chris Wilson	KGC
Bob Hanson	Wichita
Tony Cantonese	Wichita
~~[illegible]~~	~~[illegible]~~
Ed Schaub	WRI

Testimony In Support of SB 54

Presented By Jay Allbaugh; Multimedia Cablevision

On Behalf Of The Kansas Cable Telecommunications Association

House Utilities Committee

January 27, 2000

Chairman Holmes and members of the House Utilities Committee, my name is Jay Allbaugh and I appear before you today on behalf of the Kansas Cable Telecommunications Association and Multimedia Cablevision, a communications company serving multichannel video programming to over 90 rural and urban communities throughout Kansas.

I stand in support of SB 54, a bill we introduced last year to rectify a problem that has only grown in severity since the bill was debated during the 1999 legislative session. By way of background, the bill was introduced in the Senate Commerce Committee and eventually assigned to a subcommittee for further debate. In an effort to address each and every concern of the opponents to SB 54, we negotiated 4 different drafts of the bill before it was eventually passed out of Committee and then by the full Senate by a vote of 34-4.

A summary of the issue is as follows: Cable television providers have franchise agreements with cities and towns across Kansas that require, when requested, that cable service be provided to residents living within the boundaries of that city or town. Often times, a cable service provider is completely denied access to a multiple dwelling unit (apartment complex) or is asked to pay a "door charge or fee" and/or forced into a "revenue sharing" arrangement with the landlord of the apartment complex merely for trying to fulfill its' obligation under the terms of the franchise agreement with the city!

SB 54 simply allows the cable company to deliver service to those residents when such service is requested by either the landlord or the resident free from any access fee or profit sharing, and only when specifically requested, and only if the service is delivered under the terms of the franchise agreement.

I mentioned earlier that attempts were made to appease the concerns of the Kansas Realtors Association and the Kansas Manufactured Housing Association. As part of that effort, language was added to SB 54 that:

1. Protects the financial interests of landlords who have installed private satellite or cable video programming systems (satellite dishes, etc.)

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2. Protects existing contracts between landlords and providers of television services

3. Protects the landlord by requiring that either the resident or the provider of television programming bear the cost of the installation.

4. Protects the landlord by requiring that either the resident or the provider of television programming bear the cost of any damage to the property.

5. Does not limit in any way the landlords' right to enter into exclusive agreements, to enter into "bulk-rate" agreements, or engage in revenue sharing with individual providers of television services.

In short, this is as much a bill about "consumer choice," the right of the consumer to select the television service provider of their choosing as it is about allowing a television service provider the opportunity to fulfill its contractual obligations without being held hostage at the door by the landlord.

"Consumer choice" is at the foundation of each and every argument we put forth in support of SB 54. The current practice of denying access or forcing revenue sharing is an economic barrier to providers that are patently unfair to residents. Unfair, because often times the individuals or families that occupy apartments do not enjoy the luxury of having numerous housing options available to them, and by the actions of the landlord, is denied access to local news, weather alerts, school closings, emergency alert signals, etc..

Further, tenants who are denied a choice in their video services because the landlord becomes the "middleman" between the consumer and the provider may also be denied the opportunity to enjoy the exciting products that are available to the rest of the general public (i.e.: high speed internet access and two-way video, etc). SB 54 would ensure that each and every consumer, if they choose to, would be able to access the full range of telecommunications services available to others in their community.

Finally, I feel comfortable asserting that in almost every instance, the consumer ultimately benefits when competition is prevalent in the marketplace. SB 54 ensures "fair" competition and advances the state's interest in promoting a competitive market for video programming services. Currently, federal rule prohibits a landlord from denying a tenant access to satellite service. The cable television industry does not enjoy the same protection as our competitor does. SB 54 would promote a competitive environment where the consumer will be the big winner!

Throughout this process we have tried to be fair in addressing the concerns of the opponents to SB 54. But each time we satisfied one of their concerns, another was raised. In spite of that, and because of the importance of this piece of legislation, we are prepared to once again compromise.

It has come to our attention that opponents to the bill have become concerned with a 1982 US Supreme Court decision, (Loretto), that ruled that cable access where no easement existed constituted a taking and the property owner was entitled to "just" compensation. We feel strongly that the problems we are encountering in Kansas do not lend themselves to comparison to the facts considered in the Loretto case. We are seeking to use existing, compatible easements and stand before you today with an amendment that will satisfy any legal requirements that linger as to the constitutionality of our efforts to deliver service to tenants of multiple dwelling units in the state of Kansas.

Please also be aware that the legislation you are considering is not controversial and is not unique. Similar legislation has passed in other states and the US Court of Appeals in the Fourth Circuit in Virginia, upheld a statute similar to SB 54.

It is important to note that subsequent to the Loretto decision the 1984 Cable Act was enacted. This was followed by the passage of the 1992 and 1996 Cable Act. These decisions on the federal level provided some structure to address this issue.

In closing, I want to remind you that unfortunately this is a growing problem and if not fixed this year, will need to be addressed again next, or the year after. This is an issue centered on two basic issues, that of fairness, and that of choice. We appreciate your willingness to listen and ask for your favorable consideration of SB 54 as amended.

Jay Allbaugh

Multimedia Cablevision

(800) 756-1528

FEDERICO CONSULTING
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Government Affairs
Public Relations
Regulatory Counsel
JOHN J. FEDERICO, J.D.

MEMORANDUM

To: House Utilities Committee Members

From: John Federico on behalf of the KCTA

Date: January 26, 2000

Re: Background Information on SB54
The "Television Services Consumer Choice Bill"

What SB 54 does:

- The bill, as amended, would prohibit landlords from "denying access" or demanding "access fees" from providers of television services when the service has been requested by an individual tenant(s) and service is provided under the terms of the municipal or county franchise agreement.
- It protects existing contracts between landlords and providers of television services.
- It protects the financial interests of landlords who have installed private satellite or cable video programming systems (satellite dishes, etc.).
- Requires that either the provider of television programming services or the resident bear the cost of installation or damages.

Who:

- SB 54 was introduced by the Kansas Cable Telecommunications Association.
- After much negotiation and several different bill drafts, the bill has been significantly "narrowed" following negotiations with the Kansas Association of Realtors and the Kansas Manufactured Housing Association.
- The bill passed the Senate on February 25, 1999 by a vote of 34-4.

Summary:

- Cable companies have franchise agreements with cities and towns across Kansas that require that, when requested, service be provided to residents within their jurisdiction. SB 54 will allow the cable company access to those residents only when such service is requested and the services are delivered under the terms of the franchise agreements. Further, SB 54 will prevent the landlord from requesting an access fee or "door charge" for the right to fulfill the obligation under the terms of the franchise agreement.
- The bill does not limit in any way the landlords' right to enter into exclusive agreements or engage in revenue sharing with individual providers of television program services.
- Plan and simple, SB 54 preserves the right of a consumer to choose who provides their television service, while protecting the rights of the landlord/owner of the apartment building. More importantly, it eliminates the growing problems cable television providers experience when trying to abide by the terms of their franchise agreement with local municipalities and counties.

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HOUSE UTILITIES
DATE: 1-27-00
ATTACHMENT 2

KANSAS MANUFACTURED HOUSING ASSOCIATION

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TESTIMONY

BEFORE

THE

HOUSE UTILITIES COMMITTEE

TO: Representative Carl Holmes, Chairman
And Members of the Committee

FROM: Martha Neu Smith
Executive Director

DATE: January 27, 2000

RE: Sub. Senate Bill 54

Mr. Chairman and members of the Committee, my name is Martha Neu Smith and I am the Executive Director of Kansas Manufactured Housing Association (KMHA). KMHA is a statewide trade association representing all facets of the manufactured housing industry.

I appear today in opposition to Sub. SB 54. The reason for our opposition is three fold. First, and probably the most compelling reason is a 1982 United States Supreme Court decision of a New York State law which stated that landlords could not restrict cable television access to tenants and could receive $1 in compensation for that access. The Court's decision stated that without just compensation to the landlords, the New York State law constituted a "taking" of an owner's private property.

Sub. SB 54 has a similar provision, restricting landlords from receiving any compensation.

I recently received a list of Summary of State Consumer Choice Laws which lists 14 states plus the District of Columbia as all having some type of state law addressing cable access (attached). After reviewing the list it is important to note that all the states which have passed their cable access law after the 1982 Supreme Court decision, either provide for just compensation to the landlord or do not specifically restrict landlord compensation. The only exception to this is the State of West Virginia.

KMHA's second reason for opposition is that we feel this issue will be determined at the federal level. The Federal Communications Commission initiated the public comment process in Proposed Rule Making ---99-141---entitled *Promotion of Competitive Networks in Local Telecommunications Markets* on July 7, 1999. While this rule making does address telecommunications, they are requesting the same type of access, "access to rights-of way, buildings, rooftops, and facilities in multiple tenant environments". KMHA's national association, Manufactured Housing Institute and ten other national associations, representing every type of commercial and residential real estate across the country have formed a coalition to oppose the proposed forced building access.

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ATTACHMENT 3

KMHA's third reason for opposition is, where is the evidence that proves that there is a problem. How many owners of manufactured home communities or multi family dwellings have denied cable providers access to their residents?

Charlton Research Company recently conducted a survey designed to determine: the level of access granted to competitive telecommunications services by real estate owners and managers; and find out what the primary motivation was for real estate owners and managers to offer telecommunications services to their tenants. With regards to level of access, the survey found that owners and managers are actively negotiating contracts with over three-fourths of the competitive telecommunications providers. While just over one-third of real estate owners and managers have denied access, they usually did so believing it was because of problems on the provider's behalf.

The overwhelming response to what is the motivation for offering services, centered around tenant interest. The number one response of the owners and managers was "*to offer tenants options and amenities.*" Another important reason noted was *to keep their property competitive and marketable*.

Its clear from this survey that telecommunications companies are not being denied access so why should we assume that cable providers are being denied?

With those three reasons, 1982 Supreme Court decision, FCC's proposed rulemaking and lack of evidence documenting a problem, I would respectfully ask the Committee to oppose Sub. SB 54 in its current form.

Thank you for the opportunity to comment.

Summary of State Consumer Choice Laws

Landlord Compensation

Connecticut: (1995) Provides for procedures to determine the amount of landlord compensation. Post 1982 Supreme Court decision.

District of Columbia: (No date) Does not address landlord compensation.

Illinois: (1986) Provisions for "just compensation". Post 1982 Supreme Court decision.

Maine: (1987) Provides for landlord compensation of $1.00 and establishes a procedure for the state cable commission to resolve disputes regarding compensation. Post 1982 Supreme Court decision.

Maryland: (1984) N/A (utility & condominiums)

Massachusetts: (1996) Does not restrict landlord compensation. Post 1982 Supreme Court decision.

Minnesota: (1983) Provides landlord compensation. Post 1982 Supreme Court decision.

Nevada: (1987) Provides landlord compensation. Post 1982 Supreme Court decision.

New Jersey: (1982) No landlord compensation. Same year as Supreme Court decision, June 30, 1982

Pennsylvania: (1991) Provides landlord "just compensation". Post 1982 Supreme Court decision.

New York: (1973?) Provides landlord with compensation pursuant to NY Cable Commission with provision to appeal. Pre 1982 Supreme Court decisions.

Rhode Island: (1986) Provides set landlord compensation $1.00. Provides procedure by which a landlord may contest access to premise plans or compensation. Post 1982 Supreme Court decision.

Virginia: (1982) No landlord compensation. Same year as Supreme Court decision June 30, 1982.

West Virginia: (1993) No landlord compensation. Post 1982 Supreme Court decision.

Wisconsin: (1989) Does not restrict landlord compensation. Post 1982 Supreme Court decision.

Kansas Association of REALTORS®

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TO: HOUSE UTILITIES COMMITTEE

FROM: KAREN FRANCE, DIRECTOR OF GOVERNMENTAL AFFAIRS

DATE: JANUARY 27, 2000

SUBJECT: SUBSTITUE FOR SB 54, CABLE ACCESS

Thank you for the opportunity to testify. The Kansas Association of REALTORS® is opposed to this legislation and request that you do not recommend it favorable for passage.

This legislation should be rejected for two reasons:

First, the legislation is unconstitutional and constitutes a taking of private property without compensation. Second, the State should not be in the business of allowing tenants to force property owners to alter their contractual lease agreement in the name of "consumer choice".

1. The provisions of this bill are unconstitutional.

This legislation, in conjunction with the mandatory access law already in the Kansas Landlord Tenant law (Attachment 1), is similar to a New York state law which the United States Supreme Court ruled unconstitutional in 1982.

The New York Law provided:

"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."

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ATTACHMENT 4

A landlord brought suit against a cable television company that had the exclusive franchise for certain areas of Manhattan and which had installed cables on the landlord's building before the landlord acquired the building. The suit alleged that the company's installation was a trespass and, since it relied on the state law to justify its action, it constituted a taking without just compensation.

The case was certified as a class action lawsuit, representing all similarly situated landlords. The City of New York, who granted the company the franchise, intervened in the case. At each appeal level within the New York state courts, the cable company and the city prevailed. But the property owners did not give up. They appealed their case to the United States Supreme Court and the United States Supreme Court reversed the lower court's decision.

The United States Supreme Court held that the minor, but permanent, physical occupation of the owner's property authorized by the state law constituted a "taking" of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution. The court found that, when the character of the governmental action is a permanent physical occupation of real property, there is a taking to the extent of the occupation, regardless of whether the action achieves an important public benefit or has only minimal economic impact on the owner.

The language in the bill before you, in conjunction with the language which already exists in the Kansas Landlord Tenant Law is remarkably similar to the New York statute which the Supreme Court ruled unconstitutional. We believe it is ill-advised for the Kansas legislature to enact legislation which has already been ruled unconstitutional, and we urge you to not only reject this proposal, but to also repeal the unconstitutional provision of the Landlord Tenant law already on the books.

2. Consumer choice

The proponents of this legislation have touted it as a "consumer choice" issue, in that consumers should be able to choose which cable company or cable channels they want. Tenants make choices at the time they choose to sign a lease. They choose where they want to live based upon the amenities which meet their criteria. They do not have inalienable rights to force the owner to change the amenities after they have contractually agreed to accept the property with full notice as to what sort of cable service is or is not available.

I recently experienced this "choosing" process. Because we had a fire in our home after Christmas, we were in the difficult position of looking for a place to re-locate to while the house is being re-constructed. We looked at approximately three different locations and then had to choose which one would have sufficient space and features to help our family of five survive for two or three months.

In the decision-making process, we laid out the information for each of the locations on the table and started evaluating them to determine which met our needs. Some of them had coin-operated laundry facilities down the hall, some had regular washer and dryers in the units. Some offered covered parking, some did not. Some provided cable, some did not; some provided only basic cable but made extended cable available for an extra charge.

Eventually we chose the apartment that had the largest square footage, laundry machines off the kitchen and covered parking. We opted to pay the additional rent for extended cable.

When we signed our lease, we agreed to the amenities in that apartment. If we had chosen the apartment with coin-operated facilities down the hall, I would never dream of being able to force our landlord to install laundry machines in our unit. I would never dream that the legislature would allow me to have a contractor come and install a covered parking spot for me, if the landlord had not provided it. I made certain choices when I chose one apartment over another. That was the time for consumer choice, not after I had entered into an agreement.

This bill actually interferes with contractual agreements, it provides consumer choice after-the-fact.

SUMMARY

In summary, in light of its unconstitutional nature, we urge this committee to not only **not pass** this piece of legislation, but also to **repeal** the existing unconstitutional provision of the Kansas Landlord Tenant law. Passage of this bill will work an unconstitutional taking of the private property rights of apartment owners and permits cable companies to interfere with the contractual agreements entered into by the property owners and the tenants.

We appreciate the opportunity to testify and will be happy to answer any questions the committee may have.

Attach 1

(1) Service of process and receiving and receipting for notices and demands; and

(2) performing the obligations of the landlord under this act and under the rental agreement and expending or making available for such purpose all rent collected from the premises.

History: L. 1975, ch. 290, § 12; July 1.

58-2552. Delivery of possession of premises; action for possession; damages. At the commencement of the term the landlord shall deliver possession of the premises to the tenant in compliance with the rental agreement and K.S.A. 58-2553. The landlord may bring an action for possession against any person wrongfully in possession and may recover the damages provided in subsection (c) of K.S.A. 58-2570.

History: L. 1975, ch. 290, § 13; July 1.

Cross References to Related Sections:
Forcible detainer against holdover tenants, see 61-2301 to 61-2311, inclusive.

Research and Practice Aids:
Landlord and Tenant ⇐ 128(1).
C.J.S. Landlord and Tenant §§ 310, 311.

58-2553. Duties of landlord; agreement that tenant perform landlord's duties; limitations. (a) Except when prevented by an act of God, the failure of public utility services or other conditions beyond the landlord's control, the landlord shall:

(1) Comply with the requirements of applicable building and housing codes materially affecting health and safety. If the duty imposed by this paragraph is greater than any duty imposed by any other paragraph of this subsection, the landlord's duty shall be determined in accordance with the provisions of this paragraph;

(2) exercise reasonable care in the maintenance of the common areas;

(3) maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating and air-conditioning appliances including elevators, supplied or required to be supplied by such landlord;

(4) except where provided by a governmental entity, provide and maintain on the grounds, for the common use by all tenants, appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish and other waste incidental to the occupancy of the dwelling unit and arrange for their removal; and

(5) supply running water and reasonable amounts of hot water at all times and reasonable heat, unless the building that includes the dwelling units is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection. Nothing in this section shall be construed as abrogating, limiting or otherwise affecting the obligation of a tenant to pay for any utility service in accordance with the provisions of the rental agreement. The landlord shall not interfere with or refuse to allow access or service to a tenant by a communication or cable television service duly franchised by a municipality.

(b) The landlord and tenants of a dwelling unit or units which provide a home, residence or sleeping place for not to exceed four households having common areas may agree in writing that the tenant is to perform the landlord's duties specified in paragraphs (4) and (5) of subsection (a) of this section and also specified repairs, maintenance tasks, alterations or remodeling, but only if the transaction is entered into in good faith and not for the purpose of evading the obligations of the landlord.

(c) The landlord and tenant of any dwelling unit, other than a single family residence, may agree that the tenant is to perform specified repairs, maintenance tasks, alterations or remodeling only if:

(1) The agreement of the parties is entered into in good faith, and not to evade the obligations of the landlord, and is set forth in a separate written agreement signed by the parties and supported by adequate consideration;

(2) the work is not necessary to cure noncompliance with subsection (a)(1) of this section; and

(3) the agreement does not diminish or affect the obligation of the landlord to other tenants in the premises.

(d) The landlord may not treat performance of the separate agreement described in subsection (c) of this section as a condition to any obligation or the performance of any rental agreement.

History: L. 1975, ch. 290, § 14; L. 1982, ch. 230, § 2; July 1.

Law Review and Bar Journal References:
"The Mortgagee's Interest in Rents: Policy and Proposals," Patrick A. Randolph, Jr., 29 K.L.R. 1, 21 (1980).
"Survey of Kansas Law: Real Property," Michael J. Davis, 32 K.L.R. 773 (1984).
"Tenant Remedies for Breach of Habitability: Tort Dimensions of a Contract Concept," James Charles Smith, 35 K.L.R. 505, 510 (1987).

4-4

[458 US 419]

JEAN LORETTO, on behalf of herself and all others similarly situated, Appellant

v

TELEPROMPTER MANHATTAN CATV CORP. et al.

458 US 419, 73 L Ed 2d 868, 102 S Ct 3164

[No. 81–244]

Argued March 30, 1982. Decided June 30, 1982.

Decision: New York law requiring landlords to allow cable television facilities on property, held to be "taking" of property compensable under Fifth and Fourteenth Amendments.

SUMMARY

The State of New York enacted legislation to facilitate tenant access to cable television (CATV). The law 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." The Commission ruled that a one-time $1 payment is a normal fee to which a landlord is entitled. A landlord brought suit against a cable television company which has the exclusive franchise for certain areas of Manhattan and which had installed cables on the landlord's building—both "crossovers" for serving other buildings and "noncrossovers" serving the landlord's tenants—before the landlord acquired the buidling, alleging that the company's installation was a trespass and, insofar as it relied on the state law, a taking without just compensation. The City of New York, which granted the company the franchise intervened. The New York Supreme Court, Special Term, granted summary judgment to the company and the City, upholding the constitutionality of the state law, (98 Misc 2d 944, 415 NYS2d 180), and the New York Supreme Court, Appellate Division, First Department, affirmed (73 Ad 2d 849, 422 NYS2d 550). On appeal, the Court of Appeals of New York upheld the statute, ruling that the law served a legitimate public police power purpose and stating that the regulation did not have an excessive economic impact

Briefs of Counsel, p 1494, infra.

HOUSE UTILITIES
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ATTACHMENT 5

upon a landlord when measured against her aggregate property rights, and that it did not interfere with any reasonable investment-backed expectation and, accordingly, did not work the taking of the landlord's property (53 NY2d 124, 423 NE2d 320).

On appeal, the United States Supreme Court reversed and remanded. In an opinion by MARSHALL, J., joined by BURGER, Ch. J., and POWELL, REHNQUIST, STEVENS and O'CONNOR, JJ., it was held that the minor but permanent physical occupation of the owner's property authorized by the state law constituted a "taking" of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution, since when the character of the governmental action is a permanent physical occupation of real property, there is 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, the cable installation in question constituting a physical occupation and taking since the installation occupied portions of a landlord's roof inside of her building, there being no constitutional difference between a crossover and noncrossover installation.

BLACKMUN, J., joined by BRENNAN and WHITE, JJ., dissenting, expressed the view that the court erected a strained and untenable distinction between temporary physical invasions, which constitutionality concededly is subject to a balancing process, and permanent physical occupations, which are takings, and adopted an approach that is potentially dangerous as well as misguided.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

26 Am Jur 2d, Eminent Domain § 157; 74 Am Jur 2d, Telecommunications § 186

USCS, Constitution, 5th and 14th Amendments

US L Ed Digest, Eminent Domain § 98

L Ed Index to Annos, Eminent Domain; Radio or Television

ALR Quick Index, Cable Television; Eminent Domain

Federal Quick Index, Eminent Domain; Telecommunications

ANNOTATION REFERENCES

Supreme Court's views as to what constitutes "taking," within meaning of Fifth Amendment's command that private property not be taken for public use without just compensation. 57 L Ed 2d 1254.

Validity and construction of municipal ordinances regulating community antenna television services (CATV). 41 ALR3d 384.

5-2

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Eminent Domain § 98 — taking — statute authorizing permanent occupation of property — installation of cable television facilities

1a–1c. A minor but permanent physical occupation of an owner's property authorized by a state law providing that a landlord must permit a cable television company to install its cable facilities, which occupied portions of the landlord's roof and side of her building, upon her property constitutes a "taking" of property for which just compensation is due under the Fifth and Fourteenth Amendments, there being no constitutional difference between a "crossover" line for serving other buildings and a "noncrossover" installation serving the landlord's tenants. (Blackmun, Brennan, and White, JJ., dissented from this holding.)

Constitutional Law §§ 878, 879 — police power — development of cable television

2. A state law intending to facilitate tenant access to cable television and to prevent landlords' interference with that access serves the legitimate public purpose of rapid development of and maximum penetration by a means of communication which has important educational and community aspects and thus is within the state's police power.

Eminent Domain § 98 — takings — governmental regulation — standards for determining whether compensation is due

3. Although there is no set formula to determine, in all cases, whether compensation is constitutionally due for government restriction of property, standards for such determination include the economic impact of the regulation, especially the degree of interference with investment-backed expectations, and the character of the governmental action, since 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.

Eminent Domain § 75 — taking — physical occupation of property

4. When a physical intrusion by government on private property reaches the extreme form of a permanent physical occupation, a taking has occurred, in such a case the character of the government action being not only an important factor in resolving whether the action works a taking but being determinative.

Eminent Domain § 75 — taking — physical invasion — physical occupation

5. A government's physical invasion short of an occupation of property is subject to a balancing process to determine whether a taking has occurred, but this does not suggest that a permanent physical occupation would ever be exempt from the takings clause of the Fifth Amendment.

Eminent Domain § 75 — permanent occupation — physical invasion — role of government

6a, 6b. 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, although 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.

Eminent Domain § 75 — taking — permanent occupation

7. 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.

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and 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.

Eminent Domain § 75 — permanent occupation — temporary limitation

8a, 8b. The permanent and absolute exclusivity of a physical occupation distinguish it from temporary limitations on an owner's right to exclude, since not every physical invasion is a taking; temporary limitations are subject to more complex balancing process to determine whether they are a taking, the rationale being that they do not absolutely dispossess the owner of his right to use, and exclude others from, his property.

Eminent Domain § 75 — constitutional protection — size of area

9. Constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.

Damages § 125 — compensation for taking — factors — permanent occupation

10. Once the fact of permanent occupation of property is shown, a court should consider the extent of the occupation as one relevant factor in determining the compensation due.

Eminent Domain § 75 — taking — landlord's previous occupation of space

11a, 11b. It is constitutionally irrelevant whether a landlord (or her predecessor in title) had previously occupied space upon a building's roof and along its exterior wall taken by state, 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.

Eminent Domain § 98 — taking — defining property rights

12. Under the taking clause of the Fifth Amendment, the government does not have unlimited power to redefine property rights.

Eminent Domain § 98 — taking — state regulatory power

13. 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 where the government does not authorize the permanent occupation of the landlord's property by a third party and 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 the 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, will be analyzed under the multi-factor inquiry generally applicable to non-possessory government activity.

Appeal and Error § 1750 — remand — issue remaining to be decided

14. The United States Supreme Court's conclusion that a state law which requires a landlord to permit a cable television company to install its cable facilities on the property works a taking of a portion of the landlord's property does not presuppose that the fee which many landlords obtained from the cable television company prior to the law's enactment is a proper measure of the value of the property taken, and the issue of the amount of compensation that is due is a matter for the state courts to consider on remand.

SYLLABUS BY REPORTER OF DECISIONS

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-

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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.

(a) When the "character of the governmental action," Penn Central Transportation Co. v New York City, 438 US 104, 124, 57 L Ed 2d 631, 98 S Ct 2646, is a permanent physical occupation of real property, there is 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) 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.

(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.

53 NY2d 124, 423 NE2d 320, reversed and remanded.

Marshall, J., delivered the opinion of the Court, in which Burger, C. J., and Powell, Rehnquist, Stevens, and O'Connor, JJ., joined. Blackmun, J., filed a dissenting opinion, in which Brennan and White, JJ., joined.

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APPEARANCES OF COUNSEL

Michael S. Gruen argued the cause for appellants.
Erwin N. Griswold argued the cause for appellees.
Briefs of Counsel, p 1494, infra.

OPINION OF THE COURT

[458 US 421]

Justice **Marshall** delivered the opinion of the Court.

[1a] 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 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. NY Exec Law § 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, 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 Corporation and Teleprompter Manhattan CATV (collectively Teleprompter)[1] permission to install a cable on the building and the exclusive privilege of furnishing cable

[458 US 422]

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, 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

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

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(1) Service of process and receiving and receipting for notices and demands; and

(2) performing the obligations of the landlord under this act and under the rental agreement and expending or making available for such purpose all rent collected from the premises.

History: L. 1975, ch. 290, § 12; July 1.

58-2552. Delivery of possession of premises; action for possession; damages. At the commencement of the term the landlord shall deliver possession of the premises to the tenant in compliance with the rental agreement and K.S.A. 58-2553. The landlord may bring an action for possession against any person wrongfully in possession and may recover the damages provided in subsection (c) of K.S.A. 58-2570.

History: L. 1975, ch. 290, § 13; July 1.

Cross References to Related Sections:

Forcible detainer against holdover tenants, see 61-2301 to 61-2311, inclusive.

Research and Practice Aids:

Landlord and Tenant ⇐ 125.1(1).

C.J.S. Landlord and Tenant §§ 310, 311.

58-2553. Duties of landlord; agreement that tenant perform landlord's duties; limitations. (a) Except when prevented by an act of God, the failure of public utility services or other conditions beyond the landlord's control, the landlord shall:

(1) Comply with the requirements of applicable building and housing codes materially affecting health and safety. If the duty imposed by this paragraph is greater than any duty imposed by any other paragraph of this subsection, the landlord's duty shall be determined in accordance with the provisions of this paragraph;

(2) exercise reasonable care in the maintenance of the common areas;

(3) maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating and air-conditioning appliances including elevators, supplied or required to be supplied by such landlord;

(4) except where provided by a governmental entity, provide and maintain on the grounds, for the common use by all tenants, appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish and other waste incidental to the occupancy of the dwelling unit and arrange for their removal; and

(5) supply running water and reasonable amounts of hot water at all times and reasonable heat, unless the building that includes the dwelling units is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection. Nothing in this section shall be construed as abrogating, limiting or otherwise affecting the obligation of a tenant to pay for any utility service in accordance with the provisions of the rental agreement. The landlord shall not interfere with or refuse to allow access or service to a tenant by a communication or cable television service duly franchised by a municipality.

(b) The landlord and tenants of a dwelling unit or units which provide a home, residence or sleeping place for not to exceed four households having common areas may agree in writing that the tenant is to perform the landlord's duties specified in paragraphs (4) and (5) of subsection (a) of this section and also specified repairs, maintenance tasks, alterations or remodeling, but only if the transaction is entered into in good faith and not for the purpose of evading the obligations of the landlord.

(c) The landlord and tenant of any dwelling unit, other than a single family residence, may agree that the tenant is to perform specified repairs, maintenance tasks, alterations or remodeling only if:

(1) The agreement of the parties is entered into in good faith, and not to evade the obligations of the landlord, and is set forth in a separate written agreement signed by the parties and supported by adequate consideration;

(2) the work is not necessary to cure noncompliance with subsection (a)(1) of this section; and

(3) the agreement does not diminish or affect the obligation of the landlord to other tenants in the premises.

(d) The landlord may not treat performance of the separate agreement described in subsection (c) of this section as a condition to any obligation or the performance of any rental agreement.

History: L. 1975, ch. 290, § 14; L. 1982, ch. 230, § 2; July 1.

Law Review and Bar Journal References:

"The Mortgagee's Interest in Rents: Policy and Proposals," Patrick A. Randolph, Jr., 29 K.L.R. 1, 21 (1980).

"Survey of Kansas Law: Real Property," Michael J. Davis, 32 K.L.R. 773 (1984).

"Tenant Remedies for Breach of Habitability: Tort Dimensions of a Contract Concept," James Charles Smith, 35 K.L.R. 505, 510 (1987).

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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—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.

[458 US 423]

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

[458 US 424]

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 Corpo-

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, 423 NE2d, at 323, n 6.

3. New York Exec Law § 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."

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rations 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 NYS2d 180 (1979). The Appellate Division affirmed without opinion. 73 App Div 2d 849, 422 NYS2d 550 (1979).

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

[458 US 425]

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, affords just compensation. We noted probable jurisdiction. 454 US 938, 70 L Ed 2d 246, 102 S Ct 472 (1981).

II

[2] The Court of Appeals determined that § 828 serves the legitimate public purpose of "rapid devel-

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.

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opment of and maximum penetration by a means of communication which has important educational and community aspects," 53 NY2d, at 143–144, 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 Transportation

[458 US 426]

Co. v New York City, 438 US 104, 127–128, 57 L Ed 2d 631, 98 S Ct 2646 (1978); Delaware , L. & W. R. Co. v Morristown, 276 US 182, 193, 72 L Ed 523, 48 S Ct 276, 56 ALR 756 (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

[3] 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 compensation is constitutionally due for a government restriction of property. Ordinarily, the Court must engage in "essentially ad hoc, factual inquiries." Id., at 124, 57 L Ed 2d 631, 98 S Ct 2646. 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).

[4] 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.

[458 US 427]

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

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 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

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Green Bay Co., 13 Wall 166, 20 L Ed 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., at 181, 20 L Ed 557. 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 L Ed 336 (1879), the Court held that the city's construction

[458 US 428]

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." 99 US, at 642, 25 L Ed 336.

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, 47 L Ed 539, 23 S Ct 349 (1903); Bedford v United States, 192 US 217, 225, 48 L Ed 414, 24 S Ct 238 (1904); United States v Cress, 243 US 316, 327–328, 61 L Ed 746, 37 S Ct 380 (1917); Sanguinetti v United States, 264 US 146, 149, 68 L Ed 608, 44 S Ct 264 (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, 94 L Ed 1277, 70 S Ct 885 (1950).

In St. Louis v Western Union Telegraph Co. 148 US 92, 37 L Ed 380, 13 S Ct 485 (1893), the Court applied the principles enunciated in Pum-

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 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, 423 NE2d, at 337–338 (Cooke, C. J., 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 S Ct Rev 63, 82; Cormack, Legal Concepts in Cases of Eminent Domain, 41 Yale LJ 221, 225 (1931).

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pelly 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

[458 US 429]

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. . . .

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". . . 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, 37 L Ed 380, 13 S Ct 485 (emphasis added).[6]

Similarly, in Western Union Telegraph Co. v Pennsylvania R. Co., 195 US 540, 49 L Ed 312, 25 S Ct 133 (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

[458 US 430]

the invasion of the telephone lines would be a compensable taking. Id., at 570, 49 L Ed 312, 25 S Ct 133 (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., 65 W Va 739, 65 SE 196 (1909); Southwestern Bell Telephone Co. v Webb, 393 SW2d 117, 121 (Mo App 1965). Cf. Portsmouth Harbor

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, e.g., Western Union Telegraph Co. v Pennsylvania R. Co. 195 US 540, 566–567, 49 L Ed 312, 25 S Ct 133 (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, 37 L Ed 380, 13 S Ct 485.

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Land & Hotel Co. v United States, 260 US 327, 67 L Ed 287, 43 S Ct 135 (1922). See generally 2 J. Sackman, Nichols' Law of Eminent Domain § 6.21 (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, 90 L Ed 1206, 66 S Ct 1062 (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, 90 L Ed 1206, 66 S Ct 1062 (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, 90 L Ed 1206, 66 S Ct 1062.

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, 90 L Ed 1206, 66 S Ct 1062. See also Griggs v Allegheny County, 369 US 84, 7 L Ed 2d 585, 82 S Ct 531 (1962).

Two wartime takings cases are also instructive. In United States v Pewee Coal Co. 341 US 114, 95 L Ed 809, 71 S Ct 670 (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, 95 L Ed 809, 71 S Ct 670 (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, 2 L Ed 2d 1228, 78 S Ct 1097 (1958), by contrast, the Court found no taking

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 in original)); 1 P. Nichols, The Law of Eminent Domain 282 (2d ed 1917).

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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, 2 L Ed 2d 1228, 78 S Ct 1097, the Court reasoned that "the Government did not occupy,

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use, or in any manner take physical possession of the gold mines or of the equipment connected with them." Id., at 165–166, 2 L Ed 2d 1228, 78 S Ct 1097. 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, 23 L Ed 2d 117, 89 S Ct 1511 (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").

[5] 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.

[6a] 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, 57 L Ed 2d 631, 98 S Ct 2646. 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]

[458 US 433]

In Kaiser Aetna v United States, 444 US 164, 62 L Ed 2d 332, 100 S Ct 383 (1979), the Court held that the Government's imposition of a

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, 2 L Ed 2d 1228, 78 S Ct 1097.

9. [6b] 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, 57 L Ed 2d 631, 98 S Ct 2646, 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 v Green Bay Co., 13 Wall 166, 20 L Ed 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, 57 L Ed 2d 631, 98 S Ct 2646.

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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, 62 L Ed 2d 332, 100 S Ct 383. 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 [90 L Ed 1206, 66 S Ct 1062] (1946); Portsmouth Co. v United States, 260 US 327 [67 L Ed 287, 43 S Ct 135] (1922)." Id., at 180, 62 L Ed 2d 332, 100 S Ct 383 (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, 64 L Ed 2d 741, 100 S Ct 2035 (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, 64 L Ed 2d 741, 100 S Ct 2035.[11]

10. See also Andrus v Allard, 444 US 51, 62 L Ed 2d 210, 100 S Ct 318 (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, 62 L Ed 2d 210, 100 S Ct 318.

11. Teleprompter's reliance on labor cases requiring companies to permit access to union organizers, see, e. g., Hudgens v NLRB, 424 US 507, 47 L Ed 2d 196, 96 S Ct 1029 (1976); Central Hardware Co. v NLRB, 407 US 539, 33 L Ed 2d 122, 92 S Ct 2238 (1972); NLRB v Babcock & Wilcox Co. 351 US 105, 100 L Ed 975, 76 S Ct 679 (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;

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In short, when the "character of the governmental action," Penn Central, 438 US, at 124, 57 L Ed 2d 631, 98 S Ct 2646, is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to

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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, 62 L Ed 2d 210, 100 S Ct 318 (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.

[7, 8a] 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, 89 L Ed 311, 65 S Ct 357, 156 ALR 390 (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, 62 L Ed 2d 332, 100 S Ct 383; 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, 62 L Ed 2d 210, 100 S Ct 318, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied

(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. supra, at 545, 33 L Ed 2d 122, 92 S Ct 2238.

12. **[8b]** 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, 64 L Ed 2d 741, 100 S Ct 2035 (1980), Kaiser Aetna v United States, 444 US 164, 62 L Ed 2d 332, 100 S Ct 383 (1978), 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, 73 L Ed 2d, at 890. 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.

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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 Harv L Rev 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.

[9] 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]

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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]

[10] 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

13. In United States v Causby, 328 US 256, 90 L Ed 1206, 66 S Ct 1062 (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, 90 L Ed 1206, 66 S Ct 1062, quoting Butler v Frontier Telephone Co. supra, at 491–492, 79 NE 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 NY Exec Law § 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.

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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

[1b, 11a] 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]

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, 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, 73 L Ed 2d, at 893, and that appellant might have no alternative use for the cable-occupied space, post, at 453–454, 73 L Ed 2d, at 894—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. **[11b]** 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, 90 L Ed 1206, 66 S Ct 1062.

The dissent asserts that a taking of about one-eighth of a cubic foot of space is not of constitutional significance. Post, at 443, 73 L Ed 2d, at 887. The assertion appears to be factually incorrect, since it ignores the two large silver boxes 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 (NY App), p 77. Although the record does not reveal their size, appellant states that they are approximately 18″ × 12″ × 6″, Brief for Appellant 6 n, and appellees do not dispute this statement. The displaced volume, then, is in excess of 1½ 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

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[12] 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, 66 L Ed 2d 358, 101 S Ct 446 (1980) ("a State, by ipse dixit, may not transform private property into public property without compensation").

[458 US 440]

[13] 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, e. g., Heart of Atlanta Motel, Inc. v United States, 379 US 241, 13 L Ed 2d 258, 85 S Ct 348 (1964) (discrimination in places of public accommodation); Queenside Hills Realty Co. v Saxl, 328 US 80, 90 L Ed 1096, 66 S Ct 850 (1946) (fire regulation); Bowles v Willingham, 321 US 503, 88 L Ed 892, 64 S Ct 641, 28 Ohio Ops 180 (1944) (rent control); Home Building & Loan Assn. v Blaisdell, 290 US 398, 78 L Ed 413, 54 S Ct 231, 88 ALR 1481 (1934) (mortgage moratorium); Edgar A. Levy Leasing Co. v Siegel, 258 US 242, 66 L Ed 595, 42 S Ct 289 (1922) (emergency housing law); Block v Hirsh, 256 US 135, 65 L Ed 865, 41 S Ct 458, 16 ALR 165 (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 multifactor inquiry generally applicable to nonpossessory governmental activity. See Penn Central, Transportation Co. v New York City, 438 US 104, 57 L Ed 2d 631, 98 S Ct 2646 (1978).[19]

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, 73 L Ed 2d, at 891; it

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III

[1c] 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.

[14] 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]

[458 US 442]

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.

SEPARATE OPINION

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, 8 L Ed 2d 130, 82 S Ct 987 (1962).[1]

In a curiously anachronistic deci-

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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. App 83, 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, 62 L Ed 2d 332, 100 S Ct 383 (1979); Andrus v Allard, 444 US 51, 65, 62 L Ed 2d 210, 100 S Ct 318 (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, 57 L Ed 2d 631, 98 S Ct 2646 (1978); United States v Caltex, Inc. 344 US 149, 156, 97 L Ed 157, 73 S Ct 200 (1952) ("No rigid rules can be laid down to distinguish compensable losses from noncompensable losses"); Pennsylvania Coal Co. v Mahon, 260 US 393, 416, 67 L Ed 322, 43 S Ct 158, 28 ALR 1321 (1922) (a takings question "is a question of degree—and therefore cannot be disposed of by general propositions").

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sion, 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, 73 L Ed 2d, at 876. 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, 73 L Ed 2d, at 880.

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, 73 L Ed 2d, at 885, 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″ × 4″ × 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 NY Exec. Law § 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.

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, 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, 73 L Ed 2d, at 884, the New York Court of Appeals' opinion nowhere mentions them, nor are their dimensions stated anywhere in the record.

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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, 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, 62 L Ed 2d 332, 100 S Ct 383 (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, 64 L Ed 2d 741, 100 S Ct 2035 (1980). See 53 NY2d, at 144–151, 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, 423 NE2d, at 329–330. Moreover, under PruneYard Shopping Center v Robins, 447 US, at 83–84, 64 L Ed 2d 741, 100 S Ct 2035, 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, 423 NE2d, at 331.[4]

Second, the court concluded that the statute's economic impact on appellant was de minimis because

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, 423 NE2d, at 328, citing testimony of Joseph C. Swidler, Chairman of the Public Service Commission, before the Joint Legislative Committee considering the 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." NY Exec Law § 828(1)(a)(i) (McKinney Supp 1981–1982). 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).

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§ 828 did not affect the fair return on her property. 53 NY2d, at 148–150, 423 NE2d, at 332–333. Third, the statute did not interfere with appellant's reasonable investment-backed expectations. Id., at 150–151, 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, 423 NE2d, at 336.

[458 US 446]

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, 73 L Ed 2d, at 876–882, and jurisprudentially sound, see ante, at 435–438, 73 L Ed 2d, at 882–884. 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

[458 US 447]

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, 73 L Ed 2d, at 882.

A

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 be-

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, 73 L Ed 2d, at 880–882, and 882. 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, 73 L Ed 2d, at 876–877, and St. Louis v Western Union Telegraph Co. 148 US 92, 37 L Ed 380, 13 S Ct 485 (1893), cited ante, at 428, 73 L Ed 2d, at 877–878.

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 779, 809–810, 94 L Ed 1277, 70 S Ct 885. 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, 37 L Ed 380, 13 S Ct 485. 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." NY Exec Law § 828(1)(b) (McKinney Supp 1982).

come 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, 73 L Ed 2d, at 876. See, e.g., Agins v City of Tiburon, 447 US 255, 65 L Ed 2d 106, 100 S Ct 2138 (1980); Penn Central Transportation Co. v New York City, 438 US 104, 124–125, 57 L Ed 2d 631, 98 S Ct 2646 (1978); Village of Euclid v Ambler Realty Co., 272 US 365, 71 L Ed 303, 47 S Ct 114, 4 Ohio L Abs 816, 54 ALR 1016 (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 Harv L Rev 1165, 1227 (1967).

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

[458 US 448]

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, 73 L Ed 2d, at 876. 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, 73 L Ed 2d, at 882, 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, 73 L Ed 2d, at 884. 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, 73 L Ed 2d, at 885. 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 stat-

5-24

utes regulating the landlord-tenant relationship.[6] If § 828 authorizes a "permanent" occupation,

[458 US 449]

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, 73 L Ed 2d, at 885. But surely this factor cannot be determinative, since the Court simultaneously recognizes that temporary

[458 US 450]

invasions by third parties are not subject to 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, 73 L Ed 2d, at 885. 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

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, 73 L Ed 2d, at 874, does not affect § 828's fundamental character as a piece of landlord-tenant legislation. As the Court recognizes, ante, at 422, 73 L Ed 2d, at 874, 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, 73 L Ed 2d, at 884. 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, e. g., NY Mult Dwell Law § 35 (McKinney 1974) (requiring entrance doors and lights); § 36 (windows and skylights for public halls and stairs); § 50-a (Supp 1982) (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, 90 L Ed 1096, 66 S Ct 850 (1946) (upholding constitutionality 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, e. g., NY Mult Dwell Law § 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) (Supp 1981–1982) (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").

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§ 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, 2 L Ed 2d 1228, 78 S Ct 1097 (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 "temporary"

[458 US 451]

physical invasions of considerable economic magnitude. See, e. g., Block v Hirsh, 256 US 135, 65 L Ed 865, 41 S Ct 458, 16 ALR 165 (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, e. g., PruneYard Shopping Center v Robins, 447 US 74, 64 L Ed 2d 741, 100 S Ct 2035 (1980) (leafletting and demonstrating in busy shopping center); Kaiser Aetna v United States, 444 US 164, 62 L Ed 2d 332, 100 S Ct 383 (1979) (public easement of passage to private pond); United States v Causby, 328 US 256, 90 L Ed 1206, 66 S Ct 1062 (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, 73 L Ed 2d, at 879, 880–882.

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, 73 L Ed 2d, at 882, 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

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.

5-24

to dispose of, use, and exclude others from, her property. See ante, at
[458 US 452]
435–438, 73 L Ed 2d, at 882–884. 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, 73 L Ed 2d, at 885. Like § 828, these provisions merely ensure tenants access to 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 adversely
[458 US 453]
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 NY Mult Dwell Law § 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

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.

5-27

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

[458 US 454]

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, 73 L Ed 2d, at 882. 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's common-law rights, without compensation, if the legislative action serves sufficiently important public interests. See Munn v Illinois, 94 US 113, 134, 24 L Ed 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, 90 L Ed 1206, 66 S Ct 1062 (In the modern world, "[c]ommon sense revolts at the idea" that legislatures cannot alter common-law ownership rights).

[458 US 455]

As the Court of Appeals recognized, § 828 merely deprives appellant of a common-law trespass action

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, 73 L Ed 2d, at 883, or vending and washing machines, ante, at 439, n 17, 73 L Ed 2d, at 884–885, 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 York law, 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.

5-28

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, [49 L Ed 937, 25 S Ct 539] (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, 64 L Ed 2d 741, 100 S Ct 2035 (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.

[458 US 456]

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, 90 L Ed 1206, 66 S Ct 1062 (dissenting opinion). I would affirm the judgment and uphold the reasoning of the New York Court of Appeals.

12. Happily, the Court leaves open the question whether § 828 provides landlords like appellant sufficient compensation for their actual losses. See ante, at 441, 73 L Ed 2d, at 886. 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, 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.

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January 27, 2000

Testimony of Robert G. Hanson
President, Weigand-Omega Management, Inc.
333 S. Broadway, Suite 105
Wichita, KS 67202

Regarding Substitute For Senate Bill No. 54

- It is a common practice in most of the United States for providers of television services to multiple dwelling units (MDUs), whether cable or satellite based, to give the landlord a percentage of the revenue stream from the property.

- In return, the property owner signs an agreement with the provider of television services for a fixed period of time to assure them of that revenue stream.

- My first such agreement was in Tulsa. When I asked why the cable company was making me this unsolicited proposal, I was told that it was fair to share the revenues generated from the property with the owner of that property. Attached is a copy of that initial agreement. This cable company is owned by AT&T.

- I have since had several other companies want to do similar agreements for broadband and/or video services on the properties that I manage. In every case, the service provider was willing to share revenues with the property owner. The reasons for the revenue sharing is again, its fair and the property owner usually provides some degree of service, ie keeping receivers, allowing entry into a unit, coordinating additional outlets, etc.

- There are no access agreements signed by property owners, no easements granted over the property that the cablevision lines run. The franchise agreements granted by the Cities were for television services only and now without the property owner's approval, some of these lines are carrying internet access to customers on our properties. This is probably in violation of the franchise agreements since the internet did not exist when the agreements were signed.

- Enclosed are copies of two letters from the law firm of Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, LLP, from Austin, Texas, one of the most prominent law firms in the nation dealing with regulatory issues, mandatory building access and matters in the broadband and telecommunications industry. These letters address mandatory building access in Wichita, Kansas. Their answer is no. There is no mandatory building access in Wichita.

- This letter also mentions that the current Landlord Tenant Act, provides, in a pertinent part, as follows:

  > The landlord shall not interfere with or refuse to allow access or service to a tenant by a communication or cable television service duly franchised by a municipality.

  The lawyer whom they contacted in Wichita City Attorney's office stated that the general legal opinion was that this provision is unconstitutional.

HOUSE UTILITIES

DATE: 1-27-00

ATTACHMENT 6

This has been the case in other states on mandatory access.

- I believe that current provisions in the Landlord Tenant Law adequately cover what is anticipated in the Substitute for Senate Bill No. 54. whether constitutional or not. Additional laws are not needed. The only provision that is different, is that Multimedia Cable does not want to revenue share with the property owner as is common by other cable providers as well as satellite service providers.

- At the hearings last year, Landlords and Property owners were portrayed as greedy individuals who, if allowed to operate or own a satellite video network, would needlessly gouge their tenants and the tenants would be unable to do anything about it. It needs to be pointed out that rental income represents 98% of the income stream in most apartment communities and owners would not be so ignorant to not be competitive and have tenants move at the end of their leases because they were disgruntled over the 2% ancillary income. By being able to go on the open market, the landlord can get better services for less money and improve the service to his tenants. Please note the attached article from the front page of the Wichita Eagle, January 26, 2000. As found by an independent consultant hired by the City of Wichita, Wichita's cable costs are "out of line with those in other communities."

- To me it is clear, that the proposed Substitute for Senate Bill No. 54 is unnecessary, not in the best interests of the consumers, and is probably unconstitutional by violating the rights of the property owner.

We're taking television into tomorrow.

TCI Cablevision of Tulsa

Dear Property Owner,

The following are the terms we would like to offer the property owner.

1. TEN (10%) REVENUE SHARING FOR THE PROPERTY OWNER
   A. EXAMPLE
      TOTAL BILLING MONTHLY 100 UNITS
      @ $23.31 PER TENANT = $2,331.00
      OWNER PAID $233.10
2. OWNER IS PAID QUARTERLY
3. SERVICE AT NO CHARGE
4. FREE CABLE FOR MANAGERS AND OWNER
5. BULK BILLING TO BE PAID BY OWNER
   (ADDITIONAL OPTION)
   A. $12.00 PER APARTMENT
   B. OWNER MAY BE BILL TENANT AT AN ADDITIONAL COST
6. BOTH OPTIONS REQUIRE A MINIMUM FIVE (5) YEAR CONTRACT
7. IF AN OWNER DOES NOT WANT TO TAKE ADVANTAGE OF EITHER OPTION A BROADBAND EASEMENT RIGHT OF ENTRY IS STILL REQUIRED IN ORDER FOR US TO SERVE YOUR TENANTS

Karen George 459.3500

If I can be of any further assistance please let me know. I follow up with you at the end of the week. I would be available to meet with you at your request. I can be reached at (918) 459-3612.

Regards,

Janice Pankey
Commercial Accounts

P.O. Box 470800
Tulsa, Oklahoma 74147-0800
8421 E. 61st, Suite U
Tulsa, Oklahoma 74133
(918) 459-3500
FAX (918) 459-3520

Form Agreement Revised 12/10/96

EASEMENT ACCESS COMPENSATION AGREEMENT

THIS EASEMENT ACCESS COMPENSATION AGREEMENT (the "Agreement ") is entered into as of January 1, 1997 by and between Tulsa Cable Television, Inc. ("Operator") and ASHLEY PARK LIMITIED LIABILITY COMPANY ("Owner").

RECITALS

A. Operator and Owner have entered into a Broadband Easement and Right of Entry Agreement, dated JANUARY 1, 1997 (the "Access Agreement"), whereby Owner has granted Operator exclusive access to the property located at ASHLEY Apartments 5477 E. 71ST, Tulsa, OK. 74136 (the "Property") in order to construct, install, own operate and maintain equipment necessary to provide various services to the Property (as described in the Access Agreement; and

B. Operator desires to provide to Owner compensation for providing Operator exclusive access to the Property, on the terms and conditions set forth herein.

AGREEMENT

In consideration of the following mutual covenants and agreements, each of the parties hereto agree as follows:

1. In exchange for Owner granting Operator exclusive access to the Property for the purposes described in the Access Agreement , Operator agrees to provide to the Owner the following:

> Operator agrees to pay Owner ten percent (10%) of the gross monthly reoccurring Basic and Expanded Basic revenue collected from cable services at the property excluding franchise fees, sales taxes, agency commissions, equipment, installation and services fees. Operator agrees to make commission payments and deliver accounting statements within thirty (30) days after the completion of each quarter during the remaining term of this agreement.

2. Owner and Operator agree that no other payment, compensation or remuneration (monetary or otherwise) shall be due and owing to Owner by Operator during the term of the Access Agreement in exchange for Owner providing Operator access to the Property.

3. Owner shall be responsible for all taxes attributable to any and all payments received by it pursuant to the Agreement. Operator shall provide to Owner all statements which it is required to prepare pursuant to the Internal Revenue Code of 1986, as amended, in connection with the payment made to Owner by Operator as described in Section 1 above.

4. It is understood and agreed by each of the parties hereto that (a) no agency, employment, joint venture or partnership is created hereby between the parties hereto; (b) the Operator is not an affiliate of Owner; and (c) neither party, nor their agents or employees shall be deemed to be an agent of the other. In addition, neither party shall have

the right, power or authority to act for the other in any manner to create obligations or debts which would be binding upon the other party.

5. This Agreement shall inure to and be binding upon the successors, assigns, heirs, and personal representatives of each of the parties hereto.

6. This Agreement shall be effective on the date hereof and continue for a period of FIVE (5) years.

7. This Agreement supersedes any and all other agreements (other than the Access Agreement), either oral or written, between the parties hereto relating to the subject matter hereof. This Agreement contains the entire agreement between Owner and Operator (other than the Access Agreement) and may not be amended except by an agreement in writing signed by the parties. The person signing on behalf of the Owner represents that he/she is the owner of the Premises or the authorized agent of Owner, with full authority to bind Owner to the terms and conditions of this Agreement. This Agreement shall not be binding upon Operator until signed by an authorized representative of Operator.

8. Owner and/or the person signing on behalf of the Owner hereby warrant, represent and covenant that he or she shall not, directly or indirectly, disclose to any third party the material terms of this Agreement including, but not limited to, the financial terms agreed to between Owner and Operator.

Owner and Operator have caused this Agreement to be executed by their duly authorized representatives or officers, to be effective as of the date of the last signature provided hereunder.

OWNER: Ashley Park LLC

By: Robert G. Hanson

Name: Robert G. Hanson
(PRINT OR TYPE)

Title: Managing Partner

Address: 333 S. Broadway, Sl 105
Wichita, KS 67202

Attn: _____

OPERATOR:

By: Tulsa Cable Television, Inc.

Name: _____
(PRINT OR TYPE)

Title: _____

Address: _____

Attn: _____

Richard E. Franklin
Authorized Officer

BROADBAND EASEMENT AND RIGHT OF ENTRY AGREEMENT

THIS BROADBAND EASEMENT AND RIGHT OF ENTRY AGREEMENT (this "Access Agreement") dated as of JANUARY 1, 1997 is made and entered into by and between TULSA CABLE TELEVISION INC. a OKLAHOMA CORPORATION ("Operator"), and ASHLEY PARK LIMITED LIABILITY COMPANY a _____ ("Owner"), effective as of the date of Operator's execution of this Access Agreement set forth below.

RECITALS.

A. Owner owns the ASHLEY PARK APARTMENTS, located at 5477 E. 71st St. Tulsa, OK 74136 (the "Premises"), consisting of 192 units, plus any units added or constructed in the future. A legal description of the Premises is attached hereto as Exhibit A.

B. Operator owns and operates a cable television system in TULSA (the "System").

C. Owner and Operator desire to provide for Operator's access to the Premises in order to install the equipment necessary to provide multi-channel video programming and any other services that it may lawfully provide (the "Services") to the Premises, on the terms and conditions provided herein.

AGREEMENT.

In consideration of the mutual promises and conditions herein set forth, Owner and Operator agree as follows:

1. **OWNERSHIP OF THE PREMISES.** Owner represents and warrants that it is the record holder of fee title to the Premises.

2. **EASEMENTS; ACCESS.** Owner hereby grants, bargains and conveys to Operator an irrevocable easement in gross across, under and over the Premises as necessary or desirable for the routing, installation, maintenance, service and operation of the Equipment (as hereinafter defined), and the marketing and provision of the Services. Owner agrees that the Operator may from time to time enter into various agreements or arrangements with its approved lessees, agents or authorized vendors (collectively, the "Agents") and access to, and entry upon, the Premises granted by Owner pursuant to this Section shall extend to such Agents. Owner shall cause its designated representatives to accompany employees or contractors of Operator into any unoccupied residential unit for the purpose of wiring such residential unit, if such wiring is required. After the Premises have been wired for the provision of Services, Owner shall provide Operator's employees and contractors access to the Premises at reasonable times for the exercise of its easement rights hereunder. In addition to the other rights granted by Owner hereunder, upon termination of this Access Agreement, Owner hereby grants, bargains and conveys to Operator the right to enter the Premises in order to remove the Equipment from the Premises if Operator so desires. Owner represents that it has not granted and will not grant any other easements or rights which will interfere with the operation within the Premises of Operator's Service or System.

3. **TYPE OF ACCOUNT; PROVISION OF SERVICES.**

(a) Operator shall provide the Services to the Property as follows:

(Check one)

(X) Individual Rate Account: Operator, or the Agents, shall market and contract with individual residents of the Premises for all Services, and all arrangements for connecting, serving and billing residents of the Premises for the Services shall be made directly between Operator and such residents.

( ) Bulk Rate Account: Operator shall market and contract with the Owner for certain of the Services in accordance with a Bulk Rate Agreement to be signed by Operator and Owner. Operator, or the Agents, shall market and contract with individual residents of the Premises for all other Services, and all arrangements for connecting, serving and billing residents of the Premises for such Services shall be made directly between Operator or the Agents, and such residents.

(b) The Services shall initially be provided as set forth above. During the term of this Access Agreement, the method of billing may be changed (i.e., from a bulk rate to an individual rate account and visa versa) without in any way affecting the validity of this Agreement.

4. **TERM; TERMINATION.** This Access Agreement shall be effective on the date hereof and continue for a period of 5 years (the "Initial Term"), and thereafter shall automatically continue for 1 additional terms, each additional term consisting of the same number of years as the Initial Term (each a "Renewal Term"), unless either party gives the other written notice of non-renewal at least six months prior to the end of the Initial Term or then-effective Renewal Term, as appropriate. All notices which are given pursuant to this Section shall be sufficient in all respects if given in writing and delivered personally, by telecopy, by overnight courier, or by registered or certified mail, postage prepaid, to the receiving party at the respective address set forth below their signatures on the signature page to this Access Agreement or to such other address as such party may have given notice to the other pursuant hereto. Notice shall be deemed given on the date of delivery, in the case of personal delivery, on the date specified in the telecopy confirmation, in the case of telecopy; or on the delivery or refusal date, as specified on the return receipt, in the case of overnight courier or registered or certified mail.

5. **OTHER SYSTEMS.** In consideration of Operator's investment in the Equipment and other valuable consideration, for a period of time ending upon the earlier of (a) the date of termination of this Access Agreement and (b) the 5th anniversary of the effective date of this Access Agreement, Owner shall not, without the prior written consent of Operator, operate or install or permit the operation or installation of any other antenna, receiver, converter, cable or other signal amplification system on the Premises for use in connection with television or radio equipment.

I CERTIFY THAT I UNDERSTAND AND AGREE TO THE INFORMATION AND PROVISIONS PROVIDED HEREIN, I HAVE READ THE AGREEMENT ON THE REVERSE SIDE.

THE PARTIES HAVE EXECUTED THIS ACCESS AGREEMENT BY THEIR DULY-AUTHORIZED REPRESENTATIVES.

OWNER

By: _____

Print Name: ROBERT HANSON

Title: MANAGING PARTNER MEMBER

Address: 333 S Broadway Ste 105
Wichita KS 67202

Telephone: (316) 263-3215

Telecopy: (316) 263-3228

OPERATOR

By: _____

Print Name: _____

Title: _____

Address: _____

Telephone: _____

Telecopy: _____

Richard E. Franklin
Authorized Officer

STATE OF Kansas)
) ss.
COUNTY OF Sedgwick)

This instrument was acknowledged before me on March 27, 1997, by [signature]
as MANAGING PARTNER of ASHLEY PARK LLC

Given under my hand and seal of office.

My commission expires: 11/17/98

[signature]
Notary Public

Secretary
Title (and Rank)

11/17/97

STATE OF Colorado)
) ss.
COUNTY OF Denver)

This instrument was acknowledged before me on March 3, 1997, by Richard E. Franklin
as Authorized Officer of Operator

Given under my hand and seal of office.

My commission expires: [illegible]

[signature]
Notary Public

KEVIN T. PHILLIPS
NOTARY PUBLIC
STATE OF COLORADO
My Commission Expires 10-03-98

Title (and Rank)

Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P.

1700 Frost Bank Plaza 816 Congress Avenue Austin, Texas 78701-2443 (512)472-8021 Fax (512)320-5638 www.bickerstaff.com

MEMORANDUM

To: Jay Maxwell

From: Carolyn E. Shellman

Date: August 5, 1999

Re: Mandatory Building Access

Question and Short Answer:

You have asked whether there is any right of mandatory building access in Wichita, Kansas. The short answer to your question is no. The consequence of this answer is that, in the absence of a mandatory access requirement, a private property owner can sign an exclusive contract with a cable television or telecommunications service provider for the right to enter the property owner's premises and provide service to tenants. The property owner can also prevent other cable and telecommunications providers from entering the property for the same purpose.

Discussion:

It is our understanding that you own or represent owners of various apartment complexes in the City of Wichita, Kansas. Through a newly-formed company, It's ROE.com, you plan to offer telecommunications, video (cable television), security and internet services to the tenants of these complexes. All of these complexes are located on private property and none of the facilities It's ROE.com plans to install will be located within or will be required to cross the public right of way.

The locally-franchised cable television provider recently became aware of the fact that your

company was installing facilities within or to one of these properties. Objecting to the installation of a potential competitor's equipment, the local cable provider argued that it had an exclusive right to provide service to this complex. You have asked our advice concerning the validity of the cable provider's argument.

The provision of cable television services is regulated at the local level by a city through the requirement that a cable provider obtain a franchise from the city to operate within the city limits. A provider whose facilities are not located within and/or do not cross the public right of way is not required to obtain a franchise from a city to operate within the city limits. This is because a municipality's franchise authority is derived from its entitlement to payment for use of the public streets and alleys.

Some states, **e.g.,** Texas, have enacted statutes that guarantee building access. Attached for purposes of illustration, is a copy of Section 54.259 of the Texas Public Utility Regulatory Act prohibiting a property owner from discriminating against a locally-franchised and state certified telecommunications utility by preventing the utility from installing its own equipment in the building in order to respond customer requests for service. We have confirmed our earlier investigation and have determined that there is no similar mandatory building access statute in Kansas and that the City of Wichita does not have a mandatory access ordinance. Therefore, we believe that there is no legal requirement for you to provide another cable provider with access to your properties.

You mentioned and we have heard from the Wichita City Attorney's office that there may be old law in Kansas that would allow a tenant to choose a telecommunications provider. The lawyer with whom we spoke, however, was unaware of the law or any cases interpreting it. However, if the complaining cable company is asserting a legal right to building access, this may be

the basis for the assertion. We had not previously researched this issue and have not pursued it now to limit research costs. However, just as mandatory building access regulations are challenged on constitutional grounds, it could also be argued that a landlord/tenant statute with similar provisions could be vulnerable to an argument that it results in an unconstitutional taking of private property. If you would like us to follow-up on this research, we can do so quickly and amend this memorandum to add our comments about it.

Finally, you may be aware that there are two proceedings on-going at the Federal Communications Commission that affect building access issues, a Notice of Proposed Rule Making that has been pending since 1997 (CS Docket No. 95-184, *In the Matter of Telecommunications Services Inside Wiring,* Released October 17, 1997) and a new competitive networks Notice of Proposed Rulemaking issued July 7. The FCC's position in both of these proceedings is that mandatory building access is necessary to relieve barriers to competition. If you are interested in the Federal perspective on the building access issue, we can send you some materials on these two proceedings.

If there are any incorrect facts in this Memorandum, please let us know. We would want to revise it to ensure that we have given you advice that addresses your situation directly.

(2) a private or independent institution of higher education as defined by Section 61.003, Education Code.

(c) Notwithstanding any other law, the commission has the jurisdiction to enforce this section.

(V.A.C.S. Art. 1446c-0, Secs. 3.2555(c), (e), (g).)

Sec. 54.260. PROPERTY OWNER'S CONDITIONS.

(a) Notwithstanding Section 54.259, if a telecommunications utility holds a municipal consent, franchise, or permit as determined to be the appropriate grant of authority by the municipality and holds a certificate if required by this title, a public or private property owner may:

(1) impose a condition on the utility that is reasonably necessary to protect:

(A) the safety, security, appearance, and condition of the property; and

(B) the safety and convenience of other persons;

(2) impose a reasonable limitation on the time at which the utility may have access to the property to install a telecommunications service facility;

(3) impose a reasonable limitation on the number of such utilities that have access to the owner's property, if the owner can demonstrate a space constraint that requires the limitation;

(4) require the utility to agree to indemnify the owner for damage caused installing, operating, or removing a facility;

(5) require the tenant or the utility to bear the entire cost of installing, operating, or removing a facility; and

(6) require the utility to pay compensation that is reasonable and nondiscriminatory among such telecommunications utilities.

(b) Notwithstanding any other law, the commission has the jurisdiction to enforce this section.

(V.A.C.S. Art. 1446c-0, Secs. 3.2555(d), (e).)

MEMORANDUM

TO: Jay Williams

FROM: Carolyn Shellman

DATE: August 19, 1999

RE: Mandatory Access in Kansas

Confirming the conversation we had by telephone today, there is a Kansas statute which addresses building access in the context of landlord/tenant law. The statute, the Residential Landlord and Tenant Act, KS St. § 58-2553(a)(5) provides, in pertinent part, as follows:

> The landlord shall not interfere with or refuse to allow access or service to a tenant by a communication or cable television service duly franchised by a municipality.

This statute seems to require a building owner to permit access to his building and inside wiring by a franchised telecommunications or cable provider. A Westlaw search of Kansas cases revealed no cases interpreting this provision. Because of its location in the Residential Landlord and Tenant Act, the statute could be interpreted to require access only if requested by a tenant, and not merely by a telecommunications or cable provider and, of course, would not require access for an unfranchised provider. As indicated, there is no case law that we have found supporting such a limited interpretation of the statute but this is certainly one of the arguments that could be developed if a franchised provider sought building access under the authority of this statute.

We have spoken with a representative of the Kansas Corporation Commission who has been involved in the most recent STS-related docket at the Commission and he was unaware of

the statute and unaware of any attempts to enforce it. We also checked with a representative of the City Attorney's Office in Kansas City, Kansas thinking that this issue might have arisen in a larger city than Wichita. The lawyer with whom we spoke was similarly unaware of the statute and had never heard of its being enforced. Finally, in late July, we had a conversation with a lawyer in the Wichita City Attorney's office. At that time, he had mentioned to us the existence of this statute, but added that general legal opinion regarded it as unconstitutional, and that the legislature had tried to address the issue in the most recent legislative session, but that no bill had passed.

We wanted you to have this information but will not pursue this further unless you instruct us to do so. A copy of the entire Kansas statute is attached for your files.

KANSAS STATUTES ANNOTATED
CHAPTER 58.--PERSONAL AND REAL PROPERTY
ARTICLE 25.--LANDLORDS AND TENANTS
RESIDENTIAL LANDLORD AND TENANT ACT

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Current through End of 1998 Reg. Sess.

58-2553. Duties of landlord; agreement that tenant perform landlord's duties; limitations.

(a) Except when prevented by an act of God, the failure of public utility services or other conditions beyond the landlord's control, the landlord shall:

(1) Comply with the requirements of applicable building and housing codes materially affecting health and safety. If the duty imposed by this paragraph is greater than any duty imposed by any other paragraph of this subsection, the landlord's duty shall be determined in accordance with the provisions of this paragraph;

(2) exercise reasonable care in the maintenance of the common areas;

(3) maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating and air-conditioning appliances including elevators, supplied or required to be supplied by such landlord;

(4) except where provided by a governmental entity, provide and maintain on the grounds, for the common use by all tenants, appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish and other waste incidental to the occupancy of the dwelling unit and arrange for their removal; and

(5) supply running water and reasonable amounts of hot water at all times and reasonable heat, unless the building that includes the dwelling units is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection. Nothing in this section shall be construed as abrogating, limiting or otherwise affecting the obligation of a tenant to pay for any utility service in accordance with the provisions of the rental agreement. The landlord shall not interfere with or refuse to allow access or service to a tenant by a communication or cable television service duly franchised by a municipality.

(b) The landlord and tenants of a dwelling unit or units which provide a home, residence or sleeping place for not to exceed four households having common areas may agree in writing that the tenant is to perform the landlord's duties specified in paragraphs (4) and (5) of subsection (a) of this section and also specified repairs, maintenance tasks, alterations or remodeling, but only if the transaction is entered into in good faith and not for the purpose of evading the obligations of the landlord.

(c) The landlord and tenant of any dwelling unit, other than a single family residence, may agree that the tenant is to perform specified repairs, maintenance tasks, alterations or remodeling only if:

(1) The agreement of the parties is entered into in good faith, and not to evade the obligations of the landlord, and is set forth in a separate written agreement signed by the parties and supported by adequate consideration;

(2) the work is not necessary to cure noncompliance with subsection (a)(1) of this section; and

(3) the agreement does not diminish or affect the obligation of the landlord to other tenants in the premises.

(d) The landlord may not treat performance of the separate agreement described in subsection (c) of this section as a condition to any obligation or the performance of any rental agreement.

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History: L. 1975, ch. 290, § 14; L. 1982, ch. 230, § 2; July 1.

<General Materials (GM) - References, Annotations, or Tables>

LAW REVIEW AND BAR JOURNAL REFERENCES:

1994 Main Volume LAW REVIEW AND BAR JOURNAL REFERENCES:

'The Mortgagee's Interest in Rents: Policy and Proposals,' Patrick A. Randolph, Jr., 29 K.L.R. 1, 21 (1980).

'Survey of Kansas Law: Real Property,' Michael J. Davis, 32 K.L.R. 773 (1984).

'Tenant Remedies for Breach of Habitability: Tort Dimensions of a Contract Concept,' James Charles Smith, 35 K.L.R. 505, 510 (1987).

1998 Pocket Part LAW REVIEW AND BAR JOURNAL REFERENCES:

'Prosecuting and Defending Forcible Entry and Detainer Actions,' Stephen Kirschbaum, 65 J.K.B.A. No. 7, 20 (1996).

CASE ANNOTATIONS

1994 Main Volume CASE ANNOTATIONS

1. Mentioned in upholding constitutionality of subsection (d) of 58-2550. Clark v. Walker, 225 K. 359, 364, 590 P.2d 1043.

2. Cited in showing legislative intent to impose absolute and non-delegable duties on one party to contract. State v. Mwaura, 4 K.A.2d 738, 741, 610 P.2d 662.

3. Applied; violations of city housing code found to materially affect health and safety of tenant. Joe v. Spangler, 6 K.A.2d 630, 631, 632, 631 P.2d 1243 (1981).

4. Where landlord knew or should have known of defective condition, duty is owed to tenant and invited guests. Jackson v. Wood, 11 K.A.2d 478, 483, 484, 726 P.2d 796 (1986).

5. Measure of damages determined where landlord fails to comply with statutory duties. Love v. Monarch Apartments, 13 K.A.2d 341, 345, 771 P.2d 79 (1989).

6. Landlord's failure to supply hot water to tenant's bathtub determined not proximate cause of injuries to tenant's child. Aguirre v. Adams, 15 K.A.2d 470, 471, 809 P.2d 8 (1991).

K. S. A. § 58-2553

KS ST § 58-2553

END OF DOCUMENT

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Front Page
WICHITA EAGLE 10/26/00

Report calls for cheaper basic cable

■ A consultant calls Wichita's cable rates "out of line" with other cities.

BY LILLIAN ZIER MARTELL
The Wichita Eagle

The city of Wichita should urge Cox Communications to set up a lower basic cable television rate, a consultant told the City Council on Tuesday.

The lowest monthly rate in Wichita is Multimedia Cablevision's basic package of $25.76 a month for 44 channels.

Atlanta-based Cox is buying Multimedia Cablevision, the Wichita company that has provided cable services in the city since 1990. The sale is expected to close Monday.

Cox offers an option of 15 channels for $6.16 a month in Oklahoma City and $10.76 for a 24-channel package in Omaha.

• The consultant's report calls Multimedia Cablevision's basic cable rates "out of line" with those in other communities.

Along with asking for a low-cost option, the city should consider adopting consumer protection standards and working with Cox to make better use of the five public-access channels available in Wichita, said the consultant, Adrian Herbst of The Waller Herbst Law Group, based in Washington, D.C.

His advice comes as the city is reviewing its franchise agreement with the cable company, as it does every five years. The cable company pays the city a franchise fee in exchange for use of public rights of way. The fee is 5 percent of revenues,

Please see CABLE, Page 4A

CABLE

From Page 1A

worth $2.5 million to the city last year.

Mayor Bob Knight said he wanted to hear the city staff's report before deciding what he wants to see happen with the cable system.

"It's way too early for me to be forming a conclusion," he said.

The consultant's report says the city can regulate rates for basic service. But it cannot force the company to start a new, lower-level package. That would have to be negotiated with the cable company.

City Manager Chris Cherches said city officials will explore the low-cost option.

About 70 percent of Wichita households subscribe to cable. Of those that don't subscribe, it's likely some simply feel they can't afford it, Cherches said.

Multimedia officials received the report Tuesday. Mary Jobe, regional marketing manager for Multimedia, said she did not know whether the company would consider a low-cost package.

Although Multimedia has a good customer service record, the consultant said, it's unusual that the franchise agreement does not include a set of customer service standards. The report recommends that the city adopt standards that match federal regulations, and consider additional rules.

Many questions need to be answered before the city considers new regulations, City Council member Joe Pisciotte said.

"We don't need to go out looking to regulate things unless there's a clear public purpose," he said.

Multimedia's five public access channels are used by the city, Wichita State University and the Wichita school district.

In many cities, cable companies pay for equipment or expenses to provide programming on such channels. Multimedia does not do that in Wichita.

The channels are not fully used, Herbst said. He recommended the city work with the schools and the cable company to improve those services.

Pisciotte agreed.

"We don't even come close to putting those to their fullest and best use," he said.

6-16

My name is Tony Catanese. I am vice president of Key Management Company in Wichita Kansas. We manage over 3,000 multifamily residential units and over 1 million square feet of commercial office and retail space. I am here today to express my grave concern that a bill such as Substitute for Senate Bill number 54 is even being considered in the United States of America. I had hopes that when this bill was tabled last year it was because those working on it realized that it was inappropriate and probably unconstitutional.

It is very apparent that some special interests wish to take away the rights of property owners for their own selfish benefit. What I find difficult to believe is that members of this committee would even consider helping to facilitate this usurpation under the guise of beneficial legislation. No matter how they try to justify or explain it, any forced access would take away constitutionally protected rights of property owners. Similar legislation has been found to violate the Takings Clause of the Fifth Amendment and other Constitutional rights of the owners of private property.

Putting the Constitutional issue aside, I question whether such legislation is even needed. In argument against the need for such legislation I would like to quote from a recent article in the January 2000 issue of Multifamily Executive magazine. *"A nationwide survey commissioned by the 11-trade association of Real Access Alliance, and conducted this past July by the Charlton Research Co., points to evidence that today's* [telecommunication] *markets are healthy and competitive, just as Congress intended under the 1996 Telecommunications Act. The Charlton Survey demonstrates that lack of access is not a problem. Owners rarely turn providers away and when they do, it is for sound business reasons. The survey reveals that 82 percent of building owners and managers cited tenant interests and building marketability as their primary reasons for facilitating tenant access to these services. And, in more than 65 percent of the time, building access is successfully negotiated or negotiations are still in progress."*

I would also like to quote from information received from the national Institute of Real Estate Management. "*Perhaps no other industry understands the concept of and need for healthy competition better than real estate. Consider that no single entity controls more than five percent of the real estate industry's assets. This stands in stark contrast to other major sectors of the economy, including telecommunications. From the very start, our* [the real estate] *industry has been founded on entrepreneurialism and competition. To that end, we welcome the focus on consumer choice that telecommunications companies bring to the market. It parallels our own interest in giving tenants what they want and need in the way of new telecommunications services. Tenants today demand the most advanced technologies for data and messaging capabilities at the most affordable cost - needs that the real estate management industry is working diligently to meet"*

In short, building owners are motivated to take action that would be in the best interest of the tenants of their respective properties. As respectfully as I can say it, the government should have no right to take away the property owners' rights to make decisions concerning their properties, to remove their prerogative to engage in commerce nor should it insert itself into what should be the private business practices of Americans in matters such as this. Thank you for your consideration and understanding.

HOUSE UTILITIES

DATE: 1-27-00

ATTACHMENT 7

Johnson County Board of REALTORS®, Inc.
6910 W. 83rd Street, Suite 1
Overland Park, Kansas 66204-3997
(913) 381-1881
FAX (913) 381-4656
e-mail-jcbr@kcrealty.org

REALTOR®

EQUAL HOUSING OPPORTUNITY

The Voice for Real Estate®

Testimony of Erik Sartorius
Governmental Affairs Director
Before the
House Utilities Committee
Regarding
Substitute for SB 54 Forced Access to Private Property

January 27, 2000

The Johnson County Board of REALTORS® opposes this bill for three primary reasons. First, Substitute for Senate Bill 54 tramples on private property rights. Second, while the bill's purported purpose is to increase competition in the provision of telecommunication services and thereby give tenants greater "choice," we believe it will actually stifle competition and limit choice. Third, SB 54 is a policy in search of a problem. Any action in this arena is premature, at best.

PROPERTY RIGHTS

Entry into private property should be provided pursuant to a negotiated agreement between the property owner and the service provider – not by legislative fiat. We agree with the opinion of the U.S. Supreme Court in *Loretto v. Teleprompter*, 458 U.S. 419 (1982), where the Court held that "a permanent physical occupation authorized by government is a taking without regard to the public interests it may serve."

In the above-mentioned case, the State of New York passed legislation forcing landlords to permit cable companies onto their property. The U.S. Supreme Court struck down this law, saying that such government-mandated access infringed upon property owners' Fifth Amendment rights, and that they were due compensation under the Takings Clause. Allowing a permanent physical occupation of property destroys the owners' rights to possess, use and dispose of the property, as well as exclude persons from their property. As the Court noted in *Loretto*, government-mandated access does not "simply take a 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand."

Along with these rights come responsibilities, and SB 54 could prevent property owners from meeting their responsibilities to their tenants. Landlords are required to maintain their property in good working order. Serious concern must be raised as to the ability of landlords to meet such requirements if they cannot control what is being attached to their property and ensure that such work is being done in a safe manner.

CHOICE & COMPETITION

Real estate is a dynamic, market-driven business. Owners know that competing properties are doing all they can to be attractive to prospective tenants. They must respond to tenants' desires for amenities. The very reason the real estate industry is competitive is that tenants can and do leave. As such, the market – not government – is forcing greater access to better technologies.

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HOUSE UTILITIES
DATE: 1-27-00
ATTACHMENT 8

Property owners are moving to meet the demands of their tenants. Some are doing so by deploying technology in their buildings at their own cost. Senate Bill 54 would make it difficult for property owners to recoup the costs of that investment. Witnessing this, other owners will be reluctant to invest in technology for their tenants.

Under current law, property owners may bring technology to their tenants through exclusive agreements with providers. Such contracts enable new providers the time required to solidify their financial standing and expand their operations. Without such opportunities, new competitors often cannot compete with established companies, who have the capital to withstand the time it takes to recoup the costs of wiring a new building. With mandatory access, incumbent service providers can threaten the toehold a new company has in an apartment complex.

A POLICY IN SEARCH OF A PROBLEM

Understandably, cable telecommunication companies are concerned about competition in the rapidly changing technology marketplace. Being the provider of cable, telephone, and internet access is the prize being sought by the many technologies.

The Federal Communications Commission has given a "leg up" to one of cable's competitors, satellite dishes, by adopting a rule creating "forced access" for that product. The National Association of REALTORS®, joined by numerous other groups, has filed a petition for review of this rule. Whether in Kansas or at the federal level, whether cable or one of its competitors, we are consistent: property owners must not be required to surrender their property rights.

Worth noting is that many states are refusing to harm owners' property rights. In the last year or so, Florida, Georgia, Indiana, Iowa and Virginia have all rejected "forced access" legislation similar to Substitute for Senate Bill 54. While some states have adopted laws requiring property owners to admit cable providers onto their property, many of those laws allow owners fair compensation for this access.

We respectfully seek your opposition of this legislation. The Johnson County Board of REALTORS® calls on the committee to not pass out a bill that takes away the rights of property owners.

Executive Committee

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Forest City Residential
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EPT Management Co.
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Equity Residential Prop.
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Christopher Volgenau
WSNet
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January 26, 2000

Honorable Carl Holmes
Chairman
House Utilities Committee
Kansas House of Delegates
Topeka, Kansas

Dear Chairman Holmes:

The Independent Cable & Telecommunications Association, known as ICTA, includes members which are private cable operators, shared tenant services providers, equipment manufacturers, program distributors, apartment owners and Real Estate Investment Trusts, and property management-development companies. ICTA operator members provide video programming services to subscribers in competition with municipally franchised cable operators. ICTA's operator members also provide voice and data communication services to consumers. ICTA's members focus primarily on the residential multiple dwelling unit market, which I will refer to as the MDU market.

The Federal Communications Commission recently released a report indicating that private cable operators are alive and well with a 54% increase in national subscribers. Competition from private cable operators is essential if Kansas cable viewers are to receive the benefits of provider choice, better services and lower rates.

For three reasons, ICTA believes S. 54 and its House substitutes should be rejected. First, we believe the Bill is unconstitutional. Second, it discriminates against those video service providers who do not have municipal franchises, which includes most of ICTA's members. Third, it

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DATE: 1-27-00

ATTACHMENT 9

would decrease competition and consumer choice in the MDU video services market. The reality of S. 54 is it only perpetuates the current monopoly position of franchised cable operators.

With respect to constitutionality, under the Fifth Amendment to the United States Constitution, the government cannot take private property for public use without just compensation. S. 54 does result in the taking of private property. That fact could not be clearer given the United States Supreme Court decision in the Loretto case (Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) holding that the forced installation or retention of cable facilities on private property against the MDU owner's wishes is a taking which involves the Fifth Amendment. Here, S. 54 would prevent Kansas owners of multiple dwelling units from excluding any multichannel video programming distributor that wants to wire the building. The Bill forces property owners to provide continued access over their objection which is every bit as much a taking as granting forced access in the first instance. In Loretto, the cable operator was already on the property and yet the Supreme Court still found a taking. Moreover, common sense and black letter law dictate that where an owner of private property allows someone to occupy its property for a fixed contractual period of time, the owner may terminate the occupation after the period expires. If a statute prohibits the owner from terminating the occupation after the fixed period of contractual time expires, and then requires the owner to allow a provider to occupy the building the very next day, the owner's property has been taken since the Fifth Amendment right to exclude others has been abrogated by Kansas state action.

A taking can only be constitutional if it provides for just compensation and is for a public rather than a private use. Neither of these conditions is met by S. 54. Nor does the Bill, as the Third and Eleventh Circuits have held is required under the Fifth Amendment, enable the property owner to obtain compensation for the value of the right to serve subscribers on the property and is therefore unconstitutional. Several courts, including Loretto, have struck down mandatory access laws for the failure to include a satisfactory just compensation provision.

The Bill is also unconstitutional because the taking would be for a private rather than a public use. In a Supreme Court of Michigan case, it was determined that a similar provision was a taking for a private and not a public use largely because the taking predominately served to promote the cable franchises' private interest in expanding its customer base where tenants already had video services available to them through an alternative multichannel video service provider. ICTA believes that this Bill will have the same effect, and in fact will produce a wholly discriminatory anticompetitive effect.

The second reason the Bill should be rejected is it unnecessarily discriminates against non-municipally franchised multichannel video programming distributors. It totally solidifies the franchise cable operators' virtual monopoly control of MDU residents in Kansas. On its face, the bill benefits only cable operators holding municipal or county franchises. In addition, due to past regulatory advantages and current Kansas law, franchised cable operators serve the overwhelming majority of MDUs in Kansas. Competitors to the franchised cable industry have entered the market only recently and have gained less than five percent of the MDU marketplace. S. 54 only perpetuates this market dominance by franchise cable companies and ensures restricted consumer choice.

Which brings us to the third reason why we request your Committee reject S. 54. The Bill will not increase competition in the MDU video services market. The majority of the MDUs in Kansas are served by one franchised cable provider. That is not likely to change anytime soon. Unless a would-be competitive provider can recoup the costs associated with serving an MDU it almost certainly will not try to serve the MDU. The only way new competitors can ensure that they will recoup their investment is to provide exclusive service to the MDUs for a reasonable period of time. For example, members of ICTA generally cannot even acquire a loan to finance the significant up-front costs of serving an MDU unless the ratio between the annual cash flow that will be received at the MDU and the fixed costs incurred is no more than 6 to 1 – a ratio that can only be met where exclusivity is obtained. Yet this Bill prevents MDU owners from switching service providers in toto, thus preventing new entrants from bargaining for exclusive rights.

Both S. 54 (even if its constitutional problems are corrected) and the current language in K.S.A. § 58-2553(a)(5)[1] will continue to prevent meaningful cable competition and consumer choice for residents of Kansas MDUs. The two (individually and together) perpetuate the franchised company monopoly and for all intents and purposes eliminate the ability of private cable companies to compete in the MDU market. The bill will hurt residents with reduced choice and higher rates. That is in the case in numerous states that have adopted similar bills at the urging of the franchised cable companies. Why would Kansas legislators want to perpetuate a monopoly and do a disservice to Kansas MDU residents?

Legislators in Maryland, Virginia, Missouri, Indiana, Mississippi and elsewhere have prudently rejected bills similar to S. 54. Legislators in those states rejected the bills because they saw how counterproductive and anti-consumer such bills are.

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[1] The landlord shall not interfere with or refuse to allow access or service to a tenant by a communications or cable television service duly franchised by a municipality. K.S.A. § 58-2553 (1997)

In conclusion, ICTA respectfully submits that the Kansas legislature should not enact this unconstitutional and anti-consumer mandatory access law. It and the current statute have no place in a competition-oriented telecommunications environment nor does it advance the interests of Kansans. In addition, we suggest that the legislature take steps to create real choice for video programming customers at MDUs by repealing the language in K.S.A. § 58-2553(a)(5). Thank you.

Sincerely,

William J. Burhop by dm

William J. Burhop
Executive Director

cc: Member Committee on Utilities