# Takings

We now address a final method of resolving incompatible property uses. **Eminent domain** isthe inherent power of the state to transfer title of private property into state hands. In the United States, when the government “takes” land in this manner, it must pay the owner “just compensation.” This is a constitutional requirement, as the Fifth Amendment provides, “nor shall private property be taken for public use, without just compensation.” This brief constitutional provision encompasses three distinct issues that we will deal with in this chapter (though not in this order): (1) has there been a “taking” of private property? (2) Is the taking for “public use”; and (3) has “just compensation” been provided?

Precedent under the Takings Clause regulates the manner in which the state directly exercises its eminent domain power. As we will see, however, the clause also limits the ability of the state to regulate. Property owners sometimes challenge property regulations as being so onerous that it is as if the state has appropriated property and compensation is therefore due. Much of the Supreme Court’s takings caselaw concerns these so-called “regulatory takings.”

## A. Rationales

The power to take property is recognized (but not granted) by the Constitution and long historical practice, but what justifies it? Simply calling it an attribute of sovereignty does not provide a reason for its use. Property ownership usually encompasses the right to say no. If I want to ship a mobile home across your field, but we don’t agree on a price, it’s my duty to stay out. I cannot declare your property mine in exchange for a judicially determined measure of “just compensation.” What makes the state different?

One traditional explanation concerns the transaction costs of government enterprises. In a normal market, buyers can choose from among competing sellers. If houses in town A are too expensive, you can look for one in town B, and if you are priced out of the market, so be it. The state is often more constrained. Imagine a planned road that will connect two cities. Building the road requires assembling multiple, connected parcels. The number of plausible routes is finite, and increasingly constrained as plans progress. Owners along the planned route therefore may hold out for higher sale values, knowing the state has few alternatives. The absence of a functioning market depletes the social surplus of the road and may kill the project altogether. Eminent domain enables the government to engage in projects like these without the risk that a single property owner might exercise a veto.[[1]](#footnote-1)Of course private entities sometimes undertake large projects. Why might they succeed despite lacking the eminent domain power? For one argument, *see* Daniel B. Kelly, *The “Public Use” Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 Cornell L. Rev. 1, 5 (2006) (“[T]akings for the benefit of private parties are generally unnecessary--even if a private project potentially also has a public benefit--because private parties can avoid the holdout problem using secret buying agents. These undisclosed agents overcome the holdout problem by purchasing property without revealing the identity of the assembler or the nature of the assembly project to existing owners.”).

A second question concerns the requirement of compensation. Why do you think it is required? Fairness? Perhaps, but life is unfair. Moreover, we have insurance to protect against life’s calamities. Why couldn’t we insure against government takings? Might the answer have something to do with the nature of government action? Unlike forces of nature, it is susceptible to outside influence. Can you think of other rationales? For a discussion, *see* Steve P. Calandrillo, *Eminent Domain Economics: Should “Just Compensation” Be Abolished, and Would “Takings Insurance” Work Instead?*, 64 Ohio St. L.J. 451 (2003). If the government did not have a duty to compensate, how would its behavior change?

## B. “Public Use”

The Fifth Amendment declares that if private property is taken “for public use” compensation is required. What function does the term “public use” play in the clause? One could read the phrase as descriptive, i.e., as describing situations in which the government takes property via eminent domain (as opposed to taking it via the exercise of other powers, like taxation or punishment for a criminal offense). Under that reading, the only limit to the state’s taking authority is its willingness to pay (and the operation of other Constitutional requirements, like Equal Protection, Due Process, or the like). The Supreme Court takes a different view. Its precedent treats the term “for public use” as a *substantive* limitation to the takings power, albeit not a strong one.

Kelo v. City of New London, Conn.

545 U.S. 469 (2005)

Justice STEVENS delivered the opinion of the Court.

In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was “projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.” In assembling the land needed for this project, the city’s development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city’s proposed disposition of this property qualifies as a “public use” within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.

I

The city of New London (hereinafter City) sits at the junction of the Thames River and the Long Island Sound in southeastern Connecticut. Decades of economic decline led a state agency in 1990 to designate the City a “distressed municipality.” In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people. In 1998, the City’s unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.

These conditions prompted state and local officials to target New London, and particularly its Fort Trumbull area, for economic revitalization. To this end, respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reactivated. In January 1998, the State authorized a $5.35 million bond issue to support the NLDC’s planning activities and a $10 million bond issue toward the creation of a Fort Trumbull State Park. In February, the pharmaceutical company Pfizer Inc. announced that it would build a $300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area’s rejuvenation. After receiving initial approval from the city council, the NLDC continued its planning activities and held a series of neighborhood meetings to educate the public about the process.… Upon obtaining state-level approval, the NLDC finalized an integrated development plan focused on 90 acres of the Fort Trumbull area.

The Fort Trumbull area is situated on a peninsula that juts into the Thames River. The area comprises approximately 115 privately owned properties, as well as the 32 acres of land formerly occupied by the naval facility (Trumbull State Park now occupies 18 of those 32 acres). The development plan encompasses seven parcels. Parcel 1 is designated for a waterfront conference hotel at the center of a “small urban village” that will include restaurants and shopping. This parcel will also have marinas for both recreational and commercial uses. A pedestrian “riverwalk” will originate here and continue down the coast, connecting the waterfront areas of the development. Parcel 2 will be the site of approximately 80 new residences organized into an urban neighborhood and linked by public walkway to the remainder of the development, including the state park. This parcel also includes space reserved for a new U.S. Coast Guard Museum. Parcel 3, which is located immediately north of the Pfizer facility, will contain at least 90,000 square feet of research and development office space. Parcel 4A is a 2.4–acre site that will be used either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina. Parcel 4B will include a renovated marina, as well as the final stretch of the riverwalk. Parcels 5, 6, and 7 will provide land for office and retail space, parking, and water-dependent commercial uses.

The NLDC intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract. In addition to creating jobs, generating tax revenue, and helping to “build momentum for the revitalization of downtown New London,” the plan was also designed to make the City more attractive and to create leisure and recreational opportunities on the waterfront and in the park.

The city council approved the plan in January 2000, and designated the NLDC as its development agent in charge of implementation. The city council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City’s name. The NLDC successfully negotiated the purchase of most of the real estate in the 90–acre area, but its negotiations with petitioners failed. As a consequence, in November 2000, the NLDC initiated the condemnation proceedings that gave rise to this case.

II

Petitioner Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago. In all, the nine petitioners own 15 properties in Fort Trumbull—4 in parcel 3 of the development plan and 11 in parcel 4A. Ten of the parcels are occupied by the owner or a family member; the other five are held as investment properties. There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area.

In December 2000, petitioners brought this action in the New London Superior Court. They claimed, among other things, that the taking of their properties would violate the “public use” restriction in the Fifth Amendment. After a 7–day bench trial, the Superior Court granted a permanent restraining order prohibiting the taking of the properties located in parcel 4A (park or marina support). It, however, denied petitioners relief as to the properties located in parcel 3 (office space).

After the Superior Court ruled, both sides took appeals to the Supreme Court of Connecticut. That court held, over a dissent, that all of the City’s proposed takings were valid. It began by upholding the lower court’s determination that the takings were authorized by chapter 132, the State’s municipal development statute. That statute expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a “public use” and in the “public interest.” Next, relying on cases such as *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984), and *Berman v. Parker,* 348 U.S. 26 (1954), the court held that such economic development qualified as a valid public use under both the Federal and State Constitutions.

Finally, adhering to its precedents, the court went on to determine, first, whether the takings of the particular properties at issue were “reasonably necessary” to achieving the City’s intended public use and, second, whether the takings were for “reasonably foreseeable needs.” The court upheld the trial court’s factual findings as to parcel 3, but reversed the trial court as to parcel 4A, agreeing with the City that the intended use of this land was sufficiently definite and had been given “reasonable attention” during the planning process.

The three dissenting justices would have imposed a “heightened” standard of judicial review for takings justified by economic development. Although they agreed that the plan was intended to serve a valid public use, they would have found all the takings unconstitutional because the City had failed to adduce “clear and convincing evidence” that the economic benefits of the plan would in fact come to pass.

We granted certiorari to determine whether a city’s decision to take property for the purpose of economic development satisfies the “public use” requirement of the Fifth Amendment.

III

Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B,* even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future “use by the public” is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example. Neither of these propositions, however, determines the disposition of this case.

As for the first proposition, the City would no doubt be forbidden from taking petitioners’ land for the purpose of conferring a private benefit on a particular private party. Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. The takings before us, however, would be executed pursuant to a “carefully considered” development plan. The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case.…

On the other hand, this is not a case in which the City is planning to open the condemned land—at least not in its entirety—to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers. But although such a projected use would be sufficient to satisfy the public use requirement, this “Court long ago rejected any literal requirement that condemned property be put into use for the general public.” [*Midkiff,* 467 U.S.] at 244. Indeed, while many state courts in the mid–19th century endorsed “use by the public” as the proper definition of public use, that narrow view steadily eroded over time. Not only was the “use by the public” test difficult to administer (*e.g.,* what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society.… Thus, in a case upholding a mining company’s use of an aerial bucket line to transport ore over property it did not own, Justice Holmes’ opinion for the Court stressed “the inadequacy of use by the general public as a universal test.” *Strickley v. Highland Boy Gold Mining Co.,* 200 U.S. 527, 531 (1906). We have repeatedly and consistently rejected that narrow test ever since.

The disposition of this case therefore turns on the question whether the City’s development plan serves a “public purpose.” Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.

In *Berman v. Parker*, 348 U.S. 26 (1954), this Court upheld a redevelopment plan targeting a blighted area of Washington, D. C., in which most of the housing for the area’s 5,000 inhabitants was beyond repair. Under the plan, the area would be condemned and part of it utilized for the construction of streets, schools, and other public facilities. The remainder of the land would be leased or sold to private parties for the purpose of redevelopment, including the construction of low-cost housing.

The owner of a department store located in the area challenged the condemnation, pointing out that his store was not itself blighted and arguing that the creation of a “better balanced, more attractive community” was not a valid public use. Writing for a unanimous Court, Justice Douglas refused to evaluate this claim in isolation, deferring instead to the legislative and agency judgment that the area “must be planned as a whole” for the plan to be successful. The Court explained that “community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.” The public use underlying the taking was unequivocally affirmed:

“We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive.... The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.”

In *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984), the Court considered a Hawaii statute whereby fee title was taken from lessors and transferred to lessees (for just compensation) in order to reduce the concentration of land ownership. We unanimously upheld the statute and rejected the Ninth Circuit’s view that it was “a naked attempt on the part of the state of Hawaii to take the property of A and transfer it to B solely for B’s private use and benefit.” Reaffirming *Berman’s* deferential approach to legislative judgments in this field, we concluded that the State’s purpose of eliminating the “social and economic evils of a land oligopoly” qualified as a valid public use. Our opinion also rejected the contention that the mere fact that the State immediately transferred the properties to private individuals upon condemnation somehow diminished the public character of the taking. “[I]t is only the taking’s purpose, and not its mechanics,” we explained, that matters in determining public use.…

Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances.… For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.

IV

Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman,* to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

To avoid this result, petitioners urge us to adopt a new bright-line rule that economic development does not qualify as a public use. Putting aside the unpersuasive suggestion that the City’s plan will provide only purely economic benefits, neither precedent nor logic supports petitioners’ proposal. Promoting economic development is a traditional and long-accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized. In our cases upholding takings that facilitated agriculture and mining, for example, we emphasized the importance of those industries to the welfare of the States in question…. It would be incongruous to hold that the City’s interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests. Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose.

Petitioners contend that using eminent domain for economic development impermissibly blurs the boundary between public and private takings. Again, our cases foreclose this objection. Quite simply, the government’s pursuit of a public purpose will often benefit individual private parties.… The owner of the department store in *Berman* objected to “taking from one businessman for the benefit of another businessman,” referring to the fact that under the redevelopment plan land would be leased or sold to private developers for redevelopment. Our rejection of that contention has particular relevance to the instant case: “The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.”

It is further argued that without a bright-line rule nothing would stop a city from transferring citizen *A*’s property to citizen *B* for the sole reason that citizen *B* will put the property to a more productive use and thus pay more taxes. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise. They do not warrant the crafting of an artificial restriction on the concept of public use.

Alternatively, petitioners maintain that for takings of this kind we should require a “reasonable certainty” that the expected public benefits will actually accrue. Such a rule, however, would represent an even greater departure from our precedent.… The disadvantages of a heightened form of review are especially pronounced in this type of case. Orderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all interested parties be established before new construction can be commenced. A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans.

Just as we decline to second-guess the City’s considered judgments about the efficacy of its development plan, we also decline to second-guess the City’s determinations as to what lands it needs to acquire in order to effectuate the project.…

In affirming the City’s authority to take petitioners’ properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose “public use” requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. As the submissions of the parties and their *amici* make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. This Court’s authority, however, extends only to determining whether the City’s proposed condemnations are for a “public use” within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.…

Justice KENNEDY, concurring.

…. This Court has declared that a taking should be upheld as consistent with the Public Use Clause, U.S. Const., Amdt. 5, as long as it is “rationally related to a conceivable public purpose.” *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 241 (1984). This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses. The determination that a rational-basis standard of review is appropriate does not, however, alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.

A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.…

A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government’s actions were reasonable and intended to serve a public purpose. [Justice Kennedy went on to observe that the trial court made findings that supported the conclusion “that benefiting Pfizer was not ‘the primary motivation or effect of this development plan’”.] .…This case, then, survives the meaningful rational-basis review that in my view is required under the Public Use Clause.…

…. There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause. This demanding level of scrutiny, however, is not required simply because the purpose of the taking is economic development.…

Justice O’CONNOR, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join, dissenting.

…. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.,* given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings “for public use” is to wash out any distinction between private and public use of property—and thereby effectively to delete the words “for public use” from the Takings Clause of the Fifth Amendment. Accordingly I respectfully dissent.…

….Where is the line between “public” and “private” property use? We give considerable deference to legislatures’ determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.

Our cases have generally identified three categories of takings that comply with the public use requirement, though it is in the nature of things that the boundaries between these categories are not always firm. Two are relatively straightforward and uncontroversial. First, the sovereign may transfer private property to public ownership—such as for a road, a hospital, or a military base. Second, the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public’s use—such as with a railroad, a public utility, or a stadium. But “public ownership” and “use-by-the-public” are sometimes too constricting and impractical ways to define the scope of the Public Use Clause. Thus we have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use. See, *e.g., Berman v. Parker,* 348 U.S. 26 (1954); *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984).…

…. We are guided by two precedents about the taking of real property by eminent domain. In *Berman,* we upheld takings within a blighted neighborhood of Washington, D.C. The neighborhood had so deteriorated that, for example, 64.3% of its dwellings were beyond repair. It had become burdened with “overcrowding of dwellings,” “lack of adequate streets and alleys,” and “lack of light and air.” Congress had determined that the neighborhood had become “injurious to the public health, safety, morals, and welfare” and that it was necessary to “eliminat[e] all such injurious conditions by employing all means necessary and appropriate for the purpose,” including eminent domain. Mr. Berman’s department store was not itself blighted. Having approved of Congress’ decision to eliminate the harm to the public emanating from the blighted neighborhood, however, we did not second-guess its decision to treat the neighborhood as a whole rather than lot-by-lot.

In *Midkiff,* we upheld a land condemnation scheme in Hawaii whereby title in real property was taken from lessors and transferred to lessees. At that time, the State and Federal Governments owned nearly 49% of the State’s land, and another 47% was in the hands of only 72 private landowners. Concentration of land ownership was so dramatic that on the State’s most urbanized island, Oahu, 22 landowners owned 72.5% of the fee simple titles. The Hawaii Legislature had concluded that the oligopoly in land ownership was “skewing the State’s residential fee simple market, inflating land prices, and injuring the public tranquility and welfare,” and therefore enacted a condemnation scheme for redistributing title.…

In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even esthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side effects are enough to render transfer from one private party to another constitutional, then the words “for public use” do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power.…

Justice THOMAS, dissenting.

Long ago, William Blackstone wrote that “the law of the land ... postpone[s] even public necessity to the sacred and inviolable rights of private property.” 1 Commentaries on the Laws of England 134–135 (1765) (hereinafter Blackstone). The Framers embodied that principle in the Constitution, allowing the government to take property not for “public necessity,” but instead for “public use.” Amdt. 5. Defying this understanding, the Court replaces the Public Use Clause with a “ ‘[P]ublic [P]urpose’ ” Clause (or perhaps the “Diverse and Always Evolving Needs of Society” Clause (capitalization added)), a restriction that is satisfied, the Court instructs, so long as the purpose is “legitimate” and the means “not irrational.” This deferential shift in phraseology enables the Court to hold, against all common sense, that a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a “public use.”

I cannot agree. If such “economic development” takings are for a “public use,” any taking is, and the Court has erased the Public Use Clause from our Constitution, as Justice O’CONNOR powerfully argues in dissent. I do not believe that this Court can eliminate liberties expressly enumerated in the Constitution and therefore join her dissenting opinion. Regrettably, however, the Court’s error runs deeper than this. Today’s decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning. In my view, the Public Use Clause, originally understood, is a meaningful limit on the government’s eminent domain power. Our cases have strayed from the Clause’s original meaning, and I would reconsider them.…

The consequences of today’s decision are not difficult to predict, and promise to be harmful. So-called “urban renewal” programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful.…

…. In the 1950’s, no doubt emboldened in part by the expansive understanding of “public use” this Court adopted in *Berman,* cities “rushed to draw plans” for downtown development. B. Frieden & L. Sagalyn, Downtown, Inc. How America Rebuilds Cities 17 (1989). “Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite, and of these families, 56 percent of nonwhites and 38 percent of whites had incomes low enough to qualify for public housing, which, however, was seldom available to them.” Public works projects in the 1950’s and 1960’s destroyed predominantly minority communities in St. Paul, Minnesota, and Baltimore, Maryland. In 1981, urban planners in Detroit, Michigan, uprooted the largely “lower-income and elderly” Poletown neighborhood for the benefit of the General Motors Corporation. J. Wylie, Poletown: Community Betrayed 58 (1989). Urban renewal projects have long been associated with the displacement of blacks; “[i]n cities across the country, urban renewal came to be known as ‘Negro removal.’” Pritchett, The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 Yale L. & Pol’y Rev. 1, 47 (2003). Over 97 percent of the individuals forcibly removed from their homes by the “slum-clearance” project upheld by this Court in *Berman* were black. Regrettably, the predictable consequence of the Court’s decision will be to exacerbate these effects.…

Notes and Questions

1. If the state pays compensation and bears the political costs, what is wrong with taking from A and giving to B? Suppose the state wants land to be used for a particular purpose. Is it sensible to require the state to conduct operations or might turning them over to private actors enhance efficiency? Or is a “public use” requirement more about policing local political processes, deterring corruption or special interest capture? If so, is this an efficient mechanism?
2. *Kelo* provoked a strong public reaction and a flurry of state legislative activity designed to control abuses of eminent domain. By 2009, 43 states had enacted eminent domain restrictions. Does this mean that democracy works? Are there advantages to the Supreme Court’s setting limits on eminent domain? *Compare* Alberto B. Lopez, *Revisiting Kelo and Eminent Domain’s “Summer of Scrutiny”*, 59 Ala. L. Rev. 561, 565 (2008)(“[P]ost-*Kelo* legislation symbolizes the government’s effort to remedy the breach of the public’s trust caused by *Kelo* regardless of one’s substantive view of those legislative measures. Furthermore, the robust post-*Kelo* legislative response is a testament to the strength of one of the core principles of our government—federalism.”), *with* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 Minn. L. Rev. 2100, 2105 (2009) (“Only seven states that had recently engaged in significant numbers of economic development and blight condemnations have enacted post-Kelo legislative reforms with any real teeth.”). Can one’s answer be independent of one’s prior views on the legitimate uses of eminent domain?
3. As Justice Thomas’s dissent notes, one criticism of the eminent domain power has been that it has been used in either a discriminatory or racially disproportionate manner. Which way does this consideration cut in *Kelo*? After all, the practice of labeling of minority communities as “blighted” is a matter of historical record. Might the Court’s approval of eminent domain’s use on *Kelo*’s facts improve the politics of eminent domain law by making clear that anyone could be on the receiving end of a condemnation? And to the extent the problem with eminent domain is discriminatory application, why isn’t the Constitution’s Equal Protection Clause a preferable safeguard? Or does the history cited by Justice Thomas answer that question?
4. Most of the affected homeowners in New London negotiated a purchase price with the New London Development Corporation (NLDC). For her part, Kelo reportedly turned down a purchase offer that would have netted her a $22,000 profit on her home. The decision to litigate, while not letting her keep her property, did lead to a higher purchase price. The public outcry in the wake of the *Kelo* ruling led to favorable settlements for the holdout landowners. For example,

Kelo agreed in June 2006 to sell for $442,000 ($392,000 plus a pay-off of her $50,000 mortgage); not too bad for a place she had purchased in August 1997 for $53,500, and NLDC had appraised for condemnation at $123,000 in November 2000. She only sold the lot. Avner Gregory, the same preservationist who had refurbished the house after moving it from its original location to the site where Kelo found it, relocated the house a second time to a vacant parcel with a pre-existing foundation, in a modest neighborhood several miles away, on the other side of the Amtrak rail line from Fort Trumbull. A plaque identifies the house as “The Kelo House.”

George Lefcoe, *Jeff Benedict’s Little Pink House: The Back Story of the* Kelo *Case*, 42 Conn. L. Rev. 925, 954-55 (2010) (footnotes omitted). In 2009 Pfizer announced it would leave New London to cut costs, taking its jobs to its facility in Groton, Connecticut. Patrick McGeehan, “Pfizer to Leave City That Won Land-Use Case,” *New York Times*, p. A1(November 13, 2009), available at <http://www.nytimes.com/2009/11/13/nyregion/13pfizer.html?_r=0>.

## C. Eminent Domain Operations

Local governments carry out condemnations in a variety of ways. There is no standard eminent domain regime. Some states require some sort of pre-condemnation activity (e.g., formal findings that a condemnation is necessary or efforts to negotiate with the landowner); others do not. Some jurisdictions require the condemning authority to initiate a judicial action; others allow an administrative procedure, giving the landowner the right to challenge the taking in court. Some states provide for expedited procedures, “quick take” provisions, either as an independent cause of action or by motion within an ongoing proceeding. 13-79F Powell on Real Property § 79F.06.

In Illinois, for example, the condemning authority files an eminent domain action in the circuit court for the county of the property. The complaint details: “(i) the complainant’s authority in the premises, (ii) the purpose for which the property is sought to be taken or damaged, (iii) a description of the property, and (iv) the names of all persons interested in the property as owners or otherwise, as appearing of record, if known.” 735 Ill. Comp. Stat. Ann. 30/10-5-10. Either the condemning authority or the property owner may request a jury trial. Expedited procedures (called a “quick take” procedure) are also available upon motion. *Id.* § 30/20-5-5.

## D. Just Compensation

What is just compensation? The standard approach is fair market value. *See, e.g.*, 735 Ill. Comp. Stat. Ann. § 30/10-5-60 (“[T]he fair cash market value of property in a proceeding in eminent domain shall be the amount of money that a purchaser, willing, but not obligated, to buy the property, would pay to an owner willing, but not obliged, to sell in a voluntary sale.”). This amount may include costs directly attributable to the condemnation. *See id.* § 735 Ill. Comp. Stat. Ann. 30/10-5-62 (providing for compensation of reasonable relocation costs).

Evidentiary difficulties aside, the fair market value metric potentially understates the value of the home from the perspective of the property owner in at least three ways. First, fair market value ignores subjective values. A property owner often values it more than the market (as reflected by the fact that it has not yet been sold for the market price). If the property is a home, it may have high sentimental value (e.g., if it is where one raised children) or offer idiosyncratic amenities that cannot be easily duplicated but are not reflected in market price (e.g., proximity to friends, work, etc.). Second, eminent domain is a forced transaction. The landowner may experience the transaction as a violation of personal autonomy. Third, to the extent the project produces a surplus, the displaced landowner does not get a share. In other words, suppose five lots are each individually worth $10,000, but they can be assembled into a park that confers $100,000 of benefits on the surrounding area. The owners of the condemned lots do not share in the surplus, they still receive only $10,000. *See, e.g.*, 735 Ill. Comp. Stat. Ann. § 30/10-5-60 (“In the condemnation of property for a public improvement, there shall be excluded from the fair cash market value of the property any appreciation in value proximately caused by the improvement and any depreciation in value proximately caused by the improvement”).

What happens when only part of a parcel is taken? The general approach is to allow compensation for the effect of the severance on the land retained by the condemnee. Imagine O owns Blackacre and Whiteacre as one parcel with a combined value of $100,000. If Blackacre is taken for a fair market value of $50,000, and the severance leaves Whiteacre worth only $40,000, O is entitled to compensation for the lost $10,000. Note, however, that if O owned *only* Whiteacre, and its value was reduced by $10,000 due to the next-door condemnation of Blackacre, O would receive nothing. 13-79F Powell on Real Property § 79F.04.

What if a partial taking *enhances* the value of the remainder? *See, e.g.*, 735 Ill. Comp. Stat. Ann. § 30/10-5-55 (“In assessing damages or compensation for any taking or property acquisition under this Act, due consideration shall be given to any special benefit that will result to the property owner from any public improvement to be erected on the property.”); Illinois State Toll Highway Auth. v. Am. Nat. Bank & Trust Co. of Chicago, 642 N.E.2d 1249, 1255 (Ill. 1994) (“[S]pecial benefits are any benefits to the property that enhance its market value and are not conjectural or speculative.”).

This mix of rules leads to results that may strike you as unfair. Imagine a government project to build a subway station, and three affected landowners, Alice, Bob, and Charles. Alice’s parcel is condemned in its entirety; half of Bob’s land is condemned; and Charles’s land is untouched. Suppose further that the transit station leads to a doubling in the property values of the surrounding land. On these facts, Alice receives the pre-project value of her land. Bob receives nothing (assuming the appreciation of his retained half matches the pre-project value of the condemned portion); and Charles receives a windfall. Is there any way to avoid these difficulties?

Holders of future interests are also entitled to compensation. *See generally* 2-5 Nichols on Eminent Domain § 5.02; *see, e.g.*, Cal. Code Civ. Proc. § 1265.420 (“Where property acquired for public use is subject to a life tenancy, upon petition of the life tenant or any other person having an interest in the property, the court may order any of the following: (a) An apportionment and distribution of the award based on the value of the interest of life tenant and remainderman; (b) The compensation to be used to purchase comparable property to be held subject to the life tenancy; (c) The compensation to be held in trust and invested and the income (and, to the extent the instrument that created the life tenancy permits, principal) to be distributed to the life tenant for the remainder of the tenancy; (d) Such other arrangement as will be equitable under the circumstances.”).

## E. Physical Occupations

Loretto v. Teleprompter Manhattan CATV Corp.

458 U.S. 419 (1982)

Justice MARSHALL delivered the opinion of the Court.

This case presents the question whether a minor but permanent physical occupation of an owner’s property authorized by government constitutes a “taking” of property for which just compensation is due under the Fifth 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. 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. Because we conclude that such a physical occupation of property is a taking, we reverse.

I

Appellant Jean Loretto purchased a five-story apartment building located at 303 West 105th Street, New York City, in 1971. The previous owner had granted appellees Teleprompter Corp. and Teleprompter Manhattan CATV (collectively Teleprompter) permission to install a cable on the building and the exclusive privilege of furnishing cable television (CATV) services to the tenants. The New York Court of Appeals described the installation as follows:

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

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

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

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.” 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 is the normal fee to which a landlord is entitled. The Commission ruled that this nominal fee, which the Commission concluded was equivalent to what the landlord would receive if the property were condemned pursuant to New York’s Transportation Corporations Law, satisfied constitutional requirements “in the absence of a special showing of greater damages attributable to the taking.”

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. Appellee City of New York, which has granted Teleprompter an exclusive franchise to provide CATV within certain areas of Manhattan, intervened. The Supreme Court, Special Term, granted summary judgment to Teleprompter and the city, upholding the constitutionality of § 828 in both crossover and noncrossover situations. The Appellate Division affirmed without opinion.

On appeal, the Court of Appeals, over dissent, upheld the statute.… The court … 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.

II

The Court of Appeals determined that § 828 serves the legitimate public purpose of “rapid development of and maximum penetration by a means of communication which has important educational and community aspects,” 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. We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention.

A

In *Penn Central Transportation Co. v. New York City* 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.” 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.”

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.

When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking. As early as 1872, in *Pumpelly v. Green Bay Co.*, 13 Wall. (80 U.S.) 166, 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. Seven years later, the Court reemphasized the importance of a physical occupation by distinguishing a regulation that merely restricted the use of private property. In *Northern Transportation Co. v. Chicago*, 99 U.S. 635 (1879), the Court held that the city’s construction of a temporary dam in a river to permit construction of a tunnel was not a taking, even though the plaintiffs were thereby denied access to their premises, because the obstruction only impaired the use of plaintiffs’ property. The Court distinguished earlier cases in which permanent flooding of private property was regarded as a taking, *e.g., Pumpelly, supra*, as involving “a physical invasion of the real estate of the private owner, and a practical ouster of his possession.” In this case, by contrast, “[n]o entry was made upon the plaintiffs’ lot.”

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.

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

Similarly, in *Western Union Telegraph Co. v. Pennsylvania R. Co.*, 195 U.S. 540 (1904), a telegraph company constructed and operated telegraph lines over a railroad’s right of way. In holding that federal law did not grant the company the right of eminent domain or the right to operate the lines absent the railroad’s consent, the Court assumed that the invasion of the telephone lines would be a compensable taking. *Id.*, at 570 (the right-of-way “cannot be appropriated in whole or in part except upon the payment of compensation”). Later cases, relying on the character of a physical occupation, clearly establish that permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner’s use of the rest of his land.

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.…

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.…

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, the government does not simply take a single “strand” from the “bundle” of property rights: it chops through the bundle, taking a slice of every strand.

Property rights in a physical thing have been described as the rights “to possess, use and dispose of it.” *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, 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. 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, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Moreover, an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner’s property. As Part II–A, *supra*, indicates, property law has long protected an owner’s expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 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.

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. 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.

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

C

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

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 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. [[2]](#footnote-2)17…

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 U.S. 241 (1964) (discrimination in places of public accommodation); *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946) (fire regulation); *Bowles v. Willingham*, 321 U.S. 503 (1944) (rent control); *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934) (mortgage moratorium); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922) (emergency housing law); *Block v. Hirsh*, 256 U.S. 135 (1921) (rent control). In none of these cases, however, did the government authorize the permanent occupation of the landlord’s property by a third party. Consequently, our holding today in no way alters the analysis governing the State’s power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity. See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).[[3]](#footnote-3)19

III

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

Furthermore, our conclusion that § 828 works a taking of a portion of appellant’s property does not presuppose that the fee which many landlords had obtained from Teleprompter prior to the law’s enactment is a proper measure of the value of the property taken. The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand.[[4]](#footnote-4)20…

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

.… 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 L.J. 36, 37 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.…

Before examining the Court’s new takings rule, it is worth reviewing what was “taken” in this case. At issue are about 36 feet of cable one-half inch in diameter and two 4″ x 4″ x 4″ metal boxes. Jointly, the cable and boxes occupy only about one-eighth of a cubic foot of space on the roof of appellant’s Manhattan apartment building. When appellant purchased that building in 1971, the “physical invasion” she now challenges had already occurred.…

The Court argues that a *per se* rule based on “permanent physical occupation” is both historically rooted, and jurisprudentially sound. 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. But if, by chance, they 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.”

The Court’s recent Takings Clause decisions teach that *nonphysical* government intrusions on private property, such as zoning ordinances and other land-use restrictions, have become the rule rather than the exception. Modern government regulation exudes intangible “externalities” that may diminish the value of private property far more than minor physical touchings.…

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

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.” But surely this factor cannot be determinative, since the Court simultaneously recognizes that temporary 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. 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, without burdening her with the cost of buying or maintaining the cable.

In any event, under the Court’s test, the “third party” problem would remain even if appellant herself owned the cable. So long as Teleprompter continuously passed its electronic signal through the cable, a litigant could argue that the second element of the Court’s formula—a “physical touching” by a stranger—was satisfied and that § 828 therefore worked a taking. 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.…

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” physical invasions of considerable economic magnitude. 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. 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.

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,” 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. 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.”

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

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.” 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. A landlord’s dispositional rights are affected no more adversely 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. If the State constitutionally can insist that appellant make this sacrifice so that her tenants may receive mail, it is hard to understand why the State may not require her to surrender less space, *filled at another’s expense*, so that those same tenants can receive television signals.

For constitutional purposes, the relevant question cannot be solely *whether* the State has interfered in some minimal way with an owner’s use of space on her building. Any intelligible takings inquiry must also ask whether the *extent* of the State’s interference is so severe as to constitute a compensable taking in light of the owner’s alternative uses for the property. Appellant freely admitted that she would have had no other use for the cable-occupied space, were Teleprompter’s equipment not on her building.

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. 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. 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.…

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. 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. New York’s courts in this litigation, with only one jurist in dissent, unanimously upheld the constitutionality of that considered legislative judgment.

This Court now reaches back in time for a *per se* rule that disrupts that legislative determination. 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 U.S., at 274 (dissenting opinion). I would affirm the judgment and uphold the reasoning of the New York Court of Appeals.

Notes

1. Loretto’s victory at the Supreme Court amounted to little. The Commission on Cable Television decided that $1 sufficed as compensation because cable television access enhances property values, and the Court of Appeals held it was permissible for the compensation to be set by the commission, subject to later judicial review, rather than a court. Loretto v. Teleprompter Manhattan CATV Corp., 446 N.E.2d 428, 434 (N.Y. 1983).
2. **Categorical Rules.** One debate between the majority and the dissent concerns the merits of rules versus standards. As we will discuss in greater detail, the Court had developed a balancing test for determining whether government regulation goes “too far” and becomes a taking. The question thus arose whether that balancing test applies to *all* takings inquiries. Even if *Loretto* had gone the dissent’s way, it still would be the case that physical invasions would generally be takings. The dispute was over whether courts have the discretion to treat certain minor intrusions sufficiently *de minimis* as not to require compensation. The Court rejected this approach, clarifying that any permanent physical occupation by or authorized by the government is a taking as a categorical, per se, matter.
3. A consequence of the rule is that certain minor intrusions merit compensation, while more costly regulations may pass muster under the balancing test. That problem aside, Justice Blackmun claims that the per se occupations rule lacks the compensating benefit of ease of application, pointing to the difficulty of distinguishing permanent from temporary occupations. Do you agree?
4. Another point of contention between the majority and dissent is whether it is sensible to allow the state to require by regulation the installation of cable (or other) facilities, but prohibit it from directly authorizing their installation. At some point, might regulation become so extensive that it constitutes a *de facto* occupation? *Yee v. City of Escondido*, 503 U.S. 519 (1992), rejects the argument that rent control laws fall under *Loretto*’s categorical rule, concluding that the decision of the landlord to lease the premises negates the claim of any forced physical occupation.
5. **Personal property.** How does *Loretto* apply to personal property? *Horne v. Department of Agriculture*, 135 S.Ct. 2419 (2015), addressed a challenge to a Department of Agriculture program intended to promote stability in the raisin market. The program issued marketing orders that required raisin farmers to set aside a certain percentage of their annual crop. The government took title to the reserved raisins and disposed of them in a variety of ways, including sales in non-competitive markets, returning any net profits to the growers. The Court held this to be a taking under *Loretto.*

Raisin growers subject to the reserve requirement thus lose the entire “bundle” of property rights in the appropriated raisins—”the rights to possess, use and dispose of” them, *Loretto*, 458 U.S., at 435 (internal quotation marks omitted)—with the exception of the speculative hope that some residual proceeds may be left when the Government is done with the raisins and has deducted the expenses of implementing all aspects of the marketing order. The Government’s “actual taking of possession and control” of the reserve raisins gives rise to a taking as clearly “as if the Government held full title and ownership,” id., at 431 (internal quotation marks omitted), as it essentially does. The Government’s formal demand that the [farmers] turn over a percentage of their raisin crop without charge, for the Government’s control and use, is “of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine.” Id., at 432.

135 S. Ct. at 2428. As in *Loretto*, the Court rejected the argument that the reserve requirement was permissible given that the government could achieve the same end by simply prohibiting the farmers from selling a portion of their crop.

[T]hat distinction flows naturally from the settled difference in our takings jurisprudence between appropriation and regulation. A physical taking of raisins and a regulatory limit on production may have the same economic impact on a grower. The Constitution, however, is concerned with means as well as ends.

*Id.* The Court likewise determined that the farmers’ retention of a contingent monetary interest in the sale of the reserved raisins did not negate the physical taking. Dissenting, Justice Sotomayor argued that *Loretto*’s *per se* rule applies only when *all* property rights have been taken, and the farmers’ contingent interest negates use of the per se rule.

**Questions**

* 1. Do you think the Court’s decision in *Kelo* was correct as a matter of law, justice and/or policy? If you were a member of state legislature, would you vote to restrict eminent domain power to prevent takings like those in the *Kelo* case?
  2. Watts is one of the poorest neighborhoods in Los Angeles. The city of Los Angeles would like to improve the neighborhood by selling it to developers who would build high-end condominiums. Can the government use its eminent domain power to take the property, pay the current owners market value, and sell it to developers?
  3. Suppose Prof. Altman owns farmland in Nebraska. The government decides to build a highway and offramp on his land. To do so, they need one of the 100 acres that Prof. Altman owns. The farmland was worth $2000 per acre before the highway was built. After the highway was built, Prof. Altman’s farm was worth $10,000 per acre, because his land is now suitable for commercial development (e.g. gas stations, restaurants, and hotels). How much compensation should the government be required to pay Prof. Altman?
  4. Suppose housing in East Dakota is monopolized by a few large corporations which own nearly all the land and houses. Most inhabitants of East Dakota rent their homes from the corporations. East Dakota decides that it would like to increase homeownership in the state, so it takes 90% of the homes from the large corporations that own them, pays the corporations fair market value, and then sells the homes to those who currently rent them. Is East Dakota’s action constitutional?
  5. Do you think the Court’s decision in *Loretto* was correct as a matter of law, justice, and/or policy? Was he taking for a public purpose? What if NY had required landlords to install cables at own expense?
  6. The city of Oneida owns the local electric utility. It needs to construct new power lines across Prof. Rasmussen’s property. If one of the electricity poles will be on Prof. Rasmussen’s property, does the city have to pay Prof. Rasmussen compensation? Would it matter if the poles were on public land, but the power lines would cross Prof. Rasmussen’s property, 20 feet above the ground?
  7. Prof. Barnett owns property on the Pacific coast of Oregon. The government decides that the coast is more beautiful and more friendly to wildlife if there are no buildings on it, so it forbids Prof. Barnett and similarly situated landowners from building on their property. Does Oregon need to compensate Prof. Barnett?

1. And courts sometimes *do* require property owners to take the money and bear an intrusion. For example, private condemnation statutes allow landlocked owners to obtain access to public roads so long as they pay compensation. Likewise, recall that *Boomer* required nuisance plaintiffs to accept a de facto servitude on their land upon payment of permanent damages by the defendant cement plant. Both situations may be described as involving high transaction costs either in the form of bilateral monopoly or problems of coordinating numerous parties. [↑](#footnote-ref-1)
2. 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.… [↑](#footnote-ref-2)
3. 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”; it would give a landlord (rather than a CATV company) full authority over the installation except only as government specifically limited that authority. The landlord would decide how to comply with applicable government regulations concerning CATV and therefore could minimize the physical, esthetic, and other effects of the installation. Moreover, if the landlord wished to repair, demolish, or construct in the area of the building where the installation is located, he need not incur the burden of obtaining the CATV company’s cooperation in moving the cable.

   In this case, by contrast, appellant suffered injury that might have been obviated if she had owned the cable and could exercise control over its installation. The drilling and stapling that accompanied installation apparently caused physical damage to appellant’s building. Appellant, who resides in her building, further testified that the cable installation is “ugly.” 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. [↑](#footnote-ref-3)
4. 20In 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. [↑](#footnote-ref-4)