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

CHAMBERS OF
THE CHIEF JUSTICE

June 7, 1982

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

Dear Thurgood:

I join.

Regards,

WEB

Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 22, 1982

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

Dear Harry:

Please join me in your dissent in the above.

Sincerely,

Bill

Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 17, 1982

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

Dear Thurgood,

I shall await the dissent.

Sincerely yours,

Justice Marshall

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 22, 1982

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

Dear Harry,

I join your dissent.

Sincerely yours,

Justice Blackmun

Copies to the Conference

cpm

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

From: **Justice Marshall**

Circulated: MAY 11 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-244

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

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

[May ——, 1982]

JUSTICE MARSHALL delivered the opinion of the Court.

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

I

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

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

P. 1, 21

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

From: **Justice Marshall**

Circulated: _____

Recirculated: MAY 20 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-244

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

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

[May ——, 1982]

JUSTICE MARSHALL delivered the opinion of the Court.

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

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

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

P. 19

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

From: **Justice Marshall**

Circulated: _____

Recirculated: JUN 7 1982

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-244

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

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

[May ——, 1982]

JUSTICE MARSHALL delivered the opinion of the Court.

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

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

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

P. 19

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

From: **Justice Marshall**

Circulated: _____

Recirculated: JUN 21 1982

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-244

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

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

[June ——, 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. N.Y. Exec. Law § 828 (1) (McKinney). In this case, the cable installation occupied portions of appellant's roof and the side of her building. The New York Court of Appeals ruled that this appropriation does not amount to a taking. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 53 N.Y. 2d 124, —— N.E. 2d —— (1981). Because we conclude that such a physical occupation of property is a taking, we reverse.

I

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

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

STYLISTIC CHANGES THROUGHOUT.

PP. 16, 18, 19, 21

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

From: **Justice Marshall**

Circulated: _____

Recirculated: JUN 24 1982

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-244

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

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

[June ——, 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. N.Y. Exec. Law § 828 (1) (McKinney Supp. 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. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 53 N.Y. 2d 124, 423 N.E. 2d 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, in 1971. The previous owner had granted appellees Teleprompter Corporation and Teleprompter Manhattan CATV ("Teleprompter")[1] permission to install a cable on the build-

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

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 13, 1982

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

Dear Thurgood:

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

Sincerely,

H.A.B.

Justice Marshall

cc: The Conference

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

From: Justice Blackmun

Circulated: JUN 21 1982

Recirculated: _____

No. 81-244, Loretto v. Teleprompter Manhattan CATV Corp., et al.

JUSTICE BLACKMUN, 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 U.S. 590, 594 (1962).[1]

In a curiously anachronistic decision, the Court today acknowledges its historical disavowal of set formulae in almost the same breath as it constructs a rigid per se takings rule: "a permanent physical occupation authorized by the government is a taking without regard to the public interests that it may serve." Ante, at 6. 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," ante, at 12, and

[1]See Kaiser Aetna v. United States, 444 U. S. 164, 175 (1979); Andrus v. Allard, 444 U. S. 51, 65 (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 U. S. 104, 124 (1978); United States v. Caltex, Inc., 344 U. S. 149, 156 (1952) ("No rigid rules can be laid down to distinguish compensable losses from noncompensable losses."); Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 416 (1922) (a takings question "is a question of degree -- and therefore cannot be disposed of by general propositions").

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

From: Justice Blackmun

Circulated: _____

Recirculated: 6/22/82

Printed
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-244

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

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

[June ——, 1982]

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

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 U. S. 590, 594 (1962).[1]

In a curiously anachronistic decision, the Court today acknowledges its historical disavowal of set formulae in almost the same breath as it constructs a rigid *per se* takings rule: "a permanent physical occupation authorized by the government is a taking without regard to the public interests that it may serve." *Ante*, at 6. 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," *ante*, at 12, and "permanent physical occupations,"

[1] See *Kaiser Aetna* v. *United States*, 444 U. S. 164, 175 (1979); *Andrus* v. *Allard*, 444 U. S. 51, 65 (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 U. S. 104, 124 (1978); *United States* v. *Caltex, Inc.*, 344 U. S. 149, 156 (1952) ("No rigid rules can be laid down to distinguish compensable losses from noncompensable losses."); *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 416 (1922) (a takings question "is a question of degree—and therefore cannot be disposed of by general propositions").

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 25, 1982

MEMORANDUM TO THE CONFERENCE

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

In response to Thurgood's recirculation of June 24, I propose to add the following at the end of footnote 2 on page 2 of my dissent:

> "Although the Court alludes to the presence of 'two large silver boxes' on appellant's roof, ante, at 19, n. 16, the New York Court of Appeals' opinion nowhere mentions them, nor are their dimensions stated anywhere in the record."

H. A. B.

(4)

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 22, 1982

81-244 Loretto v. Teleprompter

Dear Thurgood:

Please join me.

Sincerely,

L. Lewis

Justice Marshall

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 13, 1982

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

Dear Thurgood:

I think you have written a fine opinion in this case, and I may well end up joining it even if you are unable to accommodate the following suggestion. On page 19, at the end of the first full paragraph on the page, you conclude the sentence with the following clause: "See generally PruneYard Shopping Center, 447 U.S., at 91-95 (Justice MARSHALL, concurring)."

The first part of the four pages of your concurring opinion which you have cited praises the Supreme Court of California for having followed Logan Valley rather than Lloyd or Hudgens. Then follows, on pp. 92-93, a discussion of our previously decided cases in this area, with which of course I have no quarrel. Beginning with the paragraph on page 93, carrying over to page 94, you express your views about the "normative" dimensions of property rights, which you feel stems from the Constitution itself. I agree with part of it and disagree with part of it, and naturally disagree with the footnote reference to John Stevens' dissenting opinion in Meachum v. Fano, 427 U.S. 215, since I joined Byron's opinion for the Court.

I had first thought that I might be able to suggest a citation to a shorter portion of your concurring opinion which would have been more palatable to me, but that doesn't seem possible because the thoughts are pretty well intermingled together. But in an important case like this, where there are only five votes for the result the Court reaches, I suppose each of us has some obligation to swallow minor points of personal preference. I would unhesitatingly join you if you could find some way to either change or dispense with the citation to that portion of your concurring opinion in PruneYard; if you can't I will then debate with myself whether to join you anyway or whether to write a very brief separate statement (if only you could somehow letter that paragraph

in such a way as to separate it from the rest of the opinion, I could join all of the opinion except that paragraph.)

Sincerely,

WJW

Justice Marshall

(3)

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 7, 1982

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

Dear Thurgood:

Please join me in your most recent circulation.

Sincerely,

WHR

Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 12, 1982

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

Dear Thurgood:

With the exception of footnote 20 on page 21 and the final paragraph that begins on that page, I am prepared to join your persuasive opinion.

The final paragraph of the opinion--and particularly footnote 20--might be read to suggest that the fair market value of CATV access is not the appropriate measure of compensation for the taking in this case. As you noted in your opinion for the Court in United States v. 564.54 Acres of Land, 441 U.S. 506, 511: "In giving content to the just compensation requirement of the Fifth Amendment, this Court has sought to put the owner of condemned property 'in as good a position pecuniarily as if his property had not been taken.' Olson v. United States, 292 U.S. 246, 255 (1934)." One of the aspects of the New York statute at issue in this case that I find particularly offensive is that prior to the enactment of the law the fair market value of CATV access was paid to the owners of rental property whereas, as a result of the statute, that fair market value now is transferred to the City in exchange for its grant of access to the landlord's property. If the landlord is to be put "in as good a position pecuniarily as if his property had not been taken," he should recover the fair market value of CATV access. Certainly, that is the value of "the power to exclude" in this case, which you correctly identify at page 16 as "one of the most treasured strands in an owner's bundle of property rights."

To be sure, 564.54 Acres of Land establishes that "the indemnity principle" is not absolute. In that case, however, we held that nontransferrable values arising from an owner's unique need for the property--

which exceeded fair market value--are not compensable. I am not sure that the case would support an award of compensation in this case of less than the fair market value of CATV access. I agree that we need not decide this issue, and I am aware that an argument can be made that the physical "space" that is taken does not have the same fair market value as the right of CATV access. In light of "the indemnity principle" recognized in 564.54 Acres of Land, however, I would be happier if the Court did not in any way predetermine the issue. Would you consider deleting footnote 20 and revising the last paragraph to read:

> "Furthermore, our conclusion that § 828 works a taking of a portion of appellant's property does not presuppose the amount of compensation that is due. That issue is a matter for the state courts to consider as an intial matter on remand.[FR21]

Of course, any other similar language would be fine.

Except for this one point, I think your opinion is excellent.

Respectfully,

Justice Marshall

(1)

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 20, 1982

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

Dear Thurgood:

Please join me.

Respectfully,

Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 11, 1982

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

Dear Thurgood,

Please join me in your opinion.

Sincerely,

Sandra

Justice Marshall

Copies to the Conference