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NOTES

Eminent Domain—*Loretto v. Teleprompter Manhattan CATV Corp.*: Permanent Physical Occupation as a Taking

The fifth amendment to the United States Constitution prohibits the taking of private property for public use without the payment of just compensation.[1] For many years, courts have struggled to determine when, if ever, a governmental interference with land is a "taking."[2] That this attempt has been less than successful is suggested by one commentator's observation that "in truth, the collected decisions of the Supreme Court, and all other courts, leave the subject as disheveled as a ragpicker's coat."[3] Recent cases seemed to suggest that the Supreme Court was moving toward a unified taking doctrine.[4] In *Loretto v. Teleprompter Manhattan CATV Corp.*,[5] the Court had to decide whether to continue this evolution, or to retain a two-track approach that distinguishes physical invasions from other governmental interferences with land use.

The particular issue in *Loretto*, as formulated by Justice Marshall, was "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."[6] By holding in a 6-3 opinion[7] that any permanent physical occupation authorized by government is a taking, regardless of the public interest it may serve,[8] the Court reaffirmed its two-track approach and signalled its unwillingness to hasten the evolution of a unified theory.

Loretto involved a challenge by a New York City landlord to a New York State statute[9] that prohibited landlords from interfering with the installation

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1. U.S. CONST. amend. V: "[N]or shall private property be taken for public use without just compensation." This prohibition has been made applicable to the states by the fourteenth amendment. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 241 (1897).

2. *See* Sax, *Takings, Private Property and Public Rights,* 81 YALE L.J. 149, 149 (1971); Stoebuck, *Police Power, Takings, and Due Process,* 37 WASH. & LEE L. REV. 1057, 1058-59 (1980).

3. Stoebuck, *supra* note 2, at 1059 n.11.

4. *See especially* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978). *See also* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980); Kaiser Aetna v. United States, 444 U.S. 164 (1979).

5. 102 S. Ct. 3164 (1982).

6. *Id.* at 3168.

7. Chief Justice Burger and Justices Powell, Rehnquist, Stevens and O'Connor joined Justice Marshall in the majority. Justice Blackmun wrote the dissenting opinion, in which Justices Brennan and White joined.

8. 102 S. Ct. at 3171.

9. N.Y. Exec. Law § 828 (McKinney 1982), which provides in part:

> 1. No landlord shall
>
> a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require:

of cable television facilities on their premises.[10] The New York Court of Appeals[11] upheld the statute against a taking challenge[12] after holding that it was a legitimate exercise of the police power.[13] While it did not disturb the New York court's determination that facilitating cable television was a valid public purpose,[14] the United States Supreme Court reversed on the grounds that the application of the statute effected a taking.[15]

Historically, two types of governmental interferences with land use have been subject to taking analyses: physical invasions and nonpossessory regulations on use.[16] As a general rule, any physical invasion of an owner's property by the government has been considered a taking.[17] Because the impairment in use caused by an invasion was substantially identical to that resulting from a

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i. that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning, and appearance of the premises, and the convenience and well-being of other tenants;

ii. that the cable television company or the tenant or a combination thereof bear the entire cost of the installation, operation or removal of such facilites; and

iii. that the cable television company agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities.

b. demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable; or

c. discriminate in rental charges, or otherwise, between tenants who receive cable television and those who do not.

Prior to the enactment of § 828 in 1973, Teleprompter routinely obtained authorizations for its installations from property owners along the cable's route, compensating owners at a standard rate of 5% of the gross revenues that Teleprompter realized from that particular property. *Loretto*, 102 S. Ct. at 3169.

Pursuant to § 828(1)(b), the state commission ruled that a one-time $1 payment is the normal fee to which the landlord is entitled. *Id.* at 3170.

10. The installation on plaintiff Loretto's building involved approximately 36 feet of cable one-half inch in diameter (which ran along the length of the building 18 inches above the roof and connected to the neighboring building), and two metal boxes, each occupying four cubic inches. When Loretto purchased the property, she was unaware of the existence of the cable. Two years after her purchase, Teleprompter dropped an additional cable down the front of the building to provide cable television services to one of her tenants. *Id.* at 3169-70.

11. Loretto v. Teleprompter Manhattan CATV Corp., 53 N.Y.2d 124, 423 N.E.2d 320, 440 N.Y.S.2d 843 (1981).

12. *Id.* at 151, 423 N.E.2d at 334, 440 N.Y.S.2d at 857.

13. The court noted that the statute served the public purpose of facilitating "rapid development of and maximum penetration by a means of communication which has important educational and community aspects." *Id.* at 143-44, 423 N.E.2d at 329, 440 N.Y.S.2d at 852.

14. *Loretto*, 102 S. Ct. at 3171.

15. *Id.* at 3179.

16. *See* Sax, *Takings and the Police Power,* 74 YALE L.J. 36, 36 (1964).

17. Among several cases supporting this proposition are those involving flooding, *see, e.g.,* United States v. Lynah, 188 U.S. 445 (1903) (government dam caused flooding of plaintiff's land, held that substantial invasion caused by flood waters amounted to a taking); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871) (same); United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950) (destruction of agricultural value caused by flooding above highwater mark held compensable as taking); utility lines, *e.g.,* Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 540 (1904) (telegraph company had no right of eminent domain to construct and operate its lines on railroad's property without railroad's consent; Court assumed that such an invasion would be compensable as a taking); St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893) (city had power to require telegraph company to pay for the exclusive, permanent use of space on poles); and airplane overflights, *e.g.*, Griggs v. Allegheny County, 369 U.S. 84 (1962) (frequent low altitude flights above landowner's property constituted a taking); United States v. Causby, 328 U.S. 256

formal appropriation, courts believed that the government should compensate the owner as if it had formally appropriated the land.[18]

In contrast to their relative inflexibility toward physical invasions, courts have adopted two views with respect to the regulation of land use.[19] The earlier view was that the regulation of a "noxious" use was never a taking.[20] Courts reasoned that there could be no taking in these cases, either because there was no appropriation of a proprietary interest (in contrast to the physical invasion cases),[21] or because uses in contravention of the public interest were not property interests protected by the Constitution.[22]

A second view, not necessarily inconsistent with the first, was elucidated in Justice Holmes' majority opinion in *Pennsylvania Coal Co. v. Mahon*:[23] a regulation that went "too far" would be a taking.[24] The standard for determining whether a regulation crossed this amorphous boundary was the extent of the diminution in value caused by the government's action.[25] Holmes took a narrow view of the property interest affected by the government's action,[26] and suggested that a taking was less likely to be found if a landowner burdened by a governmental action received a reciprocal benefit flowing from that action.[27]

Penn Central Transportation Co. v. New York[28] represented a watershed in the Supreme Court's thinking about taking jurisprudence. After stating that it had developed no "set formula" for determining when "justice and fairness" required that economic injuries caused by public action be compensated by government, rather than remaining disproportionately concentrated on a few persons, the Court identified several factors that should aid in making these "essentially ad hoc, factual inquiries."[29] The Court focused on the economic impact of the regulation, considering particularly the extent to which the regu-

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(1946) (same). *See also* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 HARV. L. REV. 1165, 1184 (1967).

18. *See* Michelman, *supra* note 17, at 1185-86.

19. *See* Sax, *supra* note 16, at 37-42; Stoebuck, *supra* note 2, at 1062, 1069-70.

20. *See, e.g.,* Mugler v. Kansas, 123 U.S. 623 (1887) (upholding regulation forbidding sale and manufacture of intoxicating liquors). *See also* Sax, *supra* note 16, at 38-40.

21. *See* Mugler v. Kansas, 123 U.S. 623, 668-69 (1887).

22. *See* Gardner v. Michigan, 199 U.S. 325, 332-33 (1905) (holding that property rights in hauling and disposing of garbage were not protected by the Constitution against de facto destruction by a regulation making such activities public nuisances).

23. 260 U.S. 393 (1922) (statute forbidding mining of coal that would remove the subadjacent support from surface housing held an impermissible exercise of the police power when owners of surface had failed to acquire subadjacent rights).

24. *Id.* at 415.

25. *Id.* at 413.

26. Holmes focused on the narrow right to mine coal under the particular house in question, rather than the right to mine coal on the entirety of the property. *Id.* at 413-14.

27. Holmes expressed this notion in terms of "an average reciprocity of advantage." *Id.* at 415.

28. 438 U.S. 104 (1978). *Penn Central* involved the application of New York City's Landmark Preservation Law to Grand Central Station. Although its effect was to prohibit the owners of Grand Central from developing the airspace over the terminal, the Court ruled that the application of the law was not a taking.

29. *Id.* at 123-24.

lation has interfered with distinct investment-backed expectations, and the character of the government's action.[30] In justifying this rule, the Court rejected the notion that an individual should be asked to bear a disproportionate part of the cost for a public benefit only when he has done something "wrong" (the "noxious use" test),[31] or when he will receive a reciprocal benefit to mitigate his loss (Holmes' "reciprocity of advantage").[32] The Court also limited the *Pennsylvania Coal* diminution of value standard by incorporating that standard as only one factor in the multi-factor balancing test, and by taking a much broader view of the property interest affected by the government's action than that taken by Holmes.[33]

Because *Penn Central* did not involve a physical invasion, it was unclear from that case whether the move away from historical per se rules and toward a unified theory based on an all-inclusive, multi-factor balancing test would be extended to physical invasion cases as well. By observing in dicta that "a 'taking' may more readily be found when the interference with property can be characterized as a physical invasion . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good,"[34] the Court in *Penn Central* appeared to leave open the possibility that a physical invasion could be accorded special weight in the balancing process without being determinative. Two cases decided after *Penn Central* seemed to suggest that the Court would continue its movement toward a unified doctrine.

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30. *Id.* at 124. In applying these factors, the Court determined that since the owner was able to continue to enjoy a reasonable return after the enactment of the regulation, it did not suffer a significant loss or any substantial interference with investment-backed expectations. *Id.* at 136. In addition, the Court was less hesitant to uphold the governmental action since it was a regulation rather than a physical invasion. See *id.* at 130.

31. The Court cited three cases as standing for the proposition that use regulations may be upheld if they are "reasonably related to the implementation of a policy . . . expected to produce a widespread benefit and applicable to all similarly situated property." *See id.* at 133-34 n.30. These cases were Hadacheck v. Sebastian, 239 U.S. 394 (1915) (statute requiring that the operation of an existing brickyard within the city limits be terminated upheld as valid exercise of the police power, even though its application diminished value of owner's property from $800,000 to $60,000); Miller v. Schoene, 276 U.S. 272 (1928) (upheld order of state entomologist requiring plaintiffs to cut down ornamental red cedar trees that contained a pest harmful to apple trees; compensation was limited to cost of removal); and Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (upheld regulation prohibiting excavations below the water table; effect was to prevent present and presumably most beneficial use of the land). By denying that the decisions in these cases were based on a determination that the uses involved were "noxious," when the Court had previously characterized them as such, the Court was rejecting the noxious use rule. *See Penn Central,* 438 U.S. at 144-46 (Rehnquist, J., dissenting).

32. The owner of Grand Central Station was forced to accept a burden greater than the benefit it received, and its use was not a noxious one. *Penn Central,* 438 U.S. at 133-34. *See also id.* at 147-50 (Rehnquist, J., dissenting).

33. The Court stated:

> 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . .

Id. at 130-31.

34. *Id.* at 124 (citations omitted).

In *Kaiser Aetna v. United States*[35] the owner of a nonnavigable pond wanted to convert it into a marina by connecting it to a navigable bay. After obtaining the government's approval, the owner, at his own expense, dredged a channel between the two bodies of water. The government argued that it should be able to enjoy a navigational servitude over the now navigable (formerly pond) waters without paying compensation. In deciding that the actual physical invasion resulting from the enjoyment of the servitude would effect a taking, the Court acknowledged the applicability of the *Penn Central* ad hoc test,[36] noted that the owner's significant investment was based on his reasonable expectation that the completed marina would remain private,[37] and accorded special weight to the character of the government's action (a physical invasion), which would have deprived the owner of his fundamental "right to exclude."[38]

In *Pruneyard Shopping Center v. Robins*[39] the Court applied the *Penn Central* test in upholding a state constitutional requirement that shopping center owners permit individuals to exercise free speech and petition rights on property to which the owners had already invited the general public.[40] The Court noted that given the importance of protecting the first amendment rights at issue, the mere fact of a physical invasion could not be determinative of the taking question.[41]

Thus was the stage set for the Court's decision in *Loretto*. While acknowledging the use of the *Penn Central* balancing test in recent cases, the Court concluded that when the character of the government's action rises to the level of a "permanent physical occupation," no balancing is permitted: a permanent physical occupation is a taking per se.[42] The basis for the Court's holding was its view that permanent physical occupations are qualitatively more severe than other governmental interferences with land use because they destroy three fundamental property rights: the rights to possess, use, and dispose of a physical thing.[43] In support for its per se rule, the majority cited as precedent those cases on which the historical physical invasion rule had been based.[44] It cited *Kaiser Aetna* for the proposition that the "right to exclude" was qualitatively superior to other rights and thus entitled to special protection, and distinguished *Kaiser Aetna*'s holding that a physical invasion was not determinative by drawing a distinction between "invasions" and "occupations."[45] The Court distinguished *Pruneyard*'s holding that a physical inva-

35. 444 U.S. 164 (1979).
36. *Id.* at 174-75.
37. *Id.* at 179.
38. *Id.* at 179-80.
39. 447 U.S. 74 (1980).
40. *Id.* at 83-84.
41. *Id.*
42. *Loretto,* 102 S. Ct. at 3171.
43. *Id.* at 3176-77.
44. *Id.* at 3171-74 (citing, *e.g.,* United States v. Causby, 328 U.S. 256 (1946); Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 540 (1904); United States v. Lynah, 188 U.S. 445 (1903)).
45. *Id.* at 3175.

sion was not determinative by drawing a distinction between "temporary" and "permanent" invasions.[46]

The *Loretto* dissent contains two basic themes: an affirmation that the full *Penn Central* balancing test should have been applied to the facts of *Loretto*, with a resulting determination that section 828 did not effect a taking; and an attack on both the fundamental soundness of the majority's rule and its particular application to the facts of *Loretto.*

Applying the *Penn Central* test, the dissenters would have found no taking in *Loretto* because: (1) the statute served the valid public purpose of facilitating tenant access to cable television; (2) as in *Pruneyard*, the fact of a minor physical intrusion should not have been determinative; (3) the application of the statute had minimal economic impact because it did not affect the owner's "fair return" on her property; and (4) as Loretto had been unaware of the cable's presence at the time she purchased the building, there was no interference with any investment-backed expectations.[47]

The dissenters attacked the majority's rule as "anachronistic,"[48] and expressed their fear that by carving out a niche for permanent physical occupations, the majority was inviting wasteful litigation over the meanings of these terms and encouraging the manipulation of fact patterns to take advantage of the rule.[49] While not challenging the majority's determination that the fundamental rights to possess, use, and dispose of property were entitled to special protection, the dissenters contended that section 828 did not affect these rights any differently than they were affected by other regulations that require landlords to suffer some physical occupation of their property without compensation.[50] They argued that Loretto did not lose any of her fundamental rights through the operation of section 828; rather, the intrusions of section 828 should have been viewed as ones Loretto chose to endure when she made the choice to be a landlord.[51] Furthermore, they noted that if Loretto chose to make some other use of her property, the installation of the cable pursuant to section 828 would cease to be permanent.[52]

If an analysis of consistency is limited to an inquiry into whether a similar rule was applied to similar facts in the past, the holding in *Loretto* finds some support in precedent. To the extent that the earliest cases on which the physical invasion rule was based[53] are viewed as ones involving permanent physical

46. *Id.*

47. *Id.* at 3180-81 (Blackmun, J., dissenting).

48. *Id.* at 3180 (Blackmun, J., dissenting). "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 taking rules resting on outmoded distinctions between physical and nonphysical intrusions." *Id.* at 3182 (Blackmun, J., dissenting).

49. *Id.* at 3184 (Blackmun, J., dissenting).

50. *Id.* at 3184-85 (Blackmun, J., dissenting). Examples of such regulations would be those requiring utility connections, mailboxes, smoke detectors, and fire extinguishers.

51. *Id.* at 3184-86 (Blackmun, J., dissenting).

52. *Id.* at 3185 (Blackmun, J., dissenting).

53. *E.g.,* United States v. Causby, 328 U.S. 256 (1949); Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 540 (1904); United States v. Lynah, 188 U.S. 445 (1903).

occupations, *Loretto*, involving a permanent physical occupation, is consistent with them.[54] In addition, *Loretto* arguably is not inconsistent with *Penn Central*, *Kaiser Aetna* or *Pruneyard*: *Penn Central* is distinguishable as a case involving only a regulation on use (rather than an occupation); *Kaiser Aetna* and *Pruneyard* are distinguishable because they are respectively defined as involving an invasion (rather than an occupation) that was temporary (rather than permanent).

A more sophisticated analysis of consistency, focusing on the Court's reasoning instead of on factual similarities, supports several criticisms of the *Loretto* per se rule. First, the Court may have misapplied the cases on which the physical invasion rule was based[55] by using them to support its critical proposition that occupations are qualitatively more severe than other governmental interferences with land use.[56] The decisions in these cases were based instead on the theory that because the impairment in use caused by such invasion was substantially identical to that resulting from a formal appropriation, the government should compensate the owner as if it had formally appropriated the land.[57]

Second, *Loretto* is inconsistent with *Penn Central* to the extent that the holding in *Penn Central* represents a considered judgment that takings are better analyzed in terms of a multi-factor balancing test; a test in which factors that had been considered determinative under per se rules become considerations to be weighed in determining overall fairness. Thus, the *Loretto* per se rule, which refuses to allow the fact of a permanent physical occupation to be less than determinative, fails to follow the *Penn Central* approach.

Finally, *Loretto* is inconsistent with the approach followed in *Kaiser Aetna* and *Pruneyard*, in which the Court accorded special weight in the balancing process to the fact of physical invasion without making it determinative. In *Kaiser Aetna* the balance was between the owner's right to exclude and the public's right of access under the navigational servitude.[58] In *Pruneyard* the balance was between the right to exclude and the public's right to enjoy its first amendment rights.[59] To be consistent with this approach, the *Loretto* Court would have had to frame its task in terms of balancing the right to exclude against the right of unencumbered tenant access to cable television (or against the larger policy consideration of state regulation of landlord-tenant relations).

The soundness of the Court's per se rule also may be criticized. The rule

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54. If these cases are seen as not distinguishing between invasions and occupations, they may arguably have been overruled by Kaiser Aetna v. United States, 444 U.S. 164 (1979), and Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980). *See supra* text accompanying notes 35-41.

55. *E.g.*, United States v. Causby, 328 U.S. 256 (1946); Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 540 (1904); United States v. Lynah, 188 U.S. 445 (1903). *See supra* note 17.

56. *Loretto*, 102 S. Ct. at 3176.

57. *See* Michelman, *supra* note 17, at 1185-86.

58. *Kaiser Aetna*, 444 U.S. at 178-79.

59. *Pruneyard*, 447 U.S. at 83-84.

suffers from the fault of any per se rule: it invites the proliferation of litigation as parties attempt to manipulate their facts to take advantage of the rule;[60] and it encourages the growth of exceptions to the rule when a court wishes to reach a different result on almost identical facts. More importantly, the two-track approach signalled by *Loretto* reflects the Court's insensitivity to the role that taking jurisprudence should play in a free society.

The essence of taking law is fairness. But a determination of when a governmental action is a taking should depend on more than whether it is fair to ask a particular owner to bear a disproportionate cost for a particular public benefit. Problems develop when a court addresses the question of fairness to the individual without considering how that action affects the fairness of its actions toward other individuals.

Something seems appealing about a doctrine which holds that the rights to possess, use, and dispose of a thing are particularly precious, and are to be accorded special weight in deciding if a governmental action that destroys them is a taking. Yet something seems wrong when that same doctrine compensates a landlord for losing the use of one-eighth of a cubic foot of space on her building,[61] but denies compensation to another owner who has lost the right to develop (at substantial profit) the airspace over its railroad terminal building.[62] The effect of combining the *Loretto* per se rule, which protects an owner if the government *permanently physically occupies* his land,[63] and the Court's philosophy in *Penn Central* that an individual may be asked to bear disproportionately the cost of a governmental regulation which effects a public benefit,[64] is the emergence of a taking doctrine that is manifestly unfair to those asked to bear the burdens of public regulation.

A unified taking doctrine, based upon a multi-factor balancing test in which physical occupations are important without being determinative, has the flexibility and sensitivity to deal with this problem.

Under this doctrine, a case involving both an actual physical invasion (occupation), and a large diminution in value or interference with investment-backed expectations would almost always be considered a taking.[65] A case involving a governmental regulation that causes minimal economic loss or does not interfere with investment-backed expectations would almost never be a taking. The cases in the middle, those involving governmental regulations that cause significant diminutions in value[66] and those involving physical invasions (occupations) with little economic impact,[67] are less certain. But instead of drawing a line between them, a unified doctrine would treat them together, asking: "How much of the burden for a particular public benefit

60. *See Loretto,* 102 S. Ct. at 3184 (Blackmun, J., dissenting).
61. As in *Loretto*.
62. As in *Penn Central*.
63. *Loretto,* 102 S. Ct. at 3179.
64. *See supra* notes 31 & 32 and accompanying text.
65. *E.g., Kaiser Aetna*.
66. *E.g., Penn Central*.
67. *E.g., Loretto* and *Pruneyard*.

should an individual bear, given that other individuals affected by governmental action are suffering 'X' amount?"

While this framework does not dissolve the tension between *Penn Central*, which upheld a regulation that caused a significant diminution in value,[68] and *Loretto*, which found a taking even though its minimal physical occupation had little economic impact,[69] it points the way toward a logical reconciliation. To ensure that owners who are affected by governmental regulations are treated the same as owners who suffer physical invasions by government, the Court must either: (1) increase the significance of diminution in value in regulation cases (making it more likely a taking will be found); (2) decrease the significance of permanent occupations in physical invasion cases (making it less likely a taking will be found); or (3) implement a combination of these.

In addition, a unified doctrine is attractive because it is theoretically coherent, and because it eliminates the "shoehorning" problems associated with a per se rule.

The Court in *Loretto* wanted to make the point that the rights of possession, use, and alienation should be subject to special protection from the police power.[70] Viewing *Penn Central* as a case in which the police power was given an expansive interpretation, the Court felt the need to construct a per se taking rule that effectively rejected the *Penn Central* balancing approach. The Court failed to recognize that by adopting a unified taking doctrine based upon the *Penn Central* approach, it could accomplish its goal while reconciling the disparate treatment afforded owners affected by regulations and those owners affected by physical invasions. By remaining wedded to its two-track approach, the Court has revitalized this treatment and further muddied the waters of taking jurisprudence.

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68. *See supra* notes 28-33 and accompanying text.
69. *See supra* notes 6-10 and accompanying text.
70. *Loretto*, 102 S.Ct. at 3176-77.