Loretto referred to this passage (Loretto, 458 U.S. at 435-36) in declaring that "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." Again, Nollan employed this severance approach in broadening Loretto's "permanent occupation" concept. In characterizing the right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property," it construed a public access easement as a complete thing taken, separate from the parcel as a whole. Nollan, 483 U.S. at 831-32.

Hodel v. Irving, 481 U.S. 704 (1987), is perhaps the clearest exposition thus far of the Court's view of certain fundamental private rights being so embodied in the concept of "property" that their loss gives rise to a right to compensation under the Fifth Amendment. The statute under attack in Hodel provided that upon the death of the owner of an extremely fractionated interest in allotted land, the interest should not pass to devisees but should escheat to the tribe whose land it was prior to allotment. The Court conceded a number of factors in favor of validity: the statute would lead to greater efficiency and fairness; it distributed both benefits and burdens broadly across the class of tribal members. However, the particular right affected -- denominated by the Court as "the right to pass on proper-

ty" -- lies too close to the core of ordinary notions of property rights; it "has been part of the Anglo-American legal system since feudal times". Id. at 716.[6]

In PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 n.6 (1980), the Court emphasized:

> [T]he term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." . . . It is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess."

The Court is most likely to extend the Hodel doctrine of separate and distinct interests to the Proposed Regulation that would bar an owner's right to exclude an occupant from the roof and other premises owned by the property owner, or that prevents the owner from the use

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[6] Thus, Hodel adds market alienability as another essential strand of property whose attempted abrogation constitutes a per se taking. In effect, the state may not convert fee simple property into a life estate, even if such conversion is conditioned on the owner's failure to alienate during the owner's lifetime.

The Court cemented, in this fashion, the conceptual severance approach: the Court built onto the "right to exclude others" and the "right to pass on property" as examples of core strands. Both are among "the most essential sticks in the bundle of rights that are commonly characterized as property." See also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 518-19 (1987) (dividing up the time elements of property rights).

and enjoyment of the space occupied by the antennae. That the Proposed Regulation would erect barriers to what are widely held to be fundamental elements of the ownership privilege renders it vulnerable to constitutional attack. Indeed, the Proposed Regulation stands to erode just these essential powers, to exclude or to use, by forcing owners and homeowner associations to permit the installation of reception equipment on their property wherever and whenever the occupant or other owner without exclusive control or use may wish. Once the property owners lose control over the right to exclude installation of items against their wishes, they lose that which distinguishes property ownership itself, the rights "to possess, use and dispose of it." United States v. General Motors Corp., 323 U.S. 373, 378 (1945).

E. PROPERTY RIGHTS IN AESTHETIC CONTROLS

The Commission's action on the § 1.4000 rule suggests that the Commission would give insufficient weight in analyzing the Proposed Regulation to the recognition in modern law that aesthetic controls are a significant component of property values and property rights.

In the § 1.4000 rule, the Commission has created an exemption for restrictions "that serve legitimate safety goals." (Par. 5(b)(1) and Par. 24 of Report and Order.) It has also adopted a rule safeguarding registered historic preservation areas. (Par. 5(b)(2) and Par. 26.)

Having gone this far toward accommodating local interests the Commission halts and treats environmental and aesthetic concerns with less consideration. (Par. 27.) In so doing, it is acting in accordance with the historic and out-dated treatment of aesthetic controls by ordinance, building restriction, lease, homeowners association agreement, or other private agreement. By not considering the modern trends of legislation and adjudication, however, it is sacrificing significant property values; impeding market decision-making by localities, private builders and owners, and associations; and undercutting sensitive environmental concerns. Indeed, some may discern a Philistine air in the Commission's rule and any similar analysis of the Proposed Regulation that runs the danger of the Commission being branded a scoffer of beauty and a derider of efforts to shape the appearance of the built and natural environments.

The Commission agrees that Congress intended that it should "consider and incorporate appropriate local concerns," and "to minimalize any interference owed to local governments and associations." The Commission also (Par. 19) takes tentative steps toward adopting aesthetics as a full-scale exemption by mentioning: a requirement to paint an antenna so that it blends into the background;

screening; and, in general, requirements justified by visual impact.[7]

This hesitant approach to environmental values is a retreat from the advancement and understanding of the goals of community, building and commercial environment appearance. It behooves the Commission to make explicit an exemption for reasonable aesthetic control of dishes and antennae.

The history of aesthetic controls in this country is a useful analogy for the Commission's consideration. At the outset, the courts were outrightly hostile to aesthetic values; they were not recognized as a legitimate government interest.[8] The modern judicial position

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[7] See also Par. 37 regarding height and installation restrictions in the BOCA code. Furthermore, the Report and Order states that the Commission does not believe that the rule would adversely affect the quality of the human environment in a significant fashion (Par. 26): "While we see no need to create a general exemption for environmental concerns," it argues, it does exempt registered historic preservation areas. Finally, the rule states that the Commission will consider granting waivers where it is determined that the particularly unique environmental character or nature of an area requires the restriction. (Par. 27).

[8] See Haar and Wolf, eds., Land-Use Planning 518-555 (4th ed. 1989). Aesthetic values were deemed too subjective and vague to warrant legal protection; consequently, the courts went so far as to say that the presence of aesthetic motives would taint an ordinance otherwise valid under the traditional health, safety, morals, and welfare components of the police power. As the early Passaic v. Peterson Bill Posting Co., 62 A. 267, 268 (N.J. 1905), put it: "[A]esthetic considerations are a matter of luxury and indulgence

(continued...)

accepted in most jurisdictions is that government can regulate solely for aesthetics, as described below.

Aesthetic controls, public or private, over the form and placement of antennae and dishes reflect values representative of community-wide sentiment. Eyesores should not be permitted to undermine coherent community goals. Owners and homeowner associations can define what is attractive and what is ugly about antennae and reception devices, the same way they outlaw junkyards and rag-strewn clotheslines.[9]

Over the past two decades, aesthetic considerations flourished and became routine on federal as well as state levels. There are numerous examples of legislative assertions of beauty as an appropriate end of government activity.[10] For example, the status of aesthetic values

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[8] (...continued)
rather than of necessity . . . ." This gave way -- not without a struggle -- to intermediate judicial acceptance when it was seen that aesthetic values advanced such traditional goals as the preservation of property values.

[9] See People v. Stover, 191 N.E.2d 27 (N.Y. 1963). It is increasingly recognized that community consensus can protect against arbitrary application of regulation or restriction. See United Advertising Corp. v. Borough of Metuchen, 198 A.2d 447 (N.J. 1964). In a fundamental sense, there is a collective property right to the neighborhood or commercial environment exercised by its owners.

[10] The Report and Order itself incorporates elements of the National Historic Preservation Act of 1976 in its use of the National Register for Historic Places in carving out an exemption for historic districts.

is sharply recognized in the National Environmental Policy Act of 1967, 42 U.S.C. § 4321 (NEPA). Section 4331(b)(2) of NEPA includes, among the purposes of its "Environmental Impact Statements," the assurance of "healthful, productive and aesthetically and culturally pleasing surroundings." See Ely v. Velde, 451 F.2d 1130, 1134 (4th Cir. 1971) ("other environmental . . . factors" than those directly related to health and safety are "the very ones accepted in . . . NEPA").[11]

Perhaps the most direct acceptance of aesthetic controls on the federal level is that of Justice Douglas in Berman v. Parker, 348 U.S. 26, 33 (1954):

> 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. . . . If those who govern the District of Columbia decide that the nation's Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.[12]

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[11] The aesthetic-environmental language is also found in the so-called Little NEPAs of the states. See, e.g., State v. Erickson, 285 N.W.2d 84 (Minn. 1979). Similarly, the National Highway Beautification Act regulates the manner and placement of billboards along federally assisted highways.

[12] More recently, in Members of City Council of City of Los Angeles v. Taxpayer for Vincent, 466 U.S. 789, 805 (1984), the Court stated" "It is well settled that the state may legitimately exercise its police powers to advance aesthetic values." See also Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981).

In light of the Commission's exemption for historic districts, the statements of Penn Central are especially pertinent; there the Court emphasized that "historic conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing -- or perhaps developing for the first time -- the quality of life for people." Penn Central, 438 U.S. at 108.

The Proposed Regulation would be evaluated in the context of this evolution and progress of aesthetic and environmental goals. The Report and Order, in its gingerly handling of roof line controls, may be faulted as out of step with the modern legislative and judicial endorsement of aesthetic values and design review. Certainly Paragraph 46's tentative conclusion that "non-governmental restrictions appear to be related primarily to aesthetic concerns," and the further tentative conclusion "that it was therefore appropriate to accord them less deference than local government regulations that can be based on health and safety considerations" will raise eyebrows in many circles.[13]

Increasingly, private design review is the most effective way for property owners to implement a consen-

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[13] See, e.g., Williams, Jr. and Taylor, 1 American Planning Law § 11.10 (1988 Revision): "[n]o trend is more clearly defined in current law than the trend towards full recognition of aesthetics as a valid basis for regulations". The demotion of aesthetics proffered by the Commission is an outdated view of the law.

sual decision on the aesthetic appearance of their community.[14] Widespread agreement -- expressed often in terms of enhanced property values -- exists on ensuring that utilitarian objects are hidden from sight on or around buildings. Mechanical equipment on roofs (ventilators, exhaust outlets, air conditioners), as part of the policy for community or commercial environment appearance, is usually not permitted to be visible from the street. Regulating the appearance of a community, building or commercial environment is the proper domain of the community itself and the owner(s) since the local community and owner(s) are the best judges of what is desirable for that community, building or commercial environment. Further, there is a direct line between aesthetics and property values: "economic and aesthetic considerations together constitute the nearly inseparable warp and woof

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[14] Reid v. Architectural Board of Review, 192 N.E.2d 74 (Ohio 1963), is the classic case upholding such controls. Private design review, as an alternative or supplement to local government, controls aesthetics of the physical environment by private agreement, typically through community associations. See Baah, Private Design Review in Edge City in Design Review, Challenging Urban Aesthetic Control 187 (Scheer and Preisiev eds. 1994). In many communities with design review, Baah adds, "unsightly physical features -- such as graffiti, billboards, chain-link fences, weeds and overgrown landscaping -- are now only found in public property." Id. at 196.

of the fabric upon which the modern city must design the future."[15]

So long as the private design review process is conducted along procedural due process requirements it is a legitimate and desirable exercise of property owners' interests which will be upheld by the courts. The design and environmental purposes of public and private restrictions, reasonably limited and nondiscriminatory, should be an exemption extended by the Commission.

Protection against abuse of restrictions on devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution services, or direct broadcast satellite services is afforded by the discipline of the market. Deregulation and the freeing of competitive forces already put in place by the Commission are effective restraints on abuse. Thus, analysis of the Proposed Regulation should give substantial weight to aesthetic controls imposed by landlords and owners through private agreements.

F. RELIANCE ON PRUNEYARD IS UNWARRANTED

Several commenters have relied upon PruneYard in supporting the Proposed Regulation. In analyzing the Proposed Regulation to determine whether it violates the

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[15] Metromedia, Inc. v. City of Pasadena, 216 Cal. App. 2d 270 (1963), app. dism'd, 376 U.S. 186 (1964).

Takings Clause, access to video information services does not rise to the level of a colorable constitutional argument based on the First Amendment.

As described in connection with Loretto, government policies and public benefits are irrelevant in per se takings. As to First Amendment concerns, the Loretto Court acknowledged it had no reason to question the finding of the New York Court of Appeals that the act served the legitimate public purpose of "rapid development of and maximum penetration by a means of communication which has important educational and community aspect." Loretto, 458 U.S. at 425. Nevertheless, the Court concluded that "a permanent physical occupation authorized by government is a taking without regard to the public interests it may serve." Id. at 426.

In PruneYard, which dealt with a state constitutional right to solicit signatures in shopping centers, there was no permanent physical invasion of the property (unlike the Proposed Regulation) and the Court applied the Penn Central three-factor analysis. PruneYard does not support a First Amendment limitation to or weighting in such analysis. In holding that a taking did not occur, a key finding for the Court was that preventing shopping center owners from prohibiting this sort of activity would not unreasonably impair the value or use of their property. PruneYard, 447 U.S. at 83. As the concurring

opinion of Mr. Justice Marshall (the author of the subsequent Loretto opinion) states, "there has been no showing of interference with appellant's normal business operations." Id. at 94. Indeed, the use of the shopping center's property in PruneYard was consistent with the reasons that the property was held open to the public, namely that it is "a business establishment that is open to the public to come and go as they please." Id. at 87.

The decision quoted from the California Supreme Court's opinion which distinguished this shopping center, with 25,000 persons of the general public daily using the property, from other properties (or even portions of properties, such as roof space) where use is more restricted:

> A handful of additional orderly persons soliciting signatures and distributing bandbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations . . . would not markedly dilute defendant's property rights.

Id. at 78.

This situation differs completely from the position of property owners subject to the Proposed Regulation in that the owner's opening of the property to the tenant does not extend an invitation to use the private property of the owner, such as the roof, which is specifically excluded from the demised premises. The notion of implied

consent to use the property which the Court relies on so heavily in PruneYard is not applicable here where the owners are careful to delineate the boundaries of the demised property to exclude areas such as the roof and exterior walls.

In particular, the PruneYard Court was careful to distinguish on the Penn Central three-factor grounds the facts and state constitutional right in PruneYard from the findings of unconstitutional takings despite claims of First Amendment protections in Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972) (finding against First Amendment claims challenging privately owned shopping center's restriction against the distribution of handbills), and Hudgens v. NLRB, 424 U.S. 507, 517-21 (1976) (finding against First Amendment claims challenging privately owned shopping center's restriction against pickets). PruneYard, 447 U.S. at 80-81.

G. INCREASED EMPHASIS BY COURTS AND LEGISLATURES UPON THE PROTECTION OF PROPERTY RIGHTS

As explained above, the general movement of the Court is to protect private property under the Taking Clause.[16]

Along the same lines is Executive Order 12630 of March 15, 1988, "Governmental Actions and Interference with Constitutionally Protected Property Rights." Refer-

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[16] This trend has been underlined by many experts on constitutional law, including Chief Judge Oakes of the Second Circuit Court of Appeals. Oakes, "Property Rights" in Constitutional Analysis Today, 56 Wash. L. Rev. 583 (1981).

ring to Court decisions, it states that in reaffirming the fundamental protection of private property rights they have also "reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required." Section 1(b) requires that government decision-makers should review their actions carefully to prevent unnecessary takings.

Section 3 lays down general principles to guide executive departments and agencies. Section 3(b) cautions that "[a]ctions undertaken by government officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of property." Section 3(e) warns that actions that may have a significant impact "on the use or value of private property should be scrutinized to avoid undue or unplanned burdens on the public fisc." Finally, Section 5(b) requires executive agencies to "identify the takings implication" of proposed regulatory actions.

In addition, several states have passed different forms of takings impact assessment laws and value diminution laws imposing compensation requirements when a taking, variously defined, is imminent.

Loretto and Hodel are judicial inventions for putting some kind of halt to the denaturalization and disin-

tegration of the concept of property. As the Court continues its century-long struggle to define an acceptable balance between individual and societal rights, it is apparent at least to the justices of the Court that this constitutional riddle needs more definite answers. By referring to the common understanding of what property at the core is all about, the settled usage that gives rise to legally recognized property entitlements, the Court is building up trenchant legal tests for a taking.

This is a reaction to its finding how hard it is to maintain an open-ended balancing posture; in the Penn Central case, the Court acknowledged difficulty in articulating what constitutes a taking. A per se rule, whether it be a permanent physical occupation or another core stick of the bundle denominated "property," is a bright line that provides a trenchant legal test for a taking, one that can be understood by a lay person and one that lawyers can utilize in advising clients. The cases laying down hard-and-fast rules are a token of the limitations on popular government by law.

The Court's trend toward defining the Fifth Amendment to set up of a private sphere of individual self-determination, securely buffered from politics by law, militates against the adoption of the Proposed Regulation. Elimination of the private property owner's power of possession, use, and enjoyment of the space used for

antennae installations and removal of the power to control entry by an occupant is not likely to survive judicial (or legislative) scrutiny.

II. THE COMMISSION MUST APPLY A NARROW CONSTRUCTION OF THE STATUTORY PROHIBITION ON CERTAIN PRIVATE RESTRICTIONS

The relevant case law is clear that, in light of the substantial Fifth Amendment implications described above in this Declaration, the FCC must narrowly interpret Section 207. The statutory directive "to prohibit restrictions" and the House Report explanation that Congress intended to preempt "restrictive covenants or encumbrances" fall far, far short of a broad statutory mandate to promote various video signal delivery businesses through a requirement that owners allow placement of or place antennae at the sole discretion of occupants on owners' or common private property.

As the D.C. Circuit Court of Appeals held in Bell Atlantic v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994), "[w]ithin the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions."[17] The court went on to state that when administrative interpretation of a statute would create a class of cases with an uncon-

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[17] Citing Rust v. Sullivan, 500 U.S. 173, 190-91 (1991); Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575-78 (1988).

stitutional taking, use of a "narrowing construction" prevents executive encroachment on Congress's exclusive powers to raise revenue and to appropriate funds. Id.

A fair interpretation of Section 207 does not require construing the statutory direction to prohibit certain private restrictions as going beyond the restrictions covered by the implementing rule the Commission adopted in August 1996. That rule -- addressing "any private covenant, homeowners' association rule or similar restriction on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property" -- encompasses the full extent (and perhaps more) of what the House Report intended as "restrictive covenants or encumbrances." The Proposed Regulation -- whether as a right to installation by occupants, an obligation on owners, a right to installation by third parties, or other limit on restrictions in private agreements on such action -- would be contrary to the narrowing construction of Section 207 required to avoid an unconstitutional taking.

Moreover, the Commission does not contend in its Further Notice (and cannot reasonably contend) that the proposed implied taking power is necessary in order to avoid defeating the authorization in and purpose of Section 207. See Bell Atlantic, 24 F.3d at 1446. While the Commission asks whether a further requirement on

landlords is authorized under Section 207, the § 1.4000 rule does not depend on restrictions on owners' or common private property.

The constitutional demand for a narrowing construction of Section 207 against the Proposed Regulation is particularly strong in light of the contrast between Section 207 and three other sections of the Telecommunications Act of 1996. These other sections clearly and specifically authorize a physical occupation of certain facilities, office space or other property as to certain other entities. In contrast, proponents of the Proposed Regulation can only argue that the physical taking for video reception equipment should be promulgated pursuant to a purported implied broad mandate and general policy from Section 207.

1. Section 224(f)(1) states that a "utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduct, or right-of-way owned or controlled by it." Sections 224(d)-(e) address compensation, and Section 224(f)(2) addresses insufficient capacity, safety, reliability and generally applicable engineering purposes.

Reflecting the huge complexities that would be involved in implementing the Proposed Regulation for landlords, the Commission in its August 8, 1996 intercon-

nection order (CC Docket No. 96-98) concluded that "the reasonableness of particular conditions for access imposed by a utility should be resolved on a case-specific basis." (Par. 1143) In particular, the Commission rejected the request by WinStar Communications to interpret this right of access to include roofs and riser conduit; the Commission recognized that "an overly broad interpretation of ['pole, duct, conduit, or right-of-way'] <u>could impact the owners and managers of small buildings . . . by requiring additional resources to effectively control and monitor such rights-of-way located on their properties</u>."[18]

2. Section 251(b)(4) requires local exchange carriers to "afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services at rates, terms, and conditions that are consistent with section 224".

3. Section 251(c)(6) requires incumbent local exchange carriers to provide "physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier." This section also specifies "rates, terms and conditions that are just, reasonable, and

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[18] Par. 1185 (emphasis added) & n.2895; WinStar Communications Petition for Clarification or Reconsideration at 4-5 (Sept. 30, 1996).

nondiscriminatory," and addresses space and other technical limitations.

When Congress intended a taking with compensation in these other circumstances, it clearly and specifically indicated that intention in the Telecommunications Act of 1996. Nothing in Section 207 addresses a taking or compensation for placement of antennae on owners' or common private property, and no such requirement can be implied.