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Gary D. Allison

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FREE SPEECH, INDECENCY AND THE ELECTRONIC MEDIA: THE FRAGMENTATION OF THE SUPREME COURT*

Gary D. Allison†

Consistency is the last refuge of the unimaginative.[1]

Standards are the means by which we state in advance how to test a law's validity, rather than letting the height of the bar be determined by the apparent exigencies of the day.[2]

I. INTRODUCTION

The most important free speech case from the U.S. Supreme Court's last term, *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,[3] pitted free speech values against family values in what may have been a trial run of the coming internet censorship controversy.[4] *Denver Telecom* involved Cable Television Consumer Protection and Competition Act of 1992[5] (Cable Act) provisions enacted by Congress to reduce the risk of children encountering indecent material while watching programs cablecast on leased access and public access channels. At stake was how the Court defined the hierarchy of free speech interests among cable operators, programmers affiliated with cable oper-

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† Professor of Law, University of Tulsa; B.S. 1968, J.D. 1972, University of Tulsa; L.L.M. 1976, Columbia University.

1. Oscar Wilde, *quoted in* THE WIT AND WISDOM OF OSCAR WILDE 8 (Stanyan Books 1970).

2. Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2406 (1996) (Kennedy, J., concurring in part and dissenting in part).

3. 116 S. Ct. 2374 (1996).

4. Last year, two federal district courts found the anti-indecency provisions of the Communications Decency Act of 1996 to be unconstitutional. Appeals from these cases were put on a fast track, and the U.S. Supreme Court has granted petitioners' petitions for a writ of certiorari. *See* Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y 1996), *petition for cert. filed*, 65 U.S.L.W. 3323 (Oct. 15, 1996) (No. 96-595); ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa.), *prob. juris. noted*, 117 S. Ct. 554 (1996).

5. Pub. L. No. 102-385, §10(a)-(c), 106 Stat. 1460, 1486 (1992) [hereinafter Cable Act]. Indecent material is material that "describes or depicts sexual or excretory activities or organs in a patently offensive manner." *Id.* § 10(a) (codified at 47 U.S.C. §532(h) (1994)).

ators, unaffiliated programmers and viewers. The debate over the proper free speech hierarchy was affected significantly by the emotionally charged issue of how far government can go to protect children from encountering indecent material on electronic media.

In *Denver Telecom*, the Justices were extremely divided in determining what First Amendment standards should apply. As a consequence, the Court's decision in *Denver Telecom* did not provide a precedent of great value for predicting the outcome of future electronic media cases involving First Amendment issues. This is most unfortunate, because *Denver Telecom* may have complicated the Court's upcoming task of determining the constitutionality of federal attempts to censor material on the Internet.[6]

II. CASE HISTORY

The Cable Act contains three provisions designed to reduce the risks that children will encounter indecent, but not obscene, material on leased access channels (LACs) and public access channels (PACs). Section 10(a) authorizes cable operators to forbid the broadcasting of indecent material on LACs.[7] Should cable operators permit indecent material to be shown on LACs, § 10(b),[8] and the FCC regulations implementing it,[9] requires them to:

(1) segregate all patently offensive LAC programming by showing it only on a separate channel;[10]
(2) block the transmission of the LAC indecent channel to all cable subscribers except those who submit a written request to receive it;[11]
(3) unblock transmission of the indecent channel to an subscriber requesting in writing to receive it within 30 days of the subscriber making the written request;[12]
(4) reblock transmission of the indecent channel to any subscriber receiving it within 30 days of the subscriber submitting a request for reblocking.[13]

In addition, the FCC regulations require LAC programmers to give cable operators thirty days notice of their intent to broadcast a program containing indecent

6. *See* cases cited *supra* note 4.
7. Cable Act § 10(a) (codified at 47 U.S.C. § 532(h) (1994)). "This subsection shall permit a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." *Id.* § 10(a)(2) (codified at 47 U.S.C. § 532(h)(2) (1994)).
8. 47 U.S.C. § 532(j) (1994).
9. 47 C.F.R. §§ 76.701(b)-(d), (g) (1995).
10. 47 U.S.C. § 532(j)(1)(A).
11. *Id.* § 532(j)(1)(B).
12. 47 C.F.R. § 76.701(c).
13. *Id.*

material.[14] As implemented by FCC regulations,[15] § 10(c) authorizes cable operators to prohibit the broadcasting of indecent material on PACs.[16]

The FCC issued regulations implementing the Cable Act's anti-indecency provisions.[17] The constitutionality of these provisions was immediately challenged by television access programmers and cable TV viewers, who appealed the issuance of the regulations to the U.S. Court of Appeals for the District of Columbia. A three-judge panel found all three of the Cable Act's anti-indecency provisions violated the U.S. Constitution's First Amendment.[18] Upon rehearing the case *en banc*, the court held that all three Cable Act anti-indecency provisions were constitutional as implemented.[19] After granting the challengers' petitions for a writ of certiorari,[20] the U.S. Supreme Court found § 10(a) to be constitutional, but declared §§ 10(b) and 10(c) to be unconstitutional.[21]

Unfortunately, due to deep philosophical differences, the Court managed to issue a majority opinion only with respect to § 10(b). The seven justices who declared § 10(a) to be constitutional divided four to three producing highly inconsistent justifications for their conclusions.[22] Five justices pronounced § 10(c) to be unconstitutional, but also divided three to two to produce two radically different opinions.[23] While six justices joined a majority opinion to declare § 10(b) unconstitutional,[24] the dissenting opinions as to all three sections expressed rationale with which many persons knowledgeable about First Amendment jurisprudence will agree.[25]

The Court's fragmentation arose from a debate over whether free speech issues emanating from the development of new telecommunications technology can be resolved fairly and effectively by the application of the Court's tradition-

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14. *Id.* §§ 76.701(d), (g).

15. *Id.* § 76.702.

16. Section 10(c) authorizes the FCC to promulgate regulations that will

> enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.

Cable Act § 10(c) (codified at 47 U.S.C. § 531 note (1994)).

17. *See* Implementation of Section 10 of the Cable Consumer Protection & Competition Act of 1992: Indecent Programming and Other Types of Materials on Cable Access Channels, 58 Fed. Reg. 19,623 (1993) (codified at 47 C.F.R. pt. 76).

18. *See* Alliance for Community Media v. FCC, 10 F.3d 812 (D.C. Cir. 1993).

19. *See* Alliance for Community Media v. FCC, 56 F.3d 105 (D.C. Cir. 1995) (en banc).

20. Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 471 (1995).

21. *See* Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2381 (1996).

22. Justice Breyer wrote a plurality opinion for himself and Justices Stevens, O'Connor and Souter. *See Denver Telecom*, 116 S. Ct. at 2382-90. Justice Thomas wrote a concurring opinion for himself and Justices Rehnquist and Scalia. *See id.* at 2419-32.

23. Justice Breyer wrote a plurality opinion for himself and Justices Stevens and Souter. *See id.* at 2394-97. Justice Kennedy wrote a concurring opinion for himself and Justice Ginsburg. *See id.* at 2407-10, 2416-17.

24. Justice Breyer wrote a majority opinion for himself and Justices Stevens, O'Connor and Souter, *see id.* at 2390-94, which Justices Kennedy and Ginsburg joined to the extent Justice Breyer relied on strict scrutiny to reach his conclusion, *see id.* at 2419.

25. Justice Kennedy wrote a dissent, which was joined by Justice Ginsburg, as to § 10(a). *See Denver Telecom*, 116 S. Ct. at 2411-17. Justice Thomas wrote a dissent, which was joined by Justices Rehnquist and Scalia, as to §§ 10(b) and (c). *See id.* at 2422-25 (§ 10(c)); *id.* at 2428-32 (§ 10(b)). Justice O'Connor wrote a separate dissent as to § 10(c). *See id.* at 2403-04.

al First Amendment analytical framework.[26] In fact, the big news of this case is that a brand new First Amendment analytical framework was adopted by four justices.[27] The fragmentation caused by this debate was further exacerbated by our nation's ongoing cultural war over family values.[28]

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26. Traditional First Amendment analytical framework finds government regulation of speech content unconstitutional unless it is narrowly tailored to meet a compelling government interest. *See, e.g.*, Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989). Justices Breyer, Stevens, O'Connor and Souter declined to use this analytical framework, finding it too inflexible in permitting government to solve important problems that may develop in a rapidly changing environment. *See Denver Telecom.*, 116 S. Ct. at 2384-85, 2387-89 (plurality opinion); *id.* at 2398-99 (Stevens, J., concurring); *id.* at 2401-03 (Souter, J., concurring); *id.* at 2403 (O'Connor, J., concurring in part and dissenting in part). By contrast, the five other Justices remained faithful to the traditoinal First Amendment analytical framework, finding that changing technology was no justification for weakening First Amendment standards. *See id.* at 2404-29 (Kennedy, J., concurring in part and dissenting in part) (concurring in the judgments as to §§ 10(b) and (c), but dissenting as to § 10(c), as well as from Justice Breyer's refusal to use traditional strict scrutiny); *id.* at 2428-32 (Thomas, J., concurring in part and dissenting in part) (using traditional strict scrutiny in dissenting as to § 10(b)).

27. Justice Breyer's opinion adopts a new First Amendment standard that requires Justices to examine government restrictions on speech to determine if it "properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech." *Id.* at 2385 (plurality opinion).

28. In *Denver Telecom*, the cultural war over family values was reflected in the disagreement between Justices Breyer and Thomas over the constitutionality of § 10(b) of the Cable Act. As detailed in this article's subsequent discussion of § 10(b), *see infra* Part VI, the majority and the dissenters disagreed over the effectiveness of alternative means for protecting children from encountering indecent material shown on leased access channels and as to whether cable programmers or children should bear the risk of harm.

Last year, the cultural war over family values spilled over into the telecommunications industry in the form of the Communications Decency Act, tit. V of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (1996) [hereinafter CDA]. Sections 502-509 are directed toward regulating the content of messages transmitted by any telecommunications device. Section 502(1) will amend 47 U.S.C. §223(a) so that it is a felony for anyone who

> makes, creates or solicits, and initiates the transmission of, any comment, request, suggestion, proposal, image or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of the communication placed the call or initiated the communication; . . . or knowingly permits any telecommunications facility under his control to be used for any activity prohibited [above] with the intent that it be used for such activity.

CDA § 502(1), 110 Stat. at 133. Section 502(2) will add a new subsection (d) to 47 U.S.C. § 223 that will make it a felony for anyone in interstate or foreign communications who knowingly

> uses an interactive computer service to send to a spcific person or persons under 18 years of age, or . . . to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or . . . knowingly permits any telecommunications facility under such person's control to be used for [any of the foregoing activities] with the intent that it be used for such activity.

CDA § 502(2), 110 Stat. at 133-34. The CDA also will amend Title II of the Communications Act of 1934 by addign new provisions that state it is federal policy

> to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services [and] remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate on line material.

CDA § 509, 110 Stat. at 138 (to be codified at 47 U.S.C. §§ 230(b)(3), (4)). The prohibitory provisions of the CDA, as applied to the Internet, were declared unconstitutional in *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996), *petition for cert. filed*, 65 U.S.L.W. 3323 (Oct. 15, 1996) (No. 96-595) and *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa.), *prob. juris. noted*, 117 S. Ct. 554 (1996).

III. TECHNICAL AND REGULATORY CONTEXT

Neither the Court's fragmentation nor the future significance of this case is understandable when viewed out of its technical and regulatory context. This context is a product of the ongoing socio-economic revolution spawned by the development of television and driven by emerging telecommunications technologies.[29]

Initially, television programs were delivered to viewers only through broadcast technology, which sends electromagnetic signals through the broadcast bands of the electromagnetic spectrum.[30] Each channel must be assigned unique operating frequencies to keep competing TV channels from interfering with each other's signals.[31] The fact that the broadcast spectrum is a limited

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29. According to many observers, television has had a profound impact on American society. Among the many observations about TV offered up by commentators in recent years are the following:

> [Its effect on politics] has been to make the party system meaningless, to make a telegenic appearance more important than character, to raise the power of money in political choice, and to debase the level of debate.

Abigail McCarthy, *The Empty Tube: TV Trashes Politics*, COMMONWEAL, Apr. 10, 1992, at 8.

> In its recent book-length report on five years of research on the impact of television on society the American Psychological Association concluded that "the major flaw in American broadcasting is that commercial television must generate revenue through programming that attracts large, heterogeneous, affluent audiences which do not represent the majority of viewers."
>
> The report also endorsed most of the recent research on the effects of television: that, for example, the constant portrayal of violence leads to the acceptance of violence and antisocial behavior and that the portrayal of sexual violence in particular "leads to the increased acceptance of rape."

Id.

> Dean George Gerbner of the Annenberg School of Communications recently told the first meeting of the Association for Communications and Theological Education at Yale Divinity School [that television] has become . . . our "cradle-to-the-grave value system." In consequence Americans get their ideas of how they should live from television. He explained: "Commercial stories say this, Here are your choices and this is what we recommend. . . . Try it. You'll like it. And if you like it, that's all there is to it. That's all you need to ask. Don't ask how your choice will affect other people. . . . The more satisfying something is, the more you want it and soon you are addicted. That's how instant gratification works. . . . Children are not told their stories by someone who has something to tell," he said. "They are told their stories by someone who has something to sell."

Id.

> [TV has produced] [v]ideoculture. Until the development of television, the electric and electronic media were still word-centered. With television came a wholly new development: The use of the moving image for mass communication. And with that development, as many scholars have noted, came a return to some of the conditions of the oral culture.
>
> Once again, messages were "events" to be absorbed in a group (if only in a living room), rather than concepts to be pondered in silence. Once more, the successful message involved redundancy and formula. Once more, the extended rational agrument proved ill-suited to the medium.
>
> Critics of television go a step further. The very qualities that (they say) the video culture tends to destroy—individuality, logical and sequential thought, abstract conceptualizing, deferral of gratification, and self-control—are the very ones [Neil] Postman[, author of THE DISAPPEARANCE OF CHILDHOOD,] attributes largely to a print-oriented education. Postman, in fact, speaks of contemporary society as the "childless age," in which children behave essentially as "minature adults"—a shift in behavior which he lays at television's door. [Joshua] Meyrowitz[, author of NO SENSE OF PLACE: THE IMPACT OF ELECTRONIC MEDIA ON SOCIAL BEHAVIOR,] notes two other distinctions that have broken down under the impact of video: that between male and female (since women, seeing the man's world in great detail, can no longer so readily be segregated within the home), and that between leaders and followers (since the close-range camera shows us the humanness and the flaws of leaders once placed on pedestals).

Rushworth M. Kidder, *VIDEOCULTURE 2; At Home with the Video Revolution*, CHRISTIAN SCIENCE MONITOR, June 11, 1985, at 24.

Given these alleged effects of television on American society, it is understandable that many people would be moved to enact laws to protect children from the pernicious effects of TV.

30. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 627-28 (1994).

31. *See id.* at 637-38.

resource means only a limited number of broadcast TV stations can operate in any given area.[32] As a consequence, the content of material disseminated over a large geographic area through broadcast TV could be controlled by just the few organizations owning the TV channels.[33]

The need to ration the limited broadcast frequencies, and concern that the free exchange of ideas could be subverted if control over what is broadcast were left to the unfettered discretion of TV channel owners, caused Congress to assert federal regulatory power over broadcast TV almost from the moment of its birth.[34] Not only does the FCC allocate scarce operating frequencies among broadcast TV operators, it also polices the content of what is broadcast to insure that programming is fair, diverse and decent.[35]

By contrast, cable TV transmits signals electronically through cable connections from the operator to the receiver.[36] Technological breakthroughs have made it possible for many more channels to operate over cable in each geographic area than the limited number of channels that could operate within an area using traditional broadcast TV technology.[37] Obviously, the expansion of available TV channels brought sharp increases in the number and diversity of TV programs available to TV viewers.[38]

Cable TV does not involve the use of scarce electromagnetic resources and spawns a wide diversity of programming, so it would seem that the most important justifications for regulating broadcast TV do not apply to it. Nevertheless, from its outset cable TV has also been highly regulated.

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32. *See id.*

33. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 376 & n.5 (1969).

34. In 1939, the Columbia Broadcasting System initiated television broadcasting in the United States. *See* 15 THE NEW ENCYCLOPEDIA BRITANNICA: MACROPAEDIA 213 (15th ed. 1994). Television had been subjected to federal regulation by the Federal Radio Commission at least 10 years earlier while it was in its experimental stage. *See* Allen B. Dumont Lab., Inc. v. Carroll, 184 F.2d 153, 155 & n.6 (3d Cir. 1950).

35. *See* 47 U.S.C. § 303(m)(1)(D) (1994) (authorizing FCC to suspend broadcasters' licenses for transmitting profanity or obscenity); *id.* § 303a (authorizing FCC to develop rules requiring broadcasters to offer quality children's programming); *id.* § 303b (authorizing FCC to consider whether broadcasters have provided quality children's programming during license renewal proceedings); *id.* § 303c (encouraging broadcasters and programmers to cooperate in developing ways of reducing violence in television programs); *id.* § 309(i)(3) (requiring FCC to develop rules for increasing diversity among owners of mass communications media); *id.* § 315(a) (requiring broadcasters to give equal time to opponents of any candidate they have permitted to use their broadcasting stations).

36. *See Turner*, 512 U.S. at 627-28.

37. As of 1994,

> [m]ore than half of the cable systems in operation . . . have a capacity to carry between 30 and 53 channels. And about 40 percent of cable subscribers are served by systems with a capacity of more than 53 channels. Newer systems can carry hundreds of channels, and many older systems are being upgraded with fiber optic rebuilds and digital compression technology to increase channel capacity.

Id. at 628 (citations omitted).

38. Sources of programming include not only programming created by cable operators, but programming provided by an immense array of outside sources. Examples of outside sources include "not only local or distant broadcast stations, but also the many national and regional cable programming networks that have emerged in recent years, such as CNN, MTV, ESPN, TNT, C-Span, The Family Channel, Nickelodeon, Arts and Entertainment, Black Entertainment Television, CourtTV, The Discovery Channel, American Movie Classics, Comedy Central, The Learning Channel, and The Weather Channel." *Id.* at 629. In addition, subscribers may receive premium channels and pay-for-view program options by paying extra fees. *See id.* Examples of premium and pay-for-view programming include "recent-release feature movies, sports, children's programming, [and] sexually explicit programming." *Id.*

To operate in any area, a TV cable network must be built to connect the broadcasting facilities to TV viewers. This means public and private rights-of-way must be obtained with the permission and help of state and local governments.[39] States and cities used this leverage to impose operating regulations on cable operators.[40]

In most cases, state and local governments granted cable operators exclusive operating rights.[41] Competition among cable operators for exclusive operating rights usually involved promises to provide the most diverse range of programming.[42] In addition, state and local governments often required cable operators to provide public, educational and government channels as part of the price of receiving their exclusive operating rights.[43] These channels are PACs, the program content of which Congress sought to regulate through § 10(c) of the Cable Act.[44]

In 1984, Congress required cable operators to set aside a certain number of LACs "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems."[45] LACs are the channels the program content of which Congress sought to regulate through §§ 10(a) and 10(b) of the Cable Act.[46]

Government regulation of speech is restricted by the First and Fourteenth Amendments.[47] The general First Amendment analytical framework is that government content regulation of protected speech is unconstitutional unless it is narrowly tailored to meet a compelling government interest.[48] This means not only must the government show that its interest is of paramount public importance, it must also show that as a practical matter its interest cannot be furthered successfully through means less restrictive of speech than the content regulation it imposed.[49] First Amendment review of government regulation using this framework is known as strict scrutiny.[50]

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39. *See* H.R. REP. NO. 98-934, at 24 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4661.
40. *Id.* at 23, 1984 U.S.C.C.A.N. at 4660.
41. Whether this exclusivity was granted as a matter of law, as a practical matter most cable TV franchisees have enjoyed *de facto* exclusive franchises even if state and local law prohibited the granting of exclusive franchises. *See* S. REP. NO. 102-92, at 8-9, 13-14 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1141, 1145-46.
42. *See* H.R. REP. NO. 98-934, at 21-22, 1984 U.S.C.C.A.N. at 4658-59.
43. *See* Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2408 (Kennedy, J., concurring in part and dissenting in part).
44. *See id.* at 2408.
45. 47 U.S.C. § 532(a) (1994); *see Denver Telecom*, 116 S. Ct. at 2412.
46. *See Denver Telecom*, 116 S. Ct. at 2411.
47. Federal regulation of speech is limited by U.S. CONST. amend. I, which states that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." State regulation of speech is also regulated by the First Amendment because it has been made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See* Near v. Minnesota, 283 U.S. 697, 707 (1931) (freedom of the press); Gitlow v. New York, 268 U.S. 652, 666 (1925) (free speech).
48. *See* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).
49. *See id.*
50. *See Denver Telecom*, 116 S. Ct. at 2406, 2416.

Indecent, but not obscene, speech is protected by the First Amendment.[51] Nevertheless, it has been accorded less protection than have other categories of protected speech. The U.S. Supreme Court has characterized indecent material as harmful to children and destructive of parental authority.[52] As a consequence, the U.S. Supreme Court has held that protecting children from indecent material is a compelling governmental interest.[53] The Court has permitted governments to further this compelling interest by adopting laws and regulations designed to keep children from being exposed to indecent material without their parents knowledge and consent.[54] But, the Court will not approve such restrictions unless they are, among the means available for effectively protecting children, the least burdensome on the right of people to produce indecent material and disseminate it to adults wishing to receive it.[55]

The Court has also held that the protection accorded to speakers of protected speech may vary with the means used to deliver the speech and the context in which the speech is delivered.[56] In this regard, the Court has accorded speakers using broadcast media with less protection than that enjoyed by speakers using other means of communication.[57] Several characteristics of the broadcast media have been cited by the Court as justifications for according broadcast speakers with less First Amendment protections, including:

(1) the scarcity of broadcast frequencies;
(2) the uniquely pervasive presence of the broadcast media in the lives of the American people;
(3) the way broadcast media extends into the privacy of the home;
(4) the difficulty people have in avoiding exposure to patently offensive material when listening to radio or watching television; and
(5) the fact that broadcast media are uniquely accessible to children.[58]

Given these facts, the Court has held that with respect to First Amendment issues rising from the operation of broadcast media, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[59] Consistent with this belief, the Court has permitted government to require

51. *See Sable*, 492 U.S. at 126.
52. *See* FCC v. Pacifica Found., 438 U.S. 726, 749-50; *id.* at 757-59 (Powell, J., concurring).
53. *See Sable*, 492 U.S. at 126.
54. *See Pacifica*, 438 U.S. at 749-50 (upholding bans on broadcasting indecent material at hours when children are likely to be listening and upholding requirement that indecent material be broadcast at hours when children are unlikely to be listening); Ginsberg v. New York, 390 U.S. 629, 633-39 (1968) (upholding state prohibition on selling indecent literature to minors); Dial Information Serv. Corp. of N.Y. v. Thornburgh, 938 F.2d 1535, 1536-38 (2d Cir. 1991) (upholding a state statute prohibiting providers of indecent telephone messages from making their services available to minors); Information Providers' Coalition for Defense of First Amendment v. FCC, 928 F.2d 866, 879 (9th Cir. 1991) (upholding safe harbor rules to keep children from using dial-a-porn telephone services).
55. *See Sable*, 492 U.S. at 126.
56. *See Pacifica*, 438 U.S. at 744-51.
57. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386-92 (1969); National Broad. Co. v. United States, 319 U.S. 190, 209-16 (1943).
58. *See Pacifica*, 438 U.S. at 748-51 (concerning characteristics (2)-(5)); *Red Lion*, 395 U.S. at 387-92 (concerning characteristic (1)).
59. *Red Lion*, 395 U.S. at 390.

broadcasters to carry messages they otherwise would refuse to carry,[60] and to restrict severely the broadcasting of indecent and profane speech.[61]

In *Turner Broadcasting System, Inc v. FCC*,[62] the U.S. Supreme Court's most recent cable TV case prior to *Denver Telecom*, the Court stated that cable TV should not be subject to the relaxed First Amendment standards applicable to broadcast media because it did not use scarce electromagnetic resources.[63] By this the Court meant that government regulation of cable TV speech should be subject to stricter scrutiny than that applied to government regulation of broadcast media speech.[64] The regulations at issue in *Turner* were not content based,[65] so the Court left for another day the task of defining what level of scrutiny should be applied to content regulation of cable TV programming.

IV. IDENTIFICATION OF RIGHTS AND SELECTION OF STANDARDS

The Justices disagreed violently as to whose First Amendment rights were affected by the Cable Act's anti-indecency provisions. In part, this disagreement was caused by differences of opinion as to what First Amendment categories or labels should be attached to the governmentally mandated arrangements among cable operators, LACs, PACs, programmers, and viewers encountered in this case. The analysis required to identify the relevant First Amendment rights and categories was exceedingly complicated because the Cable Act's anti-indecency provisions formed a unique private/public scheme for controlling the cablecasting of indecent material. This inquiry was made even more complicated by the rapid rate of change in the electronic communications industry.

Sections 10(a) and 10(c) placed the decision to show indecent material on LACs and PACs exclusively in the hands of private editors, the cable operators.[66] This returned to cable operators part of the total editorial control they had previously held over the channels they had been forced by federal law to convert into LACs.[67] Conversely, this marked the first time cable operators could exercise any editorial control over PACs,[68] since PACs are the channels cable operators were forced by franchise negotiations with state and local governments to set aside for the use of general public, educational and governmental programmers.[69]

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60. *See id.* at 399-401 (upholding fairness doctrine giving persons attacked over broadcast media the right to reply free of charge on the station that attacked them).

61. *See Pacifica*, 438 U.S. at 742-51.

62. 512 U.S. 622 (1994).

63. *See id.* at 637-41.

64. "In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inept when determining the First Amendment validity of cable regulation." *Id.* at 639.

65. *See id.* at 643-52.

66. *See* Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2380 (1996).

67. *See id.* at 2381, 2394.

68. *See id.* at 2394.

69. *See id.* at 2407 (Kennedy, J., concurring in part and dissenting in part).

Much of the material published or broadcast by owners of print and electronic media is created by other people. Media owners cannot disseminate all of the material offered to them, so they choose to disseminate only the material they believe will most appeal to their audiences or is otherwise compatible with their business and political philosophies. In selecting what material to disseminate, owners of media facilities engage in an editing process.

The Court has held that the editing process is speech protected by the First Amendment.[70] This protection has been deemed absolute as to the print media,[71] meaning that the print media cannot be forced by government to print any material they otherwise would refuse to print.[72] Broadcast media have not been accorded absolute protection for their editorial decisions, because the Court has held that the scarcity of broadcast frequencies justifies government requiring the broadcast media to broadcast material they otherwise would reject in order to provide broadcast audiences with fair and diverse programming.[73] In *Turner*, the Court expressly stated that cable TV's First Amendment rights are more extensive than those enjoyed by the broadcast media,[74] but it nevertheless upheld as justifiable non-content speech regulations federal statutes requiring cable operators to carry the programming of local broadcast TV channels.[75]

A. *Justice Thomas' Hierarchy of Rights*

Justices Thomas, joined by Chief Justice Rehnquist and Justice Scalia, stated that cable operators should have editorial rights comparable to those enjoyed by the print media.[76] By this, Justice Thomas meant that cable operators should have absolute editorial control over what gets shown on their cable systems.[77] He also strongly suggested that laws requiring cable operators to provide LACs and PACs violate cable operators' First Amendment rights.[78] In drawing these conclusions, Justice Thomas relied heavily on the Court's holding in *Turner* that cable TV should not be subject to the First Amendment rules

70. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).
71. *See id.*
72. *See id.*
73. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 387-92 (1969).
74. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636-41 (1994).
75. *See id.* at 661-68 (plurality opinion).
76. *See* Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2419-25 (1996) (Thomas, J., concurring in part and dissenting in part).
77. He stated:

> It is the operator's right that is preeminent. . . . [W]hen there is a conflict, a programmer's asserted right to transmit over an operator's cable system must give way to the operator's editorial discretion. Drawing an analogy to the print media, for example, the author of a book is protected in writing the book, but has no right to have the book sold in a particular book store without the store owner's consent. Nor can government force the editor of a collection of essays to print other essays on the same subject.

Id. at 2421.
78. *See id.* at 2423 & n.6, 2424.

applicable to the broadcast media because it does not use scare broadcast frequencies.[79]

Accordingly, Justice Thomas declared that the First Amendment rights of cable operators are paramount to the rights, if any, of LAC and PAC programmers and viewers.[80] He narrowly defined the programmers' First Amendment rights as simply not having the solicitations they make to cable operators for cablecast time impeded by content-based government speech restrictions.[81] He characterized the freedom from cable operator editorial control given to LAC and PAC programmers by prior statutes as merely enhanced speech rights that are entitled to only limited constitutional protection that does not interfere with the underlying constitutional rights of the cable operator.[82] From this he concluded that the First Amendment neither requires government to provide the programmers with these expanded speech rights, nor prohibits government from repealing a portion of them even though the repeal is content based.[83] Finally, Justice Thomas confined viewers' rights to being able to see, unimpeded by content-based government speech restrictions, any material cable operators choose to broadcast.[84]

For Justice Thomas, identification of the First Amendment rights he found relevant dictated his conclusion that §§ 10(a) and 10(c) are constitutional. Neither provision contains content-based speech restrictions that interfere with programmers' ability to solicit cable operators for permission to cablecast indecent material on LACs and PACs.[85] Viewers have no right to see programs other than those chosen by cable operators.[86] So, §§ 10(a) and 10(c) did not affect any of the petitioners' First Amendment rights as they were defined by Justice Thomas.[87]

Justice Thomas' definitions of the parties' First Amendment rights did not determine his views as to the constitutionality of § 10(b). He believed § 10(b) directly imposes content-based government speech restrictions on cable operators' decisions to permit indecent material to be shown on LACs.[88] This conclusion caused him to select the First Amendment's strict scrutiny standard, as it has been applied to government efforts to regulate the broadcasting of indecent speech, as the appropriate standard for judging the constitutionality of § 10(b).[89]

79. *See id.* at 2421, 2423-25; *Turner*, 512 U.S. at 637-40.
80. *See Denver Telecom*, 116 S. Ct. at 2421-22.
81. *See id.* at 2424.
82. *See id.* at 2423.
83. *See id.* at 2424.
84. *See id.* at 2421.
85. *See id.* at 2424-25.
86. *See id.* at 2421.
87. *See id.* at 2424-25.
88. *See id.* at 2429.
89. *See id.* at 2429-32.

B. Justice Kennedy's Strict Scrutiny Hierarchy

At the other extreme, Justice Kennedy, joined by Justice Ginsburg, found the First Amendment rights of programmers and viewers to be paramount to any rights possessed by cable operators. He arrived at this hierarchy of rights by focussing almost exclusively on public's interest in the expanded speech rights given to programmers by the laws creating LACs and PACs. According to Justice Kennedy PACs were created through provisions of cable TV franchise agreements bargained for by state and local governments in order to "provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas."[90] He argued forcefully that the PACs' function fits the definition of a designated public forum,[91] which the Court has defined as "property that the State has opened for expressive activity by part or all of the public."[92]

The designated public forum is an important First Amendment concept, because the Court has held that any government attempt to impose content-based restriction on speech occurring in a public forum must be given strict scrutiny.[93] Having characterized PACs as designated public fora, Justice Kennedy concluded that the constitutionality of § 10(c) must be judged by the strict scrutiny standard since it is an attempt by the federal government to discriminate against certain speech on the basis of content.[94]

Justice Kennedy also observed that the laws requiring cable operators to provide LACs contain the hallmarks of common carrier regulation: Government control over the price and conditions of LAC service, a requirement that cable operators serve all who wish to cablecast on LACs in a non-discriminatory fashion, and a prohibition on cable operators exercising editorial control over LAC programming.[95] This observation led to him to declare that cable operators are common carriers with respect to persons wishing to cablecast programs on LACs.[96] To Justice Kennedy, this common carrier status meant that LACs and PACs serve the same function—to ensure "open, non-discriminatory access to the means of communication."[97] It also meant that government mandates requiring cable operators to create PACs and LACs force cable operators to serve as "conduit[s] for the speech of others."[98] The equivalence of LAC common carrier functions and PAC public forum functions led Justice Kennedy to adopt the strict scrutiny standard for testing the constitutionality of § 10(a).[99]

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90. *Id.* at 2409 (Kennedy, J., concurring in part and dissenting in part) (quoting H.R. REP. NO. 98-934, at 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667).
91. *See id.* at 2409-10.
92. International Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992).
93. *See id.* at 678.
94. *See Denver Telecom*, 116 S. Ct. at 2410, 2416.
95. *See id.* at 2411-12.
96. *See id.*
97. *Id.* at 2412.
98. *Id.* at 2411.
99. *See id.* at 2412-16.

C. *Justice Breyer's Flexible Scrutiny*

Justice Breyer, joined by Justices Stevens, O'Connor and Souter, rejected the use of past First Amendment standards and categories as analytical tools for determining the constitutionality of the Cable Act's anti-indecency provisions. He stated that the categorical approaches of Justices Kennedy and Thomas "suffer from the same flaws: they import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect."[100] More specifically, Justice Breyer charged that Justice Kennedy's approach ignores the rights of cable operators while Justice Thomas recognizes only their rights.[101] If past analogies were to be used, said Justice Breyer, they ought to be relevant to the central question posed by this case—what may government do constitutionally to protect children from exposure to indecent speech?[102] For him, the best way to answer this question was to focus on the similarities between broadcast media and cable TV in the degree to which they put children at risk of encountering any indecent material they might present.[103]

Concerned that the First Amendment standards of the past do not fit the rapidly changing world of telecommunications, Justice Breyer resolved to create a review standard more inclusive and flexible than those he rejected.[104] He justified searching for a new standard by citing the Court's historical pattern of varying First Amendment standards to fit varying contexts and circumstances.[105] Nevertheless, he believed that all of the Court's First Amendment standards conformed to a general approach whereby the Court "has consistently held that the Government may directly regulate speech to address extraordinary problems where its regulations are appropriately tailored to resolve those prob-

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100. *Id.* at 2384 (plurality opinion).

101. *See id.* at 2387-88.

102. *See id.* at 2385.

103. *See id.* at 2386-87.

104. *See id.* at 2384-85.

105. *See id.* The Court cited, as examples:

(1) New York Times Co. v. Sullivan, 376 U.S. 254 (1964): "allowing criticism of public officials to be regulated by civil libel only if the plaintiff shows actual malice," *Denver Telecom*, 116 S. Ct. at 2384;

(2) Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974): "allowing greater regulation of speech harming individuals who are not public officials, but still requiring a negligence standard," *Denver Telecom*, 116 S. Ct. at 2384;

(3) Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969): "employing highly flexible standard in response to the scarcity problem unique to over-the-air broadcast," *Denver Telecom*, 116 S. Ct. at 2384;

(4) Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231-32 (1987): "requiring 'compelling state interest' and a 'narrowly drawn' means in context of differential taxation of media," *Denver Telecom*, 116 S. Ct. at 2384-85;

(5) Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126, 131 (1989): "applying 'compelling interest,' 'least restrictive means,' and 'narrowly tailored' requirements to indecent telephone communication," *Denver Telecom*, 116 S. Ct. at 2385;

(6) Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 640-41 (1994): "using 'heightened scrutiny' to address content-neutral regulations of cable system broadcasts," *Denver Telecom*, 116 S. Ct. at 2385;

(7) Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980): "restriction on commercial speech cannot be 'more extensive than is necessary' to serve a 'substantial' government interest," *Denver Telecom*, 116 S. Ct. at 2385.

lems without imposing unnecessarily great restrictions on speech."[106] Accordingly, Justice Breyer adopted the language quoted in the preceding sentence as a new First Amendment standard (hereinafter referred to as the flexible standard) and then applied it to test the constitutionality of the Cable Act's anti-indecency provision.[107]

V. CONSTITUTIONALITY OF § 10(a)

Two groups dramatically divided as to what were the proper First Amendment standards and policy furnished the seven justices who found § 10(a) to be constitutional. As noted above, Justices Thomas, Rehnquist and Scalia found § 10(a) to be constitutional because of their belief that programmers and viewers had very narrow First Amendment interests and that none of those interests were affected by § 10(a) giving cable operators total discretion as to whether indecent material is shown on LACs.[108] Justices Breyer, Stevens, O'Connor and Souter found § 10(a) to be constitutional by applying Justice Breyer's newly created flexible standard to § 10(a).[109] But, strict scrutiny convinced the two dissenters, Justices Kennedy and Ginsburg, that § 10(a) is unconstitutional.[110]

A. The Important/Compelling Interest

Under the flexible and strict scrutiny standards, content-based speech restrictions are unconstitutional unless the importance of the government interest they advance is at a high level. The interest advanced by § 10(a) is protecting children from patently offensive sexual material cablecast on LACs.[111] Justice Breyer said this potential problem was extremely important, even compelling.[112] Justice Kennedy said the interest was compelling.[113] Section 10(a) thus passed the interest test of both standards.

B. Fitness of the Means

Under the flexible and strict scrutiny standards, content based speech restrictions will be constitutional only if the means they use to advance the relevant government interest are not too burdensome on the speech interests they affect. Justice Breyer's flexible standard requires only that government not impose an unnecessarily great restriction on speech.[114] He characterized means

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106. *Denver Telecom*, 116 S. Ct. at 2385.
107. *See id.* at 2385-87 (reviewing § 10(a)); *id.* at 2390-94 (reviewing § 10(b)); *id.* at 2394-97 (reviewing § 10(c)).
108. *See supra* Part IV.A.
109. *See Denver Telecom*, 116 S. Ct. at 2385-87 (plurality opinion).
110. *See id.* at 2416-17 (Kennedy, J., concurring in part and dissenting in part).
111. *See id.* at 2385-86 (plurality opinion).
112. *See id.*
113. *See id.* at 2416 (Kennedy, J., concurring in part and dissenting in part).
114. *See id.* at 2385 (plurality opinion).

that meet this requirement as sufficiently or appropriately tailored.[115] Strict scrutiny requires that content based speech restrictions be less burdensome on speech than any alternative means available for effectively serving a compelling interest.[116] Means that meet this standard are said to be narrowly tailored.[117]

The means specified by § 10(a) for protecting children from indecent material is giving cable operators control over whether indecent material can be shown on LACs.[118] Justice Breyer found these means to be "a sufficiently tailored response to an extraordinarily important problem."[119] Justice Kennedy concluded that § 10(a) was not narrowly tailored to protect children from exposure to indecent material.[120]

Justice Breyer relied heavily on how the Court justified upholding a ban on daytime radio broadcasting of indecent material in *FCC v. Pacifica Foundation*[121] to support his conclusion that §10(a) was sufficiently or appropriately tailored.[122] First, he noted how the problem of protecting children from indecent material was very similar whether the media involved was broadcast radio or cable TV. Radio and cable TV are both readily accessible to children, uniquely pervasive in the lives of Americans, and capable of exposing citizens without warning to patently offensive material in the privacy of their homes.[123] In addition, there is a large variety of alternative outlets to which persons desiring access to indecent material can turn.[124]

Next, Justice Breyer found that § 10(a) was no more burdensome on speech than was the total ban on daytime radio broadcasts of indecent material the Court held to be constitutional in *Pacifica.* Permitting cable operators to decide whether indecent material can be shown on LACs allows cable operators to adopt flexible responses sensitive to needs of children and adults.[125] For example, cable operators may choose to "rearrange broadcast times, better to fit the desires of adult audiences while lessening the risks of harm to children."[126] This approach restores some editing rights to cable operators without creating a certainty that indecent programming will be banned from LACs.[127] In this regard, Justice Breyer thought § 10(a)'s restrictions were no more restrictive than those approved in *Pacifica* even though some cable operators would choose to ban LACs from cablecasting indecent material.[128]

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115. *See id.* at 2385-86.
116. *See id.* at 2417 (Kennedy, J., concurring in part and dissenting in part).
117. *See id.* at 2416-17.
118. *See id.* at 2385 (plurality opinion).
119. *See id.* at 2385-87.
120. *See id.* at 2416-17 (Kennedy, J., concurring in part and dissenting in part).
121. 438 U.S. 726 (1978).
122. *See Denver Telecom,* 116 S. Ct. at 2386-87 (plurality opinion).
123. *See id.*
124. *See id.* at 2387.
125. *See id.*
126. *Id.*
127. *See id.*
128. *See id.* at 2387 (noting that *Pacifica*'s safe harbor requirements may have induced some radio broadcasters to not broadcast any indecent material).

Justice Breyer acknowledged that § 10(a) did subject LAC programmers to the risk that some cable operators will impose a total ban on cablecasting indecent material on LACs.[129] Nevertheless, he found § 10(a) to be constitutional because

> [t]he existence of this complex balance of interests persuades us that the permissive nature of the provision, coupled with its viewpoint-neutral application, is a constitutionally permissible way to protect children from . . . sexual material . . . , while accommodating both the First Amendment interests served by the access requirements and those served in restoring to cable operators a degree of . . . editorial control.[130]

Justice Kennedy's fitness analysis focussed on § 10(a)'s potential to produce arbitrary all or nothing decisions about whether indecent material can be shown on any specific LAC. Some cable operators might permit LACs to cablecast indecent material, in which case children within the cable operator's service area will not be protected.[131] Other cable operators may impose a total ban on showing indecent material on LACS, in which case adult viewers will be deprived of viewing any material deemed unfit for children to see.[132] Correctly observing that leaving some children at risk of encountering indecent material only partially serves the compelling interest of protecting children from such risk,[133] Justice Kennedy bluntly stated that "[p]artial service of a compelling interest is not narrow tailoring."[134]

Moreover, Justice Kennedy concluded that the government had failed to show there are no means available that could adequately protect children from indecent material and still give adults some access to it.[135] He suggested that one such means could be a block and segregate program permitting persons to view indecent material without having to place themselves on a list to receive it.[136] As a consequence, Justice Kennedy concluded that proponents of § 10(a) had failed to demonstrate that is was the least restrictive means of protecting children from indecent material.[137]

VI. CONSTITUTIONALITY OF § 10(b)

The Court found § 10(b) to be unconstitutional by a six to three majority. Both the majority and the dissenters agreed that § 10(b) constitutes a directly imposed government restriction on speech, and therefore must be subject to a heightened scrutiny.[138] Both groups also agreed that § 10(b) serves the impor-

129. *See id.*
130. *Id.*
131. *See id.* at 2416 (Kennedy, J., concurring in part and dissenting in part).
132. *See id.* at 2416-17.
133. *See id.* at 2416.
134. *Id.*
135. *See id.* at 2417.
136. *See id.*
137. *See id.*
138. *See id.* at 2391-92; *id.* at 2429 (Thomas, J., concurring in part and dissenting in part).

tant/compelling interest of protecting children from indecent material shown on LAC.[139] They disagreed primarily over the effectiveness of alternative means for shielding children from indecent material as compared to the effectiveness of § 10(b)'s segregate and block requirements.

A. Justice Breyer's Fitness Analysis

Justice Breyer, joined by Justices Stevens, O'Connor, Kennedy, Souter and Ginsburg, held that § 10(b)'s segregate and block requirements unconstitutionally imposed more restrictions on cablecasting indecent material over LACs than were necessary to protect children.[140] In support of this holding, he first identified several significant restrictions § 10(b)'s segregate and block requirements imposed on adult viewers who might want to see indecent material shown on LACs. Cable operators may block or unblock transmission of LACs dedicated to indecent programming to a viewer only after receiving in advance the viewer's written request for such action.[141] Once such a request is made, the cable operator may take up to 30 days to comply with the request.[142] Justice Breyer said these 30-day compliance periods will force persons wanting to see indecent material only infrequently

* to engage in 30-day advanced planning so the indecent LAC will be unblocked when programs they want to see are cablecast, and
* to endure having the indecent LAC available in their homes days, if not weeks, after the program they wanted to see is over.[143]

In addition, Justice Breyer expressed concern that the segregation requirement may cause many viewers to assign low values to programs they otherwise would have wanted to see because they may automatically attribute to these programs the same low value they will attribute to most programs segregated on the indecent LAC.[144] He also expressed concern that the written request requirement will result in cable operators keeping lists of persons who receive the indecent LACs, thereby discouraging some people from subscribing to the indecent LACs out of fear that their reputations could be harmed if the lists became public.[145] Finally, he noted that these requirements may impose enough additional costs on cable operators to give them the incentive to ban all cablecasting of indecent material on LACs.[146]

Next, Justice Breyer concluded that proponents of § 10(b) failed to show that less restrictive means for shielding children from indecent material shown on LACs are unavailable. Key to this conclusion were the less restrictive means for protecting children from indecent material shown on non-LACs Congress

139. *See id.* at 2391; *id.* at 2429 (Thomas, J., concurring in part and dissenting in part).
140. *See id.* at 2390-94.
141. *See id.* at 2391.
142. *See id.*
143. *See id.* at 2391.
144. *See id.*
145. *See id.*
146. *See id.*

mandated in the Telecommunications Act of 1996.[147] This Act requires cable operators to:

* scramble or block indecent material shown on non-LACs "primarily dedicated to sexually oriented programming;"[148] and
* "honor a subscriber's request to block any, or all, programs on any channel to which he or she does not wish to subscribe."[149]

Justice Breyer found these methods of protecting children from indecent cablecasts less restrictive than those mandated by § 10(b) because

> they do not force the viewer to receive (for days and weeks at a time) all "patently offensive" programming or none; they will not lead the viewer automatically to judge the few [programs] by the reputation of the many; and they will not automatically place the occasional viewer's name on a special list.[150]

Justice Breyer concluded his fitness analysis by asking why § 10(b)'s more restrictive means were necessary to protect children from indecent material shown on LACs when apparently Congress believed less restrictive means would adequately protect them from indecent material shown on all other types of channels?[151] Finding that the record did not answer this question, Justice Breyer stated: "[W]e cannot find that the 'segregate and block' restrictions on speech are a narrowly, or reasonably, tailored effort to protect children. Rather, they are overly restrictive, 'sacrific[ing]' important First Amendment interests for too 'speculative a gain.' For that reason they are not consistent with the First Amendment."[152]

Evaluation of the effectiveness of the lockbox, a device the Cable Communications Policy Act of 1984 requires cable operators to provide viewers,[153] was also an important factor in Justice Breyer's fitness analysis. The lockbox can be attached to cable TV and programmed by parents to block the transmission of specific programs they do not want their children to receive.[154] In the hands of highly motivated and knowledgeable parents, lockboxes can be a very effective means of keeping children from viewing indecent material while permitting adults to see what they want. Used effectively, lockboxes would make it unnecessary to impose segregate and block rules on the cablecasting of indecent material. Thirty day waiting periods for having transmission of indecent material unblocked or reblocked would also be unnecessary.

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147. Pub. L. No. 104-104, § 505, 110 Stat. 56, 136 (1996) (to be codified at 47 U.S.C. § 561).

148. *Id.*

149. *Denver Telecom*, 116 S. Ct. at 2392 (citing Telecommunications Act of 1996, § 504, 110 Stat. at 136 (to be codified at 47 U.S.C. § 560)).

150. *Id.*

151. *See id.*

152. *Id.* at 2394 (quoting Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 127 (1973)).

153. *See* 47 U.S.C. § 544(d)(2)(A) (1994).

154. *See Denver Telecom*, 116 S. Ct. at 2393.

However, the government documented facts, the accuracy of which Justice Breyer assumed,[155] demonstrating that the lockbox has not proven to be an effective means of protecting children from indecent cablecasts. Specifically, the government contended that,

> in the case of lockboxes, parents would have to discover that such devices exist; find out that their cable operators offer them for sale; spend the time and money to buy one; learn how to program the lockbox to block undesired programs; and, finally, exercise sufficient vigilance to ensure that they have, indeed, locked out whatever indecent programming they do not wish their children to view.[156]

But, Justice Breyer argued that the frailties of the lockbox reinforced rather than refuted his holding that the segregate and block requirements of § 10(b) were too burdensome to be constitutional.[157] More to the point, he believed the defects of the lockbox pointed to the need for other solutions, such as those mandated by the Telecommunications Act of 1996.[158]

B. Justice Thomas' Fitness Analysis

In dissent, Justice Thomas, joined by Justices Rehnquist and Scalia, discounted both the disadvantages § 10(b) imposed on adult viewers and the effectiveness of alternative means for protecting children from indecent material. His fitness analysis began with an assertion that "[m]ost sexually oriented programming appears on premium or pay-per-view channels that are naturally blocked from nonpaying customers by market forces."[159] He then characterized § 10(b) as doing "nothing more than adjust the nature of government-imposed leased access requirements in order to emulate the market forces that keep indecent programming primarily on premium channels."[160]

In evaluating § 10(b)'s written access requirements, Justice Thomas strongly asserted that they pose little danger to the reputations of viewers who submit requests to receive indecent LACs. Section 10(b) does not require the creation and maintenance of a government list of the type the Court found chilling to the exercise of First Amendment rights in *Lamont v. Postmaster General*.[161] Federal law forbids cable operators from sharing information about who subscribes to sexually oriented channels.[162] Thus, Justice Thomas concluded that

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155. *See id.*
156. *Id.*
157. *See id.*
158. *See id.* Justice Breyer also suggested that the lockbox defects called for

> informational requirements, for a simple coding system, for readily available blocking equipment (perhaps accessible by telephone), for imposing cost burdens upon system operators (who may spread them through subscription fees); or perhaps even for a system that requires lockbox defaults to be set to block certain channels (say, sex-dedicated-channels).

Id.

159. *Id.* at 2428 (Thomas, J., concurring in part and dissenting in part).
160. *Id.*
161. 381 U.S. 301 (1965); *see Denver Telecom*, 116 S. Ct. at 2430.
162. 47 U.S.C. § 551 (1994).

"petitioners cannot reasonably fear the specter of an officially published list of leased-access indecency viewers."[163]

Justice Thomas acknowledged that a blocking default system forces viewers wishing to receive the blocked channels to request unblocking, and that the unblocked status of viewers will be ascertainable, at least by cable operators.[164] Nevertheless, he concluded that if there is a chilling effect because the identities of subscribers to channels subject to default blocking are knowable, it "is hardly the kind of chilling effect that implicates the First Amendment."[165]

Although cable operators have 30 days within which to act on requests to reblock indecent LACs, Justice Thomas stated it was wrong to conclude that the 30 day compliance period forced viewers to have indecent material invading their homes for extended periods.[166] He supported this assertion by pointing out that viewers waiting for cable operators to honor their reblocking requests could in the meantime use the lockbox to keep their children from viewing unwanted material.[167] Justice Thomas touted the availability of the lockbox to solve this problem, despite his belief that lockboxes were not particularly effective means for protecting children from indecent material, because he also believed lockboxes can be effective censoring tools when all the indecent material is shown on a segregated LAC.[168]

Justice Thomas found § 10(b) to be superior to its alternatives in protecting children from indecent material shown on LACs. Section 10(b)'s segregation requirement confines the showing of indecent material to specific LACs. Justice Thomas observed that without segregation, parents would have to undertake the onerous task of researching what is being shown on several different channels, a task made more complicated if the indecent material is "shown randomly or intermittently between non-indecent programs."[169]

Section § 10(b)'s blocking requirement was characterized by Justice Thomas as a default condition that automatically shields children from indecent material shown on LACs which adults can reverse by requesting cable operators to unblock the indecent LAC.[170] The alternatives to § 10(b) involve subscriber-initiated methods.[171] Citing regulatory and court findings that these alternatives

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163. *Denver Telecom*, 116 S. Ct. at 2430.
164. *See id.*
165. *Id.*
166. *See id.* at 2431.
167. *See id.* at 2430-31.
168. In this regard, Justice Thomas first noted the difficulty viewers would have in using lockboxes to block out indecent programming shown at random on LACs: "Rather than being able to simply block out certain channels at certain times, a subscriber armed with only a lockbox must carefully monitor all leased-access programming and constantly reprogram the lockbox to keep out undesired programming." *Id.* at 2429. Then he touted the potential effectiveness of lockboxes and other devices in helping viewers who choose to have indecent LACs unblocked to regulate selectively what programs on those channels are actually seen in his or her home. *See id.* at 2430-31.
169. *Id.* at 2429.
170. *See id.* at 2430.
171. These alternatives include lockboxes, V-chips and reverse blocking. *See id.* at 2430. In reverse blocking, the default position is that all channels are received by the viewer but the viewer has a process available for requesting that channels he or she does not want to receive be blocked. *See id.* at 2429 & n.15,

are not very effective,[172] Justice Thomas concluded that the default position offered by § 10(b)'s segregate and block requirement was needed to provide children with an acceptable level of protection.[173]

In sum, Justice Thomas believed the disadvantages § 10(b) imposed on LAC programmers and viewers were too inconsequential to have First Amendment significance, especially in light of his view that alternatives to § 10(b) were not as effective in protecting children from indecent material. So, he found that "[t]he United States . . . carried its burden of demonstrating that § 10(b) and its implementing regulations are narrowly tailored to satisfy a compelling governmental interest."[174]

VII. CONSTITUTIONALITY OF § 10(c)

The Court found § 10(c) to be unconstitutional by a vote of five to four. PACs and LACs are so similar in function that it would not have been surprising if the justices had voted the same way on § 10(c) as they did on § 10(a) for the same reasons. In fact, that is exactly how the Kennedy-Ginsburg coalition and the Thomas coalition dealt with § 10(c).[175] For that reason, their analyses will not be repeated here. It is sufficient to note simply that the account given above of Justice Kennedy's § 10(a) fitness analysis describes accurately his § 10(c) analysis because he analyzed them together.[176]

Demonstrating that Justice Breyer's flexible scrutiny test is indeed very flexible, Justice Breyer, joined by Justices Stevens and Souter, believed there are sufficient differences in the origins and functioning of PACs and LACs to warrant treating them differently.[177] However, Justice O'Connor did not share their belief and found through her separate flexible scrutiny that the differences between PACs and LACs were too slight to support different constitutional outcomes.[178] Thus, Justice Breyer's coalition, minus, Justice O'Connor, switched sides and joined Justices Kennedy and Ginsburg to declare § 10(c) unconstitutional.

Justice Breyer was persuaded to treat §§ 10(a) and 10(c) differently because he perceived four important differences between PACs and LACs. First,

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2430. V-chips are devices that "will be able automatically to identify and block sexually explicit or violent programs." *Id.* at 2392.

172. *See id.* at 2429 & n.16 (Thomas, J., concurring in part and dissenting in part).

173. *See id.* at 2429-31.

174. *See id.* at 2432.

175. *See id.* at 2416-17 (Kennedy, J., concurring in part and dissenting in part); *id.* at 2422-25 (Thomas, J., concurring in part and dissenting in part).

176. *See id.* at 2416-17 (Kennedy, J., concurring in part and dissenting in part).

177. *See id.* at 2394-97 (plurality opinion).

178. *See id.* at 2404 (O'Connor, J., concurring in part and dissenting in part). To Justice O'Connor,

> [t]he interest in protecting children remains the same whether on a leased access channel or a public access channel, and allowing the cable operator the option of prohibiting the transmission of indecent speech seems a constitutionally permissible means of addressing that interest. Nor is the fact that public access programming may be subject to supervisory systems in addition to the cable operator . . . sufficient in my mind to render § 10(c) so ill-tailored to its goal as to be unconstitutional.

Id. at 2404.

PACs involve channels over which historically cable operators have not had editorial control.[179] "Unlike § 10(a) therefore, § 10(c) does not restore to cable operators editorial rights they once had, and the countervailing First Amendment interest is nonexistent, or at least much diminished."[180].

Second, LAC lessees have enjoyed total programming control, while those using PACs have been "subject to complex supervisory systems of various sorts, often with both public and private elements."[181] Thus, "there is a locally accountable body capable of addressing the problem, should it arise, of patently offensive programming broadcast to children [by PACs], making it unlikely that many children will in fact be exposed to [PAC] programming considered patently offensive in that community."[182]

Third, unless the local supervising entity makes a mistake that could have been corrected by the cable operator, "a 'cable operator's veto' is less likely necessary to achieve the statute's basic objective, protecting children, than a similar veto in the context of leased channels."[183] Moreover, if cable operators gain editorial control over PACs, they could make mistakes and ban the showing of material that is not in fact indecent. Justice Breyer considered the risk of cable operator mistake to be of utmost importance.[184]

Fourth, Justice Breyer found that historically PACs have shown only a few "borderline examples" of programs some people might find to be indecent.[185] This outstanding record caused Justice Breyer to comment that "[i]t is difficult to see how such borderline examples could show a compelling need, nationally, to protect children from significantly harmful materials."[186] This is significant, because according to Justice Breyer, "[i]n the absence of a factual basis substantiating the harm and the efficacy of its proposed cure, . . . [it] cannot [be assumed] that the harm exists or that the regulation redresses it."[187]

In light of PACs' unique characteristics, Justice Breyer concluded that "the Government cannot sustain its burden of showing that § 10(c) is necessary to protect children or that it is appropriately tailored to secure that end."[188] This conclusion reflected the unwillingness of the Breyer coalition to approve a law that:

- "could radically change present programming-related relationships among local community and non-profit supervising boards and access managers,"[189]

179. *See id.* at 2394 (plurality opinion).
180. *Id.*
181. *Id.*
182. *Id.* at 2395.
183. *Id.*
184. *See id.*
185. *Id.* at 2397.
186. *Id.* at 2396-97.
187. *Id.* at 2397.
188. *Id.*
189. *Id.*

* "would not significantly restore editorial rights of cable operators,"[190]
* "but would greatly increase the risk that certain categories of programming . . . will not appear."[191]

Justice O'Connor did not believe the differences between LACs and PACs as to origin and function warranted treating § 10(a) and § 10(c) differently. To her, the focus should be on furthering the compelling interest of protecting children from indecent material.[192] In this regard, she pointed out that both LACs and PACs are uniquely accessible to children, permitting cable operators to oversee PAC programming furthers the interest in protecting children, the restrictions in § 10(c) are no more onerous than those imposed by § 10(a) and accepted by the Court in *Pacifica*.[193] Given the capacity of PACs to expose children to indecent material, and the similarities in § 10(c)'s control mechanism to others approved by the Court, Justice O'Connor found that neither the local government origins of PACs nor the existence of local mechanisms for supervising the content of PAC programming was constitutionally significant.[194]

VIII. CRITIQUE

It would be difficult to be more critical of the various opinions issued by the Justices in this case than were the Justices of each other. The Kennedy coalition harshly condemned Justice Breyer's flexible scrutiny approach[195] and in turn found its public forum/common carrier categorizations sharply attacked by the Thomas coalition.[196] Trying to be the voices of reason, members of the Breyer coalition confined their criticisms of the other coalition's opinions to mild expressions of concern that traditional First Amendment categories may not produce desirable results in a time of rapidly changing telecommunications technology.[197]

A. *Justice Breyer's Flawed Approach*

The most regrettable aspect of Justice Breyer's flexible standard is that it appears to lower the burden government must meet to justify content based restrictions on speech. As Justice Kennedy notes, Justice Breyer's formulation of his new flexible standard substitutes weaker synonyms for the stronger language contained in the traditional strict scrutiny standard.

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190. *Id.*
191. *Id.*
192. *See id.* at 2403 (O'Connor, J., concurring in part and dissenting in part).
193. *See id.*
194. *See id.* at 2403-04.
195. *See id.* at 2405-07; *see also id.* at 2416-17 (Kennedy, J., concurring in part and dissenting in part).
196. *See id.* at 2425-28 (Thomas, J., concurring in part and dissenting in part).
197. *See id.* at 2384-85, 2387-89 (plurality opinion); *id.* at 2398-99 (Stevens, J., concurring); *id.* at 2401-03 (Souter, J., concurring); *id.* at 2403 (Ginsburg, J., concurring).

> "[C]lose judicial scrutiny" is substituted for strict scrutiny, and "extremely important problem" or "extraordinary proble[m]" is substituted for "compelling interest." The admonition that the restriction not be unnecessarily great in light of the interest it serves is substituted for the usual narrow tailoring requirements. . . . We are told that the Act must be "appropriately tailored," "sufficiently tailored," or "carefully and appropriately addressed" to the problems at hand—anything, evidently, except narrowly tailored.[198]

That the wording of Justice Breyer's flexible scrutiny standard was intended not simply to restate strict scrutiny using new words, but rather to make it easier for government to impose content based speech restrictions, is amply demonstrated by Justice Breyer's express desire not to use "judicial formulae so rigid that they become a straightjacket that disables government from responding to serious problems."[199] In rejecting the calls of Justices Kennedy and Thomas for the application of traditional First Amendment categories and standards, Justice Breyer complained that

> categorical approaches suffer from the same flaws: they import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect.[200]

Justice Breyer also characterized the standard applied by Justice Kennedy as "a very strict 'narrow tailoring' test."[201]

Further clues to the Breyer coalition's intent to give government more leeway in restricting the content of speech communicated through the use of new technologies were provided by separate concurring opinions of Justices Stevens and Souter. Justice Stevens argued that if the federal government could constitutionally open up access to certain channels, "it deserves more deference than a rigid application of the public forum doctrine would allow."[202] He then confessed that

> [i]f the Government had a reasonable basis for concluding that there were already enough classical musical programs or cartoons being telecast—or, perhaps even enough political debate—I would find no First Amendment objection to an open access requirement that was extended on an impartial basis to all but those particular subjects.[203]

Justice Stevens' confession is most distressing! It implies that government could:

* review the content of all programs offered on a specific cable system;

198. *Id.* at 2406-07 (Kennedy, J., concurring in part and dissenting in part) (citations omitted).
199. *Id.* at 2385 (plurality opinion).
200. *Id.* at 2384.
201. *Id.* at 2388.
202. *Id.* at 2398 (Stevens, J., concurring).
203. *Id.* at 2398-99.

* determine that too much time was being devoted to certain types of expression;
* require the cable operator to provide access channels over which it would no longer have editorial control; and
* then exclude anyone from offering programs on the new access channel that included the disfavored content.

Giving government this type of power certainly would destroy the ideal upon which rests "'[o]ur political system and cultural life,'" which is that "the First Amendment envisions the citizen shaping the government, not the reverse" and "'each person . . . decides for him or herself the ideas and beliefs deserving of expression, consideration, and adherence.'"[204]

Characterizing the standard applied by Justice Kennedy as the strictest,[205] Justice Souter argued that with respect to a communications industry undergoing rapid changes, the "job of the courts will be [to] recogniz[e] established First Amendment interests through a close analysis that constrains the Congress, without wholly incapacitating it in all matters of the significance apparent here."[206] He closed his opinion by observing that the vagaries of the telecommunication's revolution may require the Court to follow "a much older rule, familiar to every doctor of medicine: 'First do no harm.'"[207]

The question begged here is: Do no harm to what or whom? Surely preventing harm should not include retarding the development of new telecommunications technologies. Yet, such retardation could occur if relaxed First Amendment standards permit government to impose burdensome content based restrictions on speech.[208]

The more basic harm to be avoided, however, is deterioration of the First Amendment's immense power to protect expressive freedom while permitting government to protect us from the serious harm that flows from the exercise of certain types of speech. Strict scrutiny has been the First Amendment's strong shield for protecting expressive freedom, the right considered by many to be the signal characteristic of American life.[209] Yet, strict scrutiny has not stood in

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204. *Id.* at 2405 (Kennedy, J., concurring in part and dissenting in part) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994)).

205. *Id.* at 2401 (Souter, J., concurring).

206. *Id.* at 2403.

207. *Id.*

208. The retardation of the internet as a tool for disseminating much valuable non-commercial information and discussion is the primary concern of those challenging the constitutionality of the Communications Decency Act's prohibitions on indecent speech. In *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *prob. juris. noted*, 117 S. Ct. 554 (1996), a three judge district court unanimously held unconstitutional the anti-indecency provisions of the CDA because it would chill non-commerical sources of much valuable but arguably indecent information (classical art, sex education materials, manuscripts of plays, etc.) from using the internet. *See id.* at 825, 849, 852-53. This chill would occur because it would be impossible to know in advance what material would be considered indecent in some community and to shield a person under the age of 18 from receiving it given the lack of economically and technically feasible screening and blocking technologies. *See id.* at 845-49.

209. "[E]ach person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).

the way of government meeting grave problems arising from expressive conduct. Our First Amendment jurisprudence recognizes categories of speech so unrelated to the expression of ideas and so fraught with potential to cause harm that they are denied all First Amendment protection.[210]

More relevant to this case, strict scrutiny has permitted government to establish narrowly tailored content based restrictions on speech when necessary to avoid exposing children, and unconsenting adults, to indecent speech in the privacy of their homes.[211] Providing such protection has been deemed a compelling government interest under the strict scrutiny standard.[212] The disagreement between the Kennedy and Thomas coalitions as to whether § 10(b) is narrowly tailored to meet this compelling interest demonstrated that strict scrutiny is not as rigid a standard as the Breyer coalition portrayed it.[213] Thus, strict scrutiny "does not disable government from addressing serious problems, but does ensure that the solutions do not sacrifice speech to a greater extent than necessary."[214]

Having eschewed using traditional First Amendment categories and standards, including strict scrutiny, the Breyer coalition nevertheless relied almost exclusively on the rationale of *Pacifica*, instead of its new standard, to justify its conclusion that § 10(a) is constitutional.[215] In *Pacifica*, the Court upheld a content based regulation of indecent speech without ever mentioning the strict scrutiny standard.[216] It was strongly suggested by a plurality of the Justices

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210. These categories include speech that

* incites imminent unlawfulness, *see* Brandenburg v. Ohio, 395 U.S. 47 (1969);
* constitutes fighting words, *see* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942);
* constitutes obscenity, *see* Miller v. California, 413 U.S. 15 (1973); and
* defames another, *see* Beauharnais v. Illinois, 343 U.S. 250 (1952), *as limited by* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) *and* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

211. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978).

212. *See* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

213. Compare Justice Breyer's majority opinion in *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2390-94 (1996), which the Kennedy coalition joined to the extent that it applied strict scrutiny, *id.* at 2419, with Justice Thomas' dissenting opinion, *id.* at 2428-32.

214. *See id.* at 2406 (Kennedy, J., concurring in part and dissenting in part).

215. *See id.* at 2385-87 (plurality opinion).

216. In *Pacifica*, a narrow majority of five Justices agreed that the FCC could discipline a radio station for broadcasting at 2:00 p.m. a George Carlin monologue about filthy words deemed to be patently offensive. *See Pacifica*, 438 U.S. at 742-51 (plurality opinion); *id.* at 755-762 (Powell, J., concurring). In neither opinion was strict scrutiny used to justify the judgment.

Justice Stevens justified his judgment by characterizing references to excretory and sexual organs and activities as speech which "lie[s] at the periphery of First Amendment concern," *id.* at 743, is "'no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality,'" *id.* at 746 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (Murphy, J.)), and therefore "is not entitled to absolute constitutional protection under all circumstances," *id.* at 747. To Justice Stevens, the constitutionality of speech of this character depends on context. *See id.* at 744-48. The context included the time of day and a means of communication, broadcast radio, that has been accorded lower First Amendment protection than other communications media because of its pervasive influence and intrusive nature. *See id.* at 748-51. Justice Stevens then found that the context in which the Carlin monologue was given combined with its content to deprive it of constitutional protection. *See id.* at 750-51. He summed up this conclusion with the colorful statement "when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene." *Id.*

Justice Powell concurred with Justice Stevens' contextual approach, emphasizing the need to regulate intrusive media to protect children from indecent material. *See id.* at 756-61 (Powell, J., concurring). He did

that indecent speech, though protected, is not worthy of full First Amendment protection.[217] It was also strongly suggested that broadcast media enjoy less First Amendment protection because of their pervasive influence on American life, easy accessibility to children and potential for injecting unwanted indecent speech into the privacy of homes.[218]

Given that cable TV also exerts a pervasive influence on American life, is easily accessible by children, and presents great potential for injecting unwanted indecent material into the privacy of homes, it is hard to quarrel with the Breyer coalition's use of *Pacifica* to justify upholding some form of regulation of indecent programming on cable TV. But, it is equally hard to understand why the Breyer coalition did not base its approval of regulating indecent cable TV programming exclusively on the rationale of *Pacifica* instead of inventing its flexible standard for judging the constitutionality of government imposed content based speech restrictions. For *Pacifica* provided the Breyer coalition with all the help it needed to support its conclusions. It was not necessary for the Breyer coalition to offer up a confusing, indeterminate new First Amendment standard that clearly has the potential "to make principles intended to protect speech easy to manipulate" and "sow confusion in the courts."[219]

More importantly, as applied in this case, the Breyer flexible scrutiny standard proved to be less protective of all the interests at stake than any of the standards used by the Kennedy and Thomas coalitions. In upholding the constitutionality of § 10(a), the Breyer coalition appeared to establish the flexible scrutiny standard as a rationale for giving a higher priority to protecting children from indecent speech than to protecting certain speech interests.[220] Then, it gave aid and comfort to those who value expressive freedom over vigorously combating indecent speech by finding §§ 10(b) and (c) to be unconstitutional.[221] That Justice O'Connor, a co-creator of the flexible scrutiny standard, complained so ardently about the other co-creators coming to different conclusions as to the constitutionality of §§ 10(a) and (c) speaks volumes as to how Justice Breyer's flexible scrutiny standard is an unreliable protector of all of the interests about which its creators expressed concern.[222]

Perhaps Justice Breyer's flexible scrutiny standard is just a symptom of his coalition's confusion as to what First Amendment interests were most important and what were the best means of protecting them. For the coalition's use of *Pacifica* also seemed to reflect inconstancy of purpose and means. Its suggestion that §§ 10(a) and (c) do not impose greater restrictions on speech than those approved in *Pacifica* is simply wrong. Nothing the court said in *Pacifica*

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not concur with Justice Stevens' language concerning the low value of indecent speech, stating he did not believe "that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection." *Id.* at 761.

217. *See id.* at 743, 746-47 (plurality opinion).

218. *See id.* at 748-50; *id.* at 755-61 (Powell, J., concurring).

219. *Denver Telecom*, 116 S. Ct. at 2407 (Kennedy, J., concurring in part and dissenting in part).

220. *See id.* at 2382-87 (plurality opinion).

221. *See id.* at 2390-94; *id.* at 2394-97 (plurality opinion).

222. *See id.* at 2403-04 (O'Connor, J., concurring in part and dissenting in part).

authorized either the government or a private proxy to ban totally the radio broadcasting of indecent speech. To the contrary, the Court took great pains to note that the FCC would permit radio broadcasts of indecent speech if they were segregated to hours when children were less likely to be listening.[223] If ultimately the radio station chose not to broadcast indecent speech during the permitted late night hours, that decision would have been dictated by its own business judgment rather than by the edict of the government or its chosen private proxy.[224]

By contrast, in declaring unconstitutional § 10(b)'s segregate and block requirements, the Breyer coalition rejected a child protection scheme that would have, like the late night safe harbor scheme approved in *Pacifica*, offered meaningful protection to children while permitting the regulated medium opportunities to show indecent programming without any outside interference. It did so because the Justices imagined that occasional viewers of indecent material might suffer all sorts of problems in determining whether to watch any program cablecast on an indecent LAC, including the fear that someone might release to the public lists identifying them as devotees of indecency.[225] These flights of imagination were effectively shown to be without merit by Justice Thomas, who documented well that the occasional watcher of indecent programs would have no greater difficulty in accessing such programs on LACs than they do already on non-access channels, where indecent material is almost always confined to premium and pay-for-view channels.[226] He also demonstrated how improbable it is that lists of those watching indecent LACs will ever be released to the public.[227]

Justice Breyer also said that new statutory mandates for protecting children from indecent material shown on stations other than LACs, which he found to be less restrictive on speech than § 10(b)'s segregate and block requirement, justified holding § 10(b) unconstitutional.[228] Specifically, Justice Breyer held that if these provisions are effective in protecting children, § 10(b) is too restrictive to be constitutional, but if they are not effective, then § 10(b) will provide too little benefits to be constitutional given the volume of indecent material children would encounter on other channels.[229]

While there is obvious merit in requiring that the least restrictive effective means to be used in protecting children from indecent material shown on cable TV, there had been little or no actual experience with these new mandates and

223. *See Pacifica*, 438 U.S. at 732-33.

224. In this regard, Justice Kennedy observed that "[t]here, the broadcaster wanted to air the speech in question; here, the cable operator does not. So the safe harbor of late-night programming permitted by the FCC in *Pacifica* would likely promote speech, whereas suppression will follow from § 10(a)." *Denver Telecom*, 116 S. Ct. at 2419 (Kennedy, J., concurring in part and dissenting in part).

225. *See id.* at 2391.

226. *See id.* at 2428 (Kennedy, J., concurring in part and dissenting in part).

227. *See id.* at 2430.

228. *See id.* at 2392-93. The new mandates are contained in § 505 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 136 (1996).

229. *See Denver Telecom*, 116 S. Ct. at 2392-93.

§ 10(b)'s segregate and block requirements from which to determine if either of them is acceptably effective.[230] It would seem that if the goal is to protect children, Justice Breyer should not have attached any constitutional significance to these new protections until the real world had tested their effectiveness.[231] For if the new protections failed while § 10(b)'s segregate and block requirements succeeded, given its disdain for indecency Congress undoubtedly would, if given leeway by this Court, extend the requirements of § 10(b) to cover all indecent material shown on cable TV. A Court that took seriously its belief that government has a compelling interest in protecting children from indecent material would not have found constitutional significance in the mere existence of other statutory protections at a time when their effectiveness was unknowable.

Finally, Justice Breyer expressed concern that the segregate and block requirements would be so burdensome to cable operators that they would use the editorial freedom granted them by § 10(a) to ban totally the showing of indecent material on LACs.[232] But of course, cable operators would not be able to ban the showing of indecent material on LACs if § 10(a) were declared unconstitutional. Nevertheless, despite fearing that § 10(b) would cause too much suppression of indecent material, the Breyer coalition approved § 10(a), thereby authorizing cable operators to do what Congress wanted to do but was afraid it could not do constitutionally: Totally ban the showing of indecent material on LACs.[233] It may be, as Justice Breyer prophesied, that not all cable operators will ban the showing of indecent material on LACs, but if some

230. At the time of this decision, it had been less than a year since the new protections had been mandated by the Telecommunications Act of 1996 and implementation of § 10(b)'s segregate and block requirements had been enjoined pending the outcome of this case.

231. Justice Breyer may have relying on *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989), as a model. There, the Court struck down a total ban on indecent telephone communications in part because Congress had earlier enacted less restrictive means of protecting children from them. *See id.* at 128-31. The proponents of the ban argued forcefully that Congress enacted the ban out of belief its earlier protective solutions would not be effective. *See id.* at 129-30. However, the Court rejected this justification. In doing so, it took note that the earlier solutions had never been tried, and therefore Congress had no data showing they would have been ineffective. *See id.* at 130-31. Thus, the congressional record failed to show there were no constitutional methods short of a total ban available for protecting children from indecent telephone communications. *See id.* at 129-31.

However, *Sable* is distinguishable from *Denver Telecom* in ways that make it an inappropriate model. In *Denver Telecom*, neither the allegedly less restrictive mandates nor § 10(b) involved total bans on indecent programming, so the First Amendment rights of those wishing to cablecast indecent programming on LACs would not have been totally defeated as were the First Amendment rights at stake in *Sable*. Moreover, given that in *Denver Telecom* the less restrictive mandates were not replacements for § 10(b), as was the total ban for the less restrictive mandates in *Sable*, a reasonable person could have concluded that Congress was merely setting up parallel tests to determine which types of protection would be most effective.

232. *See Denver Telecom*, 116 S. Ct. at 2391.

233. Justice Breyer acknowledged the possibility that cable operators may ban indecent programming. *See id.* at 2387 (plurality opinion). Justice Kennedy believed that cable operators have clear financial incentives to ban indecent programming on LACs that make such banning a near certainty given cable operators' historical hostility to access channels. *See id.* at 2418-19 (Kennedy, J., concurring in part and dissenting in part). Therefore, he concluded that the "obvious consequence invited by [§ 10(a)] is exclusion." *Id.* at 2419. Finally, he strongly implied that Congress was aware of the probable effects of § 10(a) at the time of its enactment. *See id.* at 2416 ("Perhaps Congress drafted the law this way to avoid the clear constitutional difficulties of banning indecent speech from access channel. . . ."); *id.* at 2418-19 (noting the financial incentives cable operators have to ban indecent material on LACs, and the general hostility of cable operators to LACs, of which he believed Congress was aware when drafting § 10(a)).

do not many children will suffer increased exposure to indecent material. Justice Breyer found this peculiar balance, where some LACs will suffer total suppression of their indecent programming and some children will suffer increased exposure to indecent material, worthwhile because cable operators will have returned to them a portion of their editorial control.[234] He called this result a constitutional balancing of all the interests involved,[235] but in reality it is nothing more than a crap shoot which the cable operators will always win by choosing to victimize either LACs or children.

B. Justice Thomas' Judicial Activism

Applying strict scrutiny to § 10(b), Justice Thomas came to a different outcome than did the Breyer and the Kennedy coalitions.[236] His difference with the Kennedy coalition is not too surprising, since reasonable people may differ as to whether a content based speech is narrowly tailored, and it would have been nonsensical for the Kennedy coalition to have upheld a qualification to §10(a)'s redistribution of editorial power after finding § 10(a) to be unconstitutional.

It is somewhat surprising, however, that the Breyer coalition could find a speech restriction wanting by use of a flexible standard requiring less tailoring while the Thomas coalition could find it to be narrowly tailored. Yet, this puzzling outcome less mysterious when viewed as a clash of personal values. By approving § 10(a), both coalitions were obligated to consider whether § 10(b)'s qualifications of the cable operators' § 10(a) powers were constitutional. It seems clear that §10(b) would make it more burdensome for cable operators to allow LACs to show indecent programs.[237] It is also seems clear that children would be less protected if § 10(b) were declared unconstitutional.[238] And, reasonable people could have differed as to whether other tools presently available to parents for protecting their children from indecent material provided an acceptable level of protection for children living in the service areas of cable operators which permitted indecent material to be shown on LACs.[239] So, the value judgment boiled down to which interests should bear the risks of loss: LACs or families. Given the close identification of Justices Thomas and Scalia

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234. *See id.* at 2387 (plurality opinion).

235. *See id.*

236. *See id.* at 2428-32 (Thomas, J., concurring in part and dissenting in part).

237. Justices Breyer and Thomas acknowledge that § 10(b) places additional operational burdens on cable operators who permit indecent programming to be shown on LACs, as they must since it is the cable operator who must carry out the mandates of § 10(b). *See Denver Telecom*, 116 S. Ct. at 2391; *id.* at 2429 (Thomas, J., concurring in part and dissenting in part). Justice Breyer described the burden as being possibly heavy enough to dissuade some cable operators from allowing indecent programming to be shown on LACs, *see id.* at 2391, while Justice Thomas did not address any financial implications of § 10(b), *see id.* at 2429-32.

238. *See id.* at 2392 (acknowledging that alternatives to § 10(b) may be less effective in protecting children from indecent material shown on LACs); *id.* at 2429-31 (Thomas, J., concurring in part and dissenting in part) (arguing forcefully that § 10(b) will be more effective in protecting children than will other available means).

239. For example, compare the effectiveness analyses of Justices Breyer and Thomas. *See id.* at 2391-94; *id.* at 2429-31 (Thomas, J., concurring in part and dissenting in part).

with conservative religious causes,[240] and the close working relationship between them and Chief Justice Rehnquist,[241] it should not have been surprising that the Thomas coalition sided with families.

There is much merit in the editorial rights analysis that led Justice Thomas to conclude that §§ 10(a) and (c) are constitutional. There is no scarcity of a critical physical resource constraining the number of channels that can operate

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240. In his First Amendment religious cases, Justice Scalia has held that legislative accomodations of religion "are appropriate if they merely act to lift a government imposed burden." Roberto L. Corrada, *Religious Accomodation and the National Labor Relations Act*, 17 BERKELEY J. OF EMP. & LAB. L. 185, 263 (1996). Justice Scalia's accomodation theory is the most permissive as applied to legislative accomodations, for by contrast Justice O'Connor believes legislative accomodations "are proper if they lift a government imposed burden and *do not endorse religion*." *Id.* (emphasis added). As of late 1996, Justice Thomas had "voted with Justice Scalia in every First Amendment religion case since becomming a member of the Court." *Id.* at 264. Evidently he shares Justice Scalia's accomodationist views.

That Justices Scalia and Thomas would be the most accomodating with respect to legislation that favors religion is not surprising given their religious backgrounds and recent actions. Both are conservative Roman Catholics, although Justice Thomas just recently converted back to his childhood faith after attending a charismatic episcopalean church for awhile. *See* David Corn, *Believing Thomas; Supreme Court Justice-nominee Clarence Thomas*, THE NATION, Aug. 12, 1991, at 180; Richard Willing, *Rolling Stones Gave No Satisfaction; Thomas Back in Catholic Church*, WASHINGTONIAN, Jan. 1997, at 10. It is speculated that Justice Scalia may have influenced Justice Thomas' decision to return to his childhood religion. *See* Willing, *supra*, at 10.

Justice Thomas' religious views apparently affect his legal views. After receiving intense criticism of his anti-affirmative action opinions, Justice Thomas

> told his longtime friend, conservative columnist Armstrong Williams, that "I cannot do to White people what an elite group of Whites did to Black people, because if I do, I am just as bad as they are. I can't break from God's law just because they did. If they were wrong in doing that (using law to discriminate) to us, then I am wrong in doing it to them."

See "God's Law" Required Him to Vote Against Affirmative Action, Says Justice Thomas, JET, Sept. 11, 1995, at 8.

Similarly, Justice Scalia provoked criticism and concern after delivering a "scathing indictment of American society as dominated by secular, 'worldly wise' enemies of Chirstianity" at an April 9, 1996, breakfast sponsored by the Christian Legal Society at the Mississippi College of law. *See* Clay Chandler, *Scalia's Religion Remarks: Just a Matter of Free Speech?*, WASH. POST, Apr. 15, 1996, at F7. Although Justice Scalia did not release a transcript of his remarks, attendees gave the following account of his speech:

> Scalia lashed out at what he called the "worldly wise," who, he said, "just will not have anything to do with miracles."
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> "The wise do not believe in the resurrection of the dead. It is really quite absurd," he said. To many Americans, he added sarcastically, "everything from the Easter morning to the Ascension had to be made up by the groveling enthusiasts as part of their plan to get themselves martyred."
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> Scalia also noted that the word "cretin" was derived from the French word for "Christian."
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> "To be honest about it, that is the view of Christians taken by modern society," he said. "Surely those who adhere to all or most of these traditional Christian beliefs are to be regarded as simple-minded."

Id. According to critics, the "issue is whether Scalia's impassioned and remarkably personal defense of Christianity, delivered at a Baptist prayer breakfast. . . , clashed with his sworn duty to impartially interpret U.S. laws, including those pertaining to religion." *Id.*

241. This close working relationship is reflected in the high percentage of agreement among Justices Rehnquist, Scalia and Thomas during the Court's last term. Justice Rehnquist was in total agreement with Justice Thomas 78.05% and Justice Scalia 75.9%, percentages exceeded only by Justice O'Connor's 78.31%, and in a combined total and partial agreement with Justice Thomas 89.02% and Justice Scalia 87.95%, which were the two highest percentages of total or partial agreement. Thomas C. Goldstein, *Statistics for the Supreme Court's October Term 1995*, 65 U.S.L.W. 3029, 3030 (1996). Justice Scalia was in total agreement with Justice Thomas 82.93% and Justice Rehnquist 75.9%, which were the two highest percentages of total agreement, and in a combined total and partial agreement with Justice Thomas 92.68% and Justice Rehnquist 87.95%, which were the two highest percentages of total or partial agreement. *See id.* at 3031. Justice Thomas was in total agreement with Justice Scalia 82.93% and Justice Rehnquist 78.05%, which were the two highest percentages of total agreement, and in a combined total and partial agreement with Justice Scalia 92.68% and Justice Rehnquist 89.02%, which were the two highest percentages of total or partial agreement. *See id.*

within each cable TV system.[242] Not all of the channels operating over a cable system, and certainly not all of the programmers supplying material to the operating channels, are affiliated with the cable operator.[243] Some channels dropped from cable TV systems have successfully won reinstatement by inciting large numbers of cable subscribers to demand that the cable operator restore them to the system.[244] Therefore, the cable TV industry may not present the same high risk of having the power to decide what is communicated over an important communications medium concentrated in just a few hands as does broadcast TV. Nor does cable TV present a threat to diversity of programming. Indeed, some commentators worry that by offering so much diversity, cable TV may contribute to a fragmentation of America's cultural identity.[245] So, there is much factual support for Justice Thomas' legal conclusion that cable operators should have the same editorial freedom enjoyed by newspapers and other non-electronic communications media.

There is also merit in, and factual support for, the suggestions that restoring full editorial rights to cable operators would destroy the interests governments advanced by establishing PACs and LACs. State and local governments secure channels, the PACS, through which their operations can be observed, educational systems can deliver material of educational value, and members of the public can try their hand at producing TV programming.[246] The federal government assures itself, through the establishment of LACs, that structural

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242. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 628-29 (1994).

243. *See id.*

244. For example, TCI Cable System, operating in the Tulsa, Oklahoma service area, restored The Nashville Network and Black Entertainment Television to its lineup after previously removing them at the first of the year. *See* Rita Sherrow, *Tulsa Gets Its Country!: Cable System Agrees to Put TNN Back in TCI Lineup*, TULSA WORLD, Jan. 23, 1997, at D3.

245. *See* Anthony Lewis, *Abroad at Home; An Atomized America*, N.Y. TIMES, Dec. 18, 1995, at A17. In this editorial, Anthony Lewis makes heavy use of observations about the disintegration of civic life in America made by Professor Robert D. Putnam in an article published by the quarterly THE AMERICAN PROSPECT. These observations included:

> Surveys of average Americans over the last 30 years, the article says, show that participation in voluntary associations is down between 25 and 50 percent. That is so of groups as diverse as P.T.A.'s, the Elks, the League of Women Voters, and the Red Cross.
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> "Americans today are significantly less engaged with their communities than was true a generation ago," Professor Putnam concludes. And with that has come a decline in what he calls "social trust": belief in one another.
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> ....
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> Why? Professor Putnam's answer is: television.
>
> The average American spends 40 percent of his free time watching television—and those who watch a lot participate little. Television discourages "social trust and group membership," Professor Putnam writes. "Heavy readers [of newspapers] are avid joiners, whereas heavy viewers are more likely to be loners." Surveys show that readers belong to 76 percent more civic groups than watchers.
>
> ....
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> "Heavy watchers of TV are unusually skeptical about the benevolence of other people," Professor Putnam says—"overestimating crime rates, for example.... Heavy TV watching may well increase pessimism about human nature."
>
> A final point goes beyond television. It is that the whole electronic revolution in communications, even while it enlarges our opportunities, has a profoundly fragmenting effect on the society. In other words, we can sit alone at our computers and interact only through electronics. Technology, Professor Putnam concludes, "may indeed be undermining our connections with one another and with our communities."

Id.

246. *See* Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2407-09 (Kennedy, J., concurring in part and dissenting in part) (describing the origins and functions of PACs).

changes within the telecommunications industry will not put total editorial control over cable TV into the hands of just a few powerful firms.[247] Given that PAC programmers create programs mainly to provide information, they are unlikely to have commercial value.[248] LAC programs are usually those cable operators and the non-access channels have rejected.[249] So, it is highly likely that many of those who secure programming time on PACs and LACs would no longer be able to do so if cable operators were given total editorial control over all access channels.

Justice Thomas did not hold that the Constitution requires giving cable operators total editorial control over PACs and LACs. Nor could he have rendered such a verdict, since none of the parties to this case questioned the constitutionality of governments requiring cable operators to provide access channels.[250] He did, however, make a strong argument that the cable operators' putative rights to full editorial control over what is cablecast over their systems justify the federal government giving them a part of their entitlement.[251] In so doing, Justice Thomas discounted governmental, societal and private interest in PACs and LACs the same way they would have been discounted had the PAC and LAC creation requirements been deemed unconstitutional. Revealing his eagerness for an opportunity to declare the unconstitutionality of the PAC and LAC requirements, in an act of spectacular judicial activism, he virtually invited cable operators to mount future challenges to the constitutionality of PACs and LACs.[252]

C. *Justice Kennedy's Complexities*

Justice Kennedy's use of the strict scrutiny standard to judge the validity of §§ 10(a)-(c) should not have been controversial. Sections 10(a)-(c) removed from PACs and LACs the editorial control over the decision to cablecast programs with indecent content given to them by the government acts that created them.[253] The removal of this editorial control clearly restricted the expressive

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247. *See* 47 U.S.C. § 532(a) (1994 & Supp. II 1996); H.R. REP. NO. 98-934, *reprinted in* 1984 U.S.C.C.A.N. 4685.

248. *See Denver Telecom*, 116 S. Ct. at 2409.

249. "In the main, . . . leased access programs are the ones the cable operator, for competitive reasons or other wise, has no interest in showing." *Id.* at 2418 (Kennedy, J., concurring in part and dissenting in part). Indeed, in his concurrence as to § 10(a), Justice Thomas characterized the requirement that cable operators set aside LACs as forced speech. *See id.* at 2423 (Thomas, J., concurring in part and dissenting in part).

250. *See id.* at 2399 n.2 (Stevens, J., concurring).

251. *See id.* at 2421-25 (Thomas, J., concurring in part and dissenting in part).

252. Thus, Justice Thomas stated bluntly, "[t]here is no getting around the fact that leased and public access are a type of forced speech." *Id.* at 2423. After acknowledging that "the constitutionality of leased and public access channels is not *directly* at issue in these cases," *id.* (emphasis added), he went on to state that "the position adopted by the Court in *Turner* ineluctably leads to the conclusion that the federal access requirements are subject to some form of heightened scrutiny," *id.* He further stated that "[t]he question petitioners pose is whether §§ 10(a) and (c) are improper restrictions on free their free speech, but *Turner* strongly suggests that the proper question is whether the leased and public access requirements . . . are improper restrictions on the *operators'* free speech rights." *Id.* at 2424; *see also id.* at 2423 n.6 (citing commentary that suggests the access channel requirements are unconstitutional).

253. Before enactment of these provisions in 1992, cable operators were forbidden to exercise editorial control over PACs and LACs. *See* 47 U.S.C. § 531(e) (1988) (PACs); *id.* § 532(c)(2) (LACs). *See also Den-*

freedom of PACs and LACs based on the content of their speech. It should have triggered in the minds of all Justices not lured away by Justice Thomas editorial rights analysis the old familiar First Amendment strict scrutiny refrain that government imposed restrictions on the content of speech are unconstitutional unless they are narrowly tailored to meet a compelling government interest. For historically the Court has invariably applied strict scrutiny to government's direct regulation of speech content unless the speaker was using a broadcast medium,[254] engaged in commercial speech,[255] or indulging in a form of unprotected speech.[256] And this case involved the dissemination of non-commercial indecent speech, a protected form of speech, through the use of a non-broadcast medium.

Why then could Justice Kennedy manage to convince only Justice Ginsburg to join his opinion? Perhaps it was the way he greatly complicated his explanation as to why strict scrutiny was the appropriate constitutional standard for judging the constitutionality of §§ 10(a)-(c). Instead of justifying the use of strict scrutiny by simply demonstrating how §§ 10(a)-(c) were content based speech restrictions, he made the use of strict scrutiny contingent on proving that PACs are public fora,[257] LACs are common carriers,[258] and the purposes of public fora and common carriers are so similar that they should be protected by the same First Amendment standard with respect to content based restrictions on speech.[259] This apparently cost him the support of the Breyer coalition justices, who were not ready to take up the novel questions of whether

> private property can be designated a public forum, whether public access channels are a public forum, whether the Government's viewpoint neutral decision to limit a public forum is subject to the same scrutiny as a selective exclusion from a pre-existing public forum, [or] whether exclusion from common carriage must for all purposes be treated like exclusion from a public forum.[260]

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ver Telecom, 116 S. Ct. at 2381; *id.* at 2409, 2411 (Kennedy, J., concurring in part and dissenting in part).

254. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978) (contextual analysis rather than strict scrutiny used to determine the constitutionality of FCC regulations of indecent material broadcast on radio); Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (FCC may restrain editorial rights of broadcast media owners to assure diverse and fair coverage of issues).

255. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980) (government regulations of commercial speech to make commercial transactions fair reviewed under less than strict scrutiny, and total bans on truthful advertising reviewed under a special care scrutiny that is more stringent than the normal commercial speech standard but less stringent than strict scrutiny).

256. *See* R.A.V. v. St. Paul, 505 U.S. 377, 382-84 (1992) (government may restrict or punish certain speech categories involving proscribable content).

257. *See Denver Telecom*, 116 S. Ct. at 2409-10 (Kennedy, J., concurring in part and dissenting in part).

258. *See id.* at 2411-12.

259. *See id.* at 2412-15.

260. *See id.* at 2385 (plurality opinion) (citations omitted).

Although Justice Thomas did use strict scrutiny to analyze § 10(b), he was sharply critical of Justice Kennedy's public forum/common carriage analysis. As to the common carrier issue, Justice Thomas complained that "common carriers are private entities and may, consistent with the First Amendment, exercise editorial discretion in the absence of a specific statutory prohibition."[261] He also observed that nothing in the constitution requires common carriers to carry indecent speech.[262] Finally, he pronounced that "[n]othing about common carrier status . . . constitutionalizes the asserted interests of the [LACs], and Justice Kennedy provide[d] no authority for his assertion that common carrier regulations 'should be reviewed under the same standard as content-based restrictions on speech in a public forum.'"[263]

With respect to the public forum issue, Justice Thomas noted that historically governments created public fora from their own property interests and that franchising governments did not obtain a property interest in a cable system merely by negotiating to have certain channels designated as PACs.[264] Justice Thomas also questioned whether governments could designate PACs as public fora even if they had a formal property interest in them, pointing out that "[i]n no other public forum that we have recognized does a private entity, owner or not, have the obligation not only to permit another to speak, but to actually help produce and then transmit the message on that person's behalf."[265]

The questions raised by Justice Thomas, and ducked by Justice Breyer, concerning Justice Kennedy's public forum/common carrier analyses are quite exacting and appropriate. They did not, however, dissuade Justice Thomas from subjecting §10(b) to strict scrutiny analysis,[266] which suggests he would have done the same for §§ 10(a) and (b) had he not believed the cable operators enjoyed editorial rights superior to those of LACs and PACs. Nor did they "relieve [the Breyer coalition] of the burden of explaining why strict should not apply," since historically "strict scrutiny [has been] the baseline rule for reviewing any content-based discrimination against speech."[267]

In any event, Justice Kennedy's conclusion that §§ 10(a) and (c) were not narrowly tailored to protect children from exposure to indecent material is certainly a meritorious one. Little is gained by government giving a private proxy discretionary editorial power it otherwise would not have had to do what the First Amendment prohibits the government from doing: Impose a total ban on indecent material being shown on another person's media outlet. In some service areas children are left unprotected and in others the showing of indecent material on LACs is totally suppressed. Failure of the proxy to exercise its

261. *Id.* at 2425 (Thomas, J., concurring in part and dissenting in part).
262. *See id.* (citing Sable Communications, Inc. v. FCC, 492 U.S. 115, 133 (1989) (Scalia, J., concurring)).
263. *Id.* (quoting *id.* at 2412 (Kennedy, J., concurring in part and dissenting in part)).
264. *See id.* at 2426-27.
265. *Id.* at 2427.
266. *See id.* at 2428-31.
267. *Id.* at 2413 (Kennedy, J., concurring in part and dissenting in part).

discretion subverts the statute's goal of protecting children from indecent material,[268] while full exercise of the discretion produces what the Court has never allowed before—the total suppression of indecent material.[269] Justice Kennedy was right on target in suggesting that the alternative should be some form of safe harbor regulation that preserves the LACs editorial control over the decision to cablecast indecent material while providing parents with effective tools for keeping their children from being exposed to it.[270]

IX. CONCLUSION

In *Denver Telecom*, four justices made sweeping technological and economic change the excuse for abandoning strict scrutiny of content based government speech restrictions. That is very bad news for those involved in the development of new telecommunications technologies, who now are without assurances that any governmental regulation of the speech they disseminate will be the least restrictive means of accomplishing the governmental interest involved. Worse yet, four justices are now committed to a First Amendment review standard so flexible that predicting the analytical methods they will apply to specific speech restrictions, much less the determinations they might make, is practically impossible.

The issue of how to protect children from indecent material continues to get more complex as new technologies are being rapidly developed that increase both the risk of exposing children to indecent material and the effectiveness of protecting them. The open question is whether the protective technologies can ever keep pace with the technologies for delivering video and audio expressions to our homes. For demands for censorship that could retard the development of new telecommunications technologies are strong when protective technologies lag behind the telecommunications technologies.

If demands for censorship are translated into law, the big question is whether such laws meet or violate First Amendment requirements. The good news from this case for proponents of new telecommunications technologies comes from the six Justices comprising the Breyer and Kennedy coalitions agreeing that § 10(b) is unconstitutional. For § 10(b) directly required the Jus-

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268. "[T]he interest in protecting children from indecency only at the caprice of the cable operator is not compelling." *Id.* at 2416.

269. In *Sable Communications of Cal., Inc., v. FCC*, 492 U.S. 115 (1989), the Court expressly held that indecent communications could not be subjected to a total ban absent "legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest in protecting minor." *Id.* at 129.

270. He stated:

> The Government has no legitimate interest in making access channels pristine. A block-and-segregate requirement similar to § 10(b), but without its constitutional infirmity . . . , protects children with far less intrusion on the liberties of programmers and adult viewers than allowing cable operators to ban indecent programming from access channels altogether. When applying strict scrutiny, we will not assume plausible alternatives will fail to protect compelling interests; there must be some basis in the record, in legislative findings or otherwise, establishing the law enacted as the least restrictive means.

Denver Telecom, 116 S. Ct. at 2417.

tices to recognize the lead time new telecommunications technologies presently enjoy over new signal blocking technologies. This forced them to choose whether to impose increased risks of harm on the telecommunications technology industry or families seeking more control over what their children see. By a vote of six to three, the Court opted for an outcome beneficial to the industry. This is a good sign for those concerned about the future of the internet, especially if it is shown in the internet cases that there are no acceptably effective means for protecting children from encounters with indecent material in cyberspace.