Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech/Media

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Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727 (1996)

The Denver Area Educational Telecommunications Consortium (DAETC) supplies educational programs to schools in the Denver area. Members of that consortium objected to three provisions of the Cable Television Consumer Protection and Competition Act, §§ 10(a), 10(b), and 10(c). Section 10(a) permitted a cable system operator to forbid on leased channels programs the "operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive way." Section 10(c) granted cable operators the same permission to restrict programming on public access channels. Section 10(b) required cable operators to place all patently offensive programs on a single channel and required viewers to request access to that channel in writing. The DAETC filed lawsuit in the Court of Appeals for the District of Columbia, claiming that the law violated the First Amendment. A Court of Appeals panel agreed, but that decision was reversed by the entire Court, sitting en banc. The DAETC appealed to the Supreme Court of the United States.

The Supreme Court sustained the restriction on obscenity on leased channels by a 7–2 vote, but struck down the restriction on public access channel by a 5–4 vote and declared unconstitutional by a 6–3 vote the requirement that all offensive programs be on one channel. Justice Breyer's opinion announcing the judgment of the court performed series of ad hoc balancing tests when sustaining some provisions of the Cable Television Protection and Competition Act and rejecting others. How did he distinguish between the constitutional and unconstitutional provisions? Are his distinctions sound? The main issue that divided the justices in this case was whether a clear standard should apply to all regulations of cable television. Why did Justice Breyer reject the call for clear rules and standards? How did that rejection influence his decision? Why did Justice Thomas call for clear rules and standards? What clear rules and standards did he apply? Was the call for clear rules and standards premature in 1996? Is such a call still premature?

JUSTICE BREYER announced the judgment of the Court

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We recognize that the First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech—and this is so ordinarily even where those decisions take place within the framework of a regulatory regime such as broadcasting. . . .

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Like petitioners, Justices KENNEDY and THOMAS would have us decide these cases simply by transferring and applying literally categorical standards this Court has developed in other contexts. For Justice KENNEDY, leased access channels are like a common carrier, cablecast is a protected medium, strict scrutiny applies, § 10(a) fails this test, and, therefore, § 10(a) is invalid. For Justice THOMAS, the case is simple because the cable operator who owns the system over which access channels are broadcast, like a bookstore owner with respect to what it displays on the shelves, has a predominant First Amendment interest. Both 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.

The history of this Court's First Amendment jurisprudence, however, is one of continual development, as the Constitution's general command that "Congress shall make no law . . . abridging the freedom of speech, or of the press," has been applied to new circumstances requiring different adaptations of prior principles and precedents. The essence of that protection is that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required.

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This tradition teaches that the First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems. This Court, in different contexts, has consistently held that government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech. . . . [N]o definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes. That is not to say that we reject all the more specific formulations of the standard—they appropriately cover the vast majority of cases involving government regulation of speech. Rather, aware as we are of the changes taking place in the law, the technology, and the industrial structure related to telecommunications, we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now. . . .

Rather than decide these issues, we can decide these cases more narrowly, by closely scrutinizing § 10(a) to assure that it properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech. The importance of the interest at stake here—protecting children from exposure to patently offensive depictions of sex; the accommodation of the interests of programmers in maintaining access channels and of cable operators in editing the contents of their channels; the similarity of the problem and its solution to those at issue in [*FCC v. Pacifica Foundation* (1978)] ; and the flexibility inherent in an approach that permits private cable operators to make editorial decisions, lead us to conclude that § 10(a) is a sufficiently tailored response to an extraordinarily important problem.

[T]he provision before us comes accompanied with an extremely important justification, one that this Court has often found compelling—the need to protect children from exposure to patently offensive sex-related material.

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. . . Cable television broadcasting, including access channel broadcasting, is as "accessible to children" as over-the-air broadcasting, if not more so. . . . Cable television systems, including access channels, "have established a uniquely pervasive presence in the lives of all Americans." . . . "Patently offensive" material from these stations can "confron[t] the citizen" in the "privacy of the home" with little or no prior warning. There is nothing to stop "adults who feel the need" from finding similar programming elsewhere, say, on tape or in theaters. . . .

[T]he permissive nature of § 10(a) means that it likely restricts speech less than, not more than, the ban at issue in *Pacifica*. The provision removes a restriction as to some speakers—namely, cable operators. Moreover, although the provision does create a risk that a program will not appear, that risk is not the same as the certainty that accompanies a governmental ban. . . .

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. . . The ban at issue in *Sable*, however, was not only a total governmentally imposed ban on a category of communications, but also involved a communications medium, telephone service, that was significantly less likely to expose children to the banned material, was less intrusive, and allowed for significantly more control over what comes into the home than either broadcasting or the cable transmission system before us. . . .

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For three reasons, however, it is unnecessary, indeed, unwise, for us definitively to decide whether or how to apply the public forum doctrine to leased access channels. First, while it may be that content-based exclusions from the right to use common carriers could violate the First Amendment it is

not at all clear that the public forum doctrine should be imported wholesale into the area of common carriage regulation. As discussed above, we are wary of the notion that a partial analogy in one context, for which we have developed doctrines, can compel a full range of decisions in such a new and changing area. Second, it is plain from this Court's cases that a public forum "may be created for a limited purpose." Our cases have not yet determined, however, that government's decision to dedicate a public forum to one type of content or another is necessarily subject to the highest level of scrutiny. Must a local government, for example, show a compelling state interest if it builds a band shell in the park and dedicates it solely to classical music (but not to jazz)? The answer is not obvious. . . . Finally, and most important, the effects of Congress' decision on the interests of programmers, viewers, cable operators, and children are the same, whether we characterize Congress' decision as one that limits access to a public forum, discriminates in common carriage, or constrains speech because of its content. If we consider this particular limitation of indecent television programming acceptable as a constraint on speech, we must no less accept the limitation it places on access to the claimed public forum or on use of a common carrier.

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The Government argues that . . . the "segregate and block" requirements are lawful because they are "the least restrictive means of realizing" a "'compelling interest,'" namely, "'protecting the physical and psychological well-being of minors.'" . . .

We agree with the Government that protection of children is a "compelling interest." But we do not agree that the "segregate and block" requirements properly accommodate the speech restrictions they impose and the legitimate objective they seek to attain. . . . [O]nce one examines this governmental restriction, it becomes apparent that, not only is it not a "least restrictive alternative" and is not "narrowly tailored" to meet its legitimate objective, it also seems considerably "more extensive than necessary." That is to say, it fails to satisfy this Court's formulations of the First Amendment's "strictest," as well as its somewhat less "strict," requirements. . . .

Several circumstances lead us to this conclusion. For one thing, the law, as recently amended, uses other means to protect children from similar "patently offensive" material broadcast on unleased cable channels, i.e., broadcast over any of a system's numerous ordinary, or public access, channels. The law, as recently amended, requires cable operators to "scramble or . . . block" such programming on any (unleased) channel "primarily dedicated to sexually-oriented programming." In addition, cable operators must honor a subscriber's request to block any, or all, programs on any channel to which he or she does not wish to subscribe. And manufacturers, in the future, will have to make television sets with a so-called "V-chip"—a device that will be able automatically to identify and block sexually explicit or violent programs.

The record does not . . . explain why, under the new Act, blocking alone—without written access requests—adequately protects children from exposure to regular sex-dedicated channels, but cannot adequately protect those children from programming on similarly sex-dedicated channels that are leased. It does not explain why a simple subscriber blocking request system, perhaps a phone-call-based system, would adequately protect children from "patently offensive" material broadcast on ordinary non-sex-dedicated channels (i.e., almost all channels) but a far more restrictive segregate/block/written-access system is needed to protect children from similar broadcasts on what (in the absence of the segregation requirement) would be non-sex-dedicated channels that are leased. Nor is there any indication Congress thought the new ordinary channel protections less than adequate.

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No provision, we concede, short of an absolute ban, can offer certain protection against assault by a determined child. We have not, however, generally allowed this fact alone to justify "reduc[ing] the adult population . . . to . . . only what is fit for children." But, leaving that problem aside, the Government's list of practical difficulties would seem to call, not for "segregate and block" requirements, but, rather, 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). These kinds of requirements resemble

those that Congress has recently imposed upon all but leased channels. For that reason, the "lockbox" description and the discussion of its frailties reinforces our conclusion that the leased channel provision is overly restrictive when measured against the benefits it is likely to achieve. . . .

The statute's third provision, as implemented by FCC regulation, is similar to its first provision, in that it too permits a cable operator to prevent transmission of "patently offensive" programming, in this case on public access channels. But there are four important differences.

The first is the historical background. [C]able operators have traditionally agreed to reserve channel capacity for public, governmental, and educational channels as part of the consideration they give municipalities that award them cable franchises. [T]he requirement to reserve capacity for public access channels is similar to the reservation of a public easement, or a dedication of land for streets and parks, as part of a municipality's approval of a subdivision of land. . . . Unlike § 10(a) therefore, § 10(c) does not restore to cable operators editorial rights that they once had, and the countervailing First Amendment interest is nonexistent, or at least much diminished.

The second difference is the institutional background that has developed as a result of the historical difference. When a "leased channel" is made available by the operator to a private lessee, the lessee has total control of programming during the leased time slot. Public access channels, on the other hand, are normally subject to complex supervisory systems of various sorts, often with both public and private elements. Municipalities generally provide in their cable franchising agreements for an access channel manager, who is most commonly a nonprofit organization, but may also be the municipality, or, in some instances, the cable system owner. . . .

This system of public, private, and mixed nonprofit elements, through its supervising boards and nonprofit or governmental access managers, can set programming policy and approve or disapprove particular programming services. And this system can police that policy by, for example, requiring indemnification by programmers, certification of compliance with local standards, time segregation, adult content advisories, or even by prescreening individual programs. . . . Whether these locally accountable bodies prescreen programming, promulgate rules for the use of public access channels, or are merely available to respond when problems arise, the upshot is the same: There is a locally accountable body capable of addressing the problem, should it arise, of patently offensive programming broadcast to children, making it unlikely that many children will in fact be exposed to programming considered patently offensive in that community. . . .

Finally, our examination of the legislative history and the record before us is consistent with what common sense suggests, namely, that the public/nonprofit programming control systems now in place would normally avoid, minimize, or eliminate any child-related problems concerning "patently offensive" programming. . .

[T]he upshot, in respect to the public access channels, is a law that could radically change present programming-related relationships among local community and nonprofit supervising boards and access managers, which relationships are established through municipal law, regulation, and contract. In doing so, it would not significantly restore editorial rights of cable operators, but would greatly increase the risk that certain categories of programming (say, borderline offensive programs) will not appear. At the same time, given present supervisory mechanisms, the need for this particular provision, aimed directly at public access channels, is not obvious. Having carefully reviewed the legislative history of the Act, the proceedings before the FCC, the record below, and the submissions of the parties and amici here, we conclude 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. Consequently, we find that this third provision violates the First Amendment.

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JUSTICE STEVENS, concurring.

The difference between § 10(a) and § 10(c) is the difference between a permit and a prohibition. The former restores the freedom of cable operators to reject indecent programs; the latter requires local franchising authorities to reject such programs. . . .

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The Federal Government established the leased access requirements to ensure that certain programmers would have more channels available to them. Section 10(a) is therefore best understood as a limitation on the amount of speech that the Federal Government has spared from the censorial control of the cable operator, rather than a direct prohibition against the communication of speech that, in the absence of federal intervention, would flow freely.

I do not agree, however, that § 10(a) established a public forum. Unlike sidewalks and parks, the Federal Government created leased access channels in the course of its legitimate regulation of the communications industry. In so doing, it did not establish an entirely open forum, but rather restricted access to certain speakers, namely, unaffiliated programmers able to lease the air time. . . .

When the Federal Government opens cable channels that would otherwise be left entirely in private hands, it deserves more deference than a rigid application of the public forum doctrine would allow. At this early stage in the regulation of this developing industry, Congress should not be put to an all or nothing-at-all choice in deciding whether to open certain cable channels to programmers who would otherwise lack the resources to participate in the marketplace of ideas.

Just as Congress may legitimately limit access to these channels to unaffiliated programmers, I believe it may also limit, within certain reasonable bounds, the extent of the access that it confers upon those programmers. If 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. A contrary conclusion would ill-serve First Amendment values by dissuading the Government from creating access rights altogether.

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Even though it is often difficult to determine whether a given access restriction impermissibly singles out certain ideas for repression, in these cases I find no basis for concluding that § 10(a) is a species of viewpoint discrimination. By returning control over indecent programming to the cable operator, § 10(a) treats indecent programming on access channels no differently from indecent programming on regular channels. The decision to permit the operator to determine whether to show indecent programming on access channels therefore cannot be said to reflect a governmental bias against the indecent programming that appears on access channels in particular.

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[T]he criteria § 10(a) identifies for limiting access are fully consistent with the Government's contention that the speech restrictions are not designed to suppress "a certain form of expression that the Government dislikes," but rather to protect children from sexually explicit programming on a pervasive medium. In other cases, we have concluded that such a justification is both viewpoint neutral and legitimate. . . .

As both Justice BREYER and Justice KENNEDY have explained, the public, educational, and governmental access channels that are regulated by § 10(c) are not creations of the Federal Government. They owe their existence to contracts forged between cable operators and local cable franchising authorities. . .

[I]f left to their own devices, those authorities may choose to carry some programming that the Federal Government has decided to restrict. As I read § 10(c), the federal statute would disable local governments from making that choice. It would inject federally authorized private censors into fora from which they might otherwise be excluded, and it would therefore limit local fora that might otherwise be open to all constitutionally protected speech.

Section 10(c) operates as a direct restriction on speech that, in the absence of federal intervention, might flow freely. The Federal Government is therefore not entitled to the same leeway that I believe it deserves when it enacts provisions, such as § 10(a), that define the limits of federally created access rights. The Federal Government has no more entitlement to restrict the power of a local authority to disseminate materials on channels of its own creation, than it has to restrict the power of cable operators to do so on channels that they own. . . .

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JUSTICE SOUTER, concurring.

. . . Neither the speech nor the limitation at issue here may be categorized simply by content. Our prior case most nearly on point dealt not with a flat restriction covering a separate category of indecency at the First Amendment's periphery, but with less than a total ban, directed to instances of indecent speech easily available to children through broadcasts readily received in the household and difficult or impossible to control without immediate supervision. . . .

Nor does the fact that we deal in these cases with cable transmission necessarily suggest that a simple category subject to a standard level of scrutiny ought to be recognized at this point; while we have found cable television different from broadcast with respect to the factors justifying intrusive access requirements under the rule in *Red Lion Broadcasting Co. v. FCC*, (1969), today's plurality opinion rightly observes that the characteristics of broadcast radio that rendered indecency particularly threatening in *Pacifica*, that is, its intrusion into the house and accessibility to children, are also present in the case of cable television. It would seem, then, that the appropriate category for cable indecency should be as contextually detailed as the Pacifica example, and settling upon a definitive level-of-scrutiny rule of review for so complex a category would require a subtle judgment; but there is even more to be considered, enough more to demand a subtlety tantamount to prescience.

All of the relevant characteristics of cable are presently in a state of technological and regulatory flux. . . . As cable and telephone companies begin their competition for control over the single wire that will carry both their services, we can hardly settle rules for review of regulation on the assumption that cable will remain a separable and useful category of First Amendment scrutiny. And as broadcast, cable, and the cybertechnology of the Internet and the World Wide Web approach the day of using a common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others.

Accordingly, in charting a course that will permit reasonable regulation in light of the values in competition, we have to accept the likelihood that the media of communication will become less categorical and more protean. Because we cannot be confident that for purposes of judging speech restrictions it will continue to make sense to distinguish cable from other technologies, and because we know that changes in these regulated technologies will enormously alter the structure of regulation itself, we should be shy about saying the final word today about what will be accepted as reasonable tomorrow. . . .

JUSTICE O'CONNOR, concurring in part and dissenting in part.

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I find the features shared by § 10(a), which covers leased access channels, and § 10(c), which covers public access channels, to be more significant than the differences. For that reason, I would find that § 10(c) also withstands constitutional scrutiny.

Both §§ 10(a) and 10(c) serve an important governmental interest: the well-established compelling interest of protecting children from exposure to indecent material. . . .

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Furthermore, both provisions are permissive. Neither presents an outright ban on a category of speech. . . .

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To be sure, the leased access channels covered by § 10(a) were a product of the Federal Government, while the public access channels at issue in § 10(c) arose as part of the cable franchises awarded by municipalities, see ante, at 2394–2395, but I am not persuaded that the difference in the origin of the access channels is sufficient to justify upholding § 10(a) and striking down § 10(c). The 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.

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JUSTICE KENNEDY, with whom JUSTICE GINSBURG joins, concurring in part, concurring in the judgment in part, and dissenting in part.

When confronted with a threat to free speech in the context of an emerging technology, we ought to have the discipline to analyze the case by reference to existing elaborations of constant First Amendment principles. This is the essence of the case-by-case approach to ensuring protection of speech under the First Amendment, even in novel settings. Rather than undertake this task, however, the plurality just declares that, all things considered, § 10(a) seems fine. I think the implications of our past cases for these cases are clearer than the plurality suggests, and they require us to hold § 10(a) invalid. Though I [concur in the judgment] striking down § 10(b) of the Act, and concur in the judgment that § 10(c) is unconstitutional, with respect I dissent from the remainder.

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. . . Sections 10(a) and (c) disadvantage nonobscene, indecent programming, a protected category of expression . . . .

. . . As a general matter, a private person may exclude certain speakers from his or her property without violating the First Amendment. . . . Access channels, however, are property of the cable operator, dedicated or otherwise reserved for programming of other speakers or the government. A public access channel is a public forum, and laws requiring leased access channels create common-carrier obligations. When the government identifies certain speech on the basis of its content as vulnerable to exclusion from a common carrier or public forum, strict scrutiny applies. These laws cannot survive this exacting review. However compelling Congress' interest in shielding children from indecent programming, the provisions in these cases are not drawn with enough care to withstand scrutiny under our precedents.

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[T]he creation of standards and adherence to them, even when it means affording protection to speech unpopular or distasteful, is the central achievement of our First Amendment jurisprudence. 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. They also provide notice and fair warning to those who must predict how the courts will respond to attempts to suppress their speech. Yet formulations like strict scrutiny, used in a number of constitutional settings to ensure that the inequities of the moment are subordinated to commitments made for the long run, mean little if they can be watered down whenever they seem too strong. They mean still less if they can be ignored altogether when considering a case not on all fours with what we have seen before.

. . . The straightforward issue here is whether the Government can deprive certain speakers, on the basis of the content of their speech, of protections afforded all others. There is no reason to discard our existing First Amendment jurisprudence in answering this question.

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Public access channels meet the definition of a public forum. We have recognized two kinds of public fora. The first and most familiar are traditional public fora, like streets, sidewalks, and parks, which by custom have long been open for public assembly and discourse. "The second category of public property is the designated public forum, whether of a limited or unlimited character—property that the State has opened for expressive activity by part or all of the public."

Public access channels fall in the second category. Required by the franchise authority as a condition of the franchise and open to all comers, they are a designated public forum of unlimited character. . . . Public fora do not have to be physical gathering places, nor are they limited to property owned by the government. Indeed, in the majority of jurisdictions, title to some of the most traditional of public fora, streets and sidewalks, remains in private hands. Public access channels are analogous; they are public fora even though they operate over property to which the cable operator holds title.

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In providing public access channels under their franchise agreements, cable operators therefore are not exercising their own First Amendment rights. They serve as conduits for the speech of others. Section 10(c) thus restores no power of editorial discretion over public access channels that the cable operator once had; the discretion never existed. It vests the cable operator with a power under federal law, defined by reference to the content of speech, to override the franchise agreement and undercut the public forum the agreement creates. By enacting a law in 1992 excluding indecent programming from protection but retaining the prohibition on cable operators' editorial control over all other protected speech, the Federal Government at the same time ratified the public-forum character of public access channels but discriminated against certain speech based on its content.

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Laws requiring cable operators to provide leased access are the practical equivalent of making them common carriers, analogous in this respect to telephone companies: They are obliged to provide a conduit for the speech of others. . . .

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Laws removing common-carriage protection from a single form of speech based on its content should be reviewed under the same standard as content-based restrictions on speech in a public forum. Making a cable operator a common carrier does not create a public forum in the sense of taking property from private control and dedicating it to public use; rather, regulations of a common carrier dictate the manner in which private control is exercised. A common-carriage mandate, nonetheless, serves the same function as a public forum. It ensures open, nondiscriminatory access to the means of communication. . . .

In *Police Dept. of Chicago v. Mosley* (1972), we made clear that selective exclusions from a public forum were unconstitutional. Invoking the First and Fourteenth Amendments to strike down a city ordinance allowing only labor picketing on any public way near schools, we held the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." . . . Since the same standard applies to exclusions from limited or unlimited designated public fora as from traditional forums . . ., there is no reason the kind of selective exclusion we condemned in Mosley should be tolerated here.

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. . . If Government has a freer hand to draw content-based distinctions in limiting a forum than in excluding someone from it, the First Amendment would be a dead letter in designated public fora; every exclusion could be recast as a limitation. . . . The power to limit or redefine fora for a specific legitimate purpose does not allow the government to exclude certain speech or speakers from them for any reason at all.

. . .

I do not foreclose the possibility that the Government could create a forum limited to certain topics or to serving the special needs of certain speakers or audiences without its actions being subject to strict scrutiny. This possibility seems to trouble the plurality, which wonders if a local government must "show a compelling state interest if it builds a band shell in the park and dedicates it solely to classical music (but not to jazz)." This is not the correct analogy. These cases are more akin to the Government's creation of a band shell in which all types of music might be performed except for rap music. The provisions here are content-based discriminations in the strong sense of suppressing a certain form of expression that the Government dislikes or otherwise wishes to exclude on account of its effects, and there is no justification for anything but strict scrutiny here.

Giving government free rein to exclude speech it dislikes by delimiting public fora (or common-carriage provisions) would have pernicious effects in the modern age. Minds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media. The extent of public entitlement to participate in those means of communication may be changed as technologies change; and in expanding those entitlements the Government has no greater right to discriminate on suspect grounds than it does when it effects a ban on speech against the backdrop of the entitlements to which we have been more

accustomed. It contravenes the First Amendment to give Government a general license to single out some categories of speech for lesser protection so long as it stops short of viewpoint discrimination.

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At a minimum, the proper standard for reviewing §§ 10(a) and (c) is strict scrutiny. The plurality gives no reason why it should be otherwise. I would hold these enactments unconstitutional because they are not narrowly tailored to serve a compelling interest.

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Congress does have, however, a compelling interest in protecting children from indecent speech. . . . So long as society gives proper respect to parental choices, it may, under an appropriate standard, intervene to spare children exposure to material not suitable for minors. . . .

Sections 10(a) and (c) nonetheless are not narrowly tailored to protect children from indecent programs on access channels. First, to the extent some operators may allow indecent programming, children in localities those operators serve will be left unprotected. Partial service of a compelling interest is not narrow tailoring. . . .

Second, to the extent cable operators prohibit indecent programming on access channels, not only children but adults will be deprived of it. The Government may not "reduce the adult population . . . to [viewing] only what is fit for children." It matters not that indecent programming might be available on the operator's other channels. 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 of requiring persons to place themselves on a list to receive programming, 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. . . .

[T]he plurality suggests the permissive nature of § 10(a) at least does not create the same risk of exclusion as a total ban on indecency. This states the obvious, but the possibility the Government could have imposed more draconian limitations on speech never has justified a lesser abridgment. Indeed, such an argument almost always is available; few of our First Amendment cases involve outright bans on speech. . . .

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In agreement with the plurality's analysis of § 10(b) of the Act, insofar as it applies strict scrutiny, I join Part III of its opinion. Its position there, however, cannot be reconciled with upholding § 10(a). In the plurality's view, § 10(b), which standing alone would guarantee an indecent programmer some access to a cable audience, violates the First Amendment, but § 10(a), which authorizes exclusion of indecent programming from access channels altogether, does not. There is little to commend this logic or result. I dissent from the judgment of the Court insofar as it upholds the constitutionality of § 10(a).

JUSTICE THOMAS, joined by THE CHIEF JUSTICE and JUSTICE SCALIA, concurring in the judgment in part and dissenting in part.

Our First Amendment distinctions between media, dubious from their infancy, placed cable in a doctrinal wasteland in which regulators and cable operators alike could not be sure whether cable was entitled to the substantial First Amendment protections afforded the print media or was subject to the more onerous obligations shouldered by the broadcast media. . . Over time, however, we have drawn closer to recognizing that cable operators should enjoy the same First Amendment rights as the nonbroadcast media.

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There is no getting around the fact that leased and public access are a type of forced speech. Though the constitutionality of leased and public access channels is not directly at issue in these cases, 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. . . Under that view, content-neutral governmental impositions on an operator's editorial discretion may be sustained only if they further an important governmental interest unrelated to the suppression of free speech and are no greater than is essential to further the asserted interest. . . .

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. . . The question petitioners pose is whether §§ 10(a) and (c) are improper restrictions on their free speech rights, but Turner strongly suggests that the proper question is whether the leased and public access requirements (with §§ 10(a) and (c)) are improper restrictions on the operators' free speech rights. In my view, the constitutional presumption properly runs in favor of the operators' editorial discretion, and that discretion may not be burdened without a compelling reason for doing so. . . .

It is one thing to compel an operator to carry leased and public access speech, in apparent violation of *Tornillo*, but it is another thing altogether to say that the First Amendment forbids Congress to give back part of the operators' editorial discretion, which all recognize as fundamentally protected, in favor of a broader access right. . . .

Because the access provisions are part of a scheme that restricts the free speech rights of cable operators and expands the speaking opportunities of access programmers, who have no underlying constitutional right to speak through the cable medium, I do not believe that access programmers can challenge the scheme, or a particular part of it, as an abridgment of their "freedom of speech." Outside the public forum doctrine, Government intervention that grants access programmers an opportunity to speak that they would not otherwise enjoy—and which does not directly limit programmers' underlying speech rights—cannot be an abridgement of the same programmers' First Amendment rights, even if the new speaking opportunity is content based.

. . .

The First Amendment challenge, if one is to be made, must come from the party whose constitutionally protected freedom of speech has been burdened. Viewing the federal access requirements as a whole, it is the cable operator, not the access programmer, whose speech rights have been infringed. Consequently, it is the operator, and not the programmer, whose speech has arguably been infringed by these provisions. . . .

It makes no difference that the leased access restrictions may take the form of common carrier obligations. . . . Common carriers are private entities and may, consistent with the First Amendment, exercise editorial discretion in the absence of a specific statutory prohibition. . . .

. . .

Cable systems are not public property. Cable systems are privately owned and privately managed, and petitioners point to no case in which we have held that government may designate private property as a public forum. The public forum doctrine is a rule governing claims of "a right of access to public property," and has never been thought to extend beyond property generally understood to belong to the government. . . .

. . .

Nor am I convinced that a formal transfer of a property interest in public access channels would suffice to permit a local franchising authority to designate those channels as a public forum. In 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. Cable operators regularly retain some level of managerial and operational control over their public access channels, subject only to the requirements of federal, state, and local law and the franchise agreement. In more traditional public forums, the government shoulders the burden of administering and enforcing the openness of the expressive forum, but it is frequently a private citizen, the operator, who shoulders that burden for public access channels.

. . .

Unlike §§ 10(a) and (c), § 10(b) clearly implicates petitioners' free speech rights. Though § 10(b) by no means bans indecent speech, it clearly places content-based restrictions on the transmission of private speech by requiring cable operators to block and segregate indecent programming that the operator has agreed to carry. Consequently, § 10(b) must be subjected to strict scrutiny and can be upheld only if it furthers a compelling governmental interest by the least restrictive means available. . . . Because § 10(b) is narrowly tailored to achieve that well-established compelling interest, I would uphold it. I therefore dissent from the Court's decision to the contrary.

Our precedents establish that government may support parental authority to direct the moral upbringing of their children by imposing a blocking requirement as a default position. . . .

. . .

The Court strikes down § 10(b) by pointing to alternatives, such as reverse blocking and lockboxes, that it says are less restrictive than segregation and blocking. Though these methods attempt to place in parents' hands the ability to permit their children to watch as little, or as much, indecent programming as the parents think proper, they do not effectively support parents' authority to direct the moral upbringing of their children. . . . [I]ndecent programming on leased access channels is "especially likely to be shown randomly or intermittently between non-indecent programs." 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. Thus, even assuming that cable subscribers generally have the technical proficiency to properly operate a lockbox, by no means a given, this distinguishing characteristic of leased access channels makes lockboxes and reverse blocking largely ineffective.

. . .