Confronting Indecent Cable Television Programming: Balancing the Interests of Children and the Exercise of Free Speech in Denver Area Educational Telecommunications Consortium, Inc. v. FCC

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I. INTRODUCTION

In recent history, courts have been repeatedly confronted with issues
involving indecency in literature, on the telephone, over the radio, and on
television. As purveyors of indecent messages, both visual and audio, become more adept at communicating their messages to an increasing number of people, much concern has been expressed over those who inadvertently receive communications of sexually explicit adult material. Although the target audience of pornography peddlers, and of those entrepreneurs whose products are of a more benign nature, may be mature adults, there is little question that this target is not always accurately hit.

Children are receiving products and messages from which they should be protected until such time as they are mature and old enough to legally and morally decide what they want to see, hear, and do. The majority of distributors of indecent materials are undoubtedly lawful and moral businessmen and entrepreneurs, striving to make a profit by making accessibility to their products by an adult audience as easy as possible. Amidst this frantic race for profits, however, sexually explicit materials and messages are often carelessly distributed by mail, broadcast over airwaves, and transmitted over telephone wires. The individuals who create these messages are either ignorant of this budding problem or disinclined to adjust their marketing practices for fear of economic repercussions. Regardless, the inadvertent exposure of sexually explicit materials to minors has become a problem of epidemic proportion, forcing the issue to be confronted by the United States Supreme Court on more than one occasion.

Few of the Supreme Court decisions regarding indecency offer clear standards by which to resolve comparable issues. Those cases which are decided are often done so in terms exclusive to that medium, be it telephone, radio, or television. This practice of narrowness in Supreme Court decisions involving First Amendment protection indicates an unwillingness on the part of the Court to enforce restrictions on specified types of speech in all media. This reluctance further indicates an inclination by the Court to preserve the constitutionally protected right to free speech held invaluable by each citizen of the United States. The downside of this practice is that each subsequent court that is faced with a First Amendment issue is forced to determine which bits and pieces of previous decisions are applicable to the situation at hand and to piece those bits into a coherent decision. Recent decisions, therefore, often involve incongruous combinations of established doctrine and modern technology. As a result, the resolution of disputes in this area of the law are often unpredictable.
One of the most recent Supreme Court decisions regarding indecency is *Denver Area Educational Telecommunications Consortium, Inc. v. FCC.* In this case, a statute authorizing cable operators to prohibit indecent speech was challenged by a group of cable programmers and viewers. Part II of this article will examine recent Supreme Court cases which have confronted obscenity and indecency, since many of the issues discussed in these cases reemerge in the context of cable television in *Denver.* These cases have defined the terms and established the levels of First Amendment protection afforded indecent and obscene messages. It is from this foundation that the United States Supreme Court will derive its principles to analyze the *Denver* case. Part III will explain the substance and effect of sections 10(a), 10(b), and 10(c) of the 1992 Cable Television Consumer Protection and Competition Act of 1992, the Act challenged in *Denver.* Part IV will follow the case history of *Denver* prior to the Supreme Court granting a writ of certiorari. Part V will examine the decision of the Court, paying careful attention to the plurality opinion written by Justice Breyer and examining separate opinions written by Justice O'Connor, Justice Kennedy, and Justice Thomas, each of whom differ in their views regarding how this case should have been decided. Finally, Part VI will argue that, although the plurality attempted to strike a balance between the protection of children and the exercise of free speech, it overlooked the most effective and inexpensive means of protecting children from exposure to indecent cable television programming and may have inadvertently set the stage for future First Amendment legal battles.

II. HISTORICAL ANALYSIS

A. The Threshold of Obscenity: Miller v. California

Before determining the standard by which to regulate indecent materials, the United States Supreme Court was faced with the task of evaluating the regulation of obscene materials. The threshold determination in deciding how to prevent inadvertent exposure to obscene materials by children was defining the term “obscene.” This issue was decided by the Supreme Court in *Miller v. California.* Miller advertised the sale of adult literature by mass mailing sexually explicit brochures, one of which was received, unsolicited, by a man and his mother. Miller was convicted of violating section 311.2(a)

3. Id. at 16–18.
of the California Penal Code, which deemed any person distributing obscene materials through the mail guilty of a misdemeanor.\footnote{Id. at 16–17. This section at the time read:

Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state "(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has, in, his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor . . . ."

\textit{Id.} See \textit{CAL PENAL CODE} § 311.2 (1985).}
The Court began its analysis in \textit{Miller} by reaffirming the established tenet that obscene material is not protected by the First Amendment.\footnote{\textit{Id.} at 23 (citing Kois v. Wisconsin, 408 U.S. 229 (1992); United States v. Reidel, 402 U.S. 351, 354 (1971); Roth v. United States, 354 U.S. 476, 485 (1957)). In \textit{Roth}, the Supreme Court upheld a conviction under a federal statute prohibiting the mailing of obscene, lewd, lascivious, or filthy materials. The opinion stated:

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.

\textit{Roth}, 354 U.S. at 484.}

Acknowledging the inherent risks involved in regulating an individual's freedom of expression, the Supreme Court limited the scope of the regulation to materials which describe or display sexual conduct only.\footnote{\textit{Id.}, 413 U.S. at 23–24.}

The Court proceeded to establish guidelines by which to determine what constitutes obscenity. Among the considerations are: 1) whether an average person applying contemporary community standards would find the material to have a "prurient appeal;" 2) whether the material depicts sexual activity in a patently offensive manner; and 3) whether the material lacks significant literary, cultural, or scientific value.\footnote{\textit{Id.} at 24.}

Perhaps the most important attribute of obscene materials under this formulation is the degree of prurient content as judged by contemporary community standards. The Court reasoned it would be unrealistic and futile to attempt to articulate a single standard, given the expansive and diverse American population.\footnote{\textit{Id.} at 30.}

This \textit{Miller} standard of obscenity impacts future decisions regarding indecency, including \textit{Denver}, as it sets forth definitive guidelines by which to judge constitutionally unprotected materials.
B. A Pervasive Medium: FCC v. Pacifica Foundation

The regulation of potentially offensive communications was further examined in the medium of radio broadcasting in FCC v. Pacifica Foundation.\textsuperscript{9} A New York radio station, owned by Pacifica Foundation, aired a monologue entitled “Filthy Words” during an afternoon broadcast as performed by comedian George Carlin.\textsuperscript{10} A man wrote a letter of complaint to the FCC a few weeks later, explaining that he and his young son heard the broadcast and expressing his discontent with the FCC for allowing the program to be aired.\textsuperscript{11} In an effort to address growing concerns about indecent speech over the airwaves, the FCC turned to 18 U.S.C. § 1464, which provides: “Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.”\textsuperscript{12} The FCC determined the monologue to be indecent, defining “indecent” as “intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.”\textsuperscript{13} Utilizing many of the same terms used to define obscenity in Miller, the FCC implemented a community based standard by which to judge indecency. This definition was tailored to protect children from indecent broadcasts to the greatest extent possible. Recognizing the possibility of its order violating the First Amendment, the FCC issued an opinion following its declaration of the monologue as indecent. The FCC stated that it never intended to absolutely prohibit indecent broadcasts, but rather it sought to reduce the risk of exposure to children by channeling that type of programming into time periods when children are least likely to be listening.\textsuperscript{14}

In determining the broadcast to be indecent, the FCC identified several words and phrases in the monologue that repeatedly described sexual and

\textsuperscript{9} 438 U.S. 726 (1978).
\textsuperscript{10} Id. at 729. Carlin’s monologue began: “I was thinking about the curse words and the swear words, the cuss words and the words that you can’t say, that you’re not supposed to say all the time, ['cause words or people into words want to hear your words.” Id. at 751. He proceeded to repeat curse words over and over, using them in different contexts and as colloquialisms.
\textsuperscript{11} Id. at 730.
\textsuperscript{12} Id. at 731. See 18 U.S.C. § 1464 (1976).
\textsuperscript{13} Pacifica, 438 U.S. at 731–32.
\textsuperscript{14} Id. at 732–33.
excretory activity. Furthermore, the broadcast was aired in the afternoon when children were likely to be listening, therefore making the broadcast patently offensive and indecent. Pacifica Foundation conceded the broadcast was patently offensive but argued the broadcast was not indecent within the meaning of 18 U.S.C. § 1464, claiming the term "indecent" is synonymous with "obscene." The essential element of "obscenity," and thus "indecency," under Pacifica's reasoning, is prurient appeal. Upon examining the text of the monologue, it is apparent no such prurient appeal exists. The Supreme Court rejected this argument, however, noting the language of 18 U.S.C § 1464 prohibits "obscene, indecent, or profane" language, implying each phrase was meant by Congress to be construed separately.

The Court further determined the statute was not overbroad because it was issued in a specific, factual context, which is an important consideration when reviewing the regulation of indecent communications. The Court explained that radio broadcasting has received the most limited constitutional protection of all media thus far, justifying this limitation in the context of the broadcasting medium. Broadcasting, stated the Court, has "established a uniquely pervasive presence in the lives of all Americans." This pervasiveness is so great that citizens, including children, may be subjected to unexpected indecent programming while listening at home due to the tendency of listeners to tune in and out. Section 1464 was subsequently deemed a constitutionally permissible method of regulating the broadcasting medium.

C. Narrowing the Means: Sable Communications of California, Inc. v. FCC

More recently, the Supreme Court decided the constitutionality of section 223(b) of the Communications Act of 1934, as amended in 1988,
which imposed an outright ban on indecent and obscene interstate commercial telephone messages.24 This issue was decided in Sable Communications of California, Inc. v. FCC.25 Sable operated a dial-a-porn business offering prerecorded sexually explicit phone messages. Sable sought to enjoin the FCC from prosecuting the company under section 223(b).

The Court began its opinion by reiterating the message that First Amendment protection does not protect obscene speech.26 The Court proceeded to reject Sable’s contention that section 223(b) attempts to mandate a national standard of obscenity in violation of the “community standards” requirement established in Miller.27 The Court asserted that, in light of this varying standard, Sable would have had to bear the costs of conforming its interstate messages to local community standards if it sought to continue providing obscene messages. The Court declined to determine whether the messages provided by Sable were, in fact, obscene, but rather attempted to determine whether Congress may prohibit those messages, whether viewed to be indecent or obscene.28

In order for Congress to permissibly restrict this type of speech, it must first demonstrate it is attempting to further a compelling government interest. The Court identified the compelling interest that was being served by the statute as the “physical and psychological well-being of minors.”29 While this interest is compelling, to withstand strict scrutiny, the statute must also be narrowly drawn and designed to serve this compelling interest without unnecessarily interfering with the exercise of the First Amendment.30 In support of the statute, the government argued that a total ban on indecent telephone messages was justified because it was the least restrictive means of preventing children from gaining access to those messages.31 The Court rejected the argument that alternatives to an outright ban, such as credit cards, access codes, and scrambling devices, would not effectively promote

26. Id. at 124.
27. Id. at 124–25. In Hamling v. United States, 418 U.S. 87 (1974), the Court stated: “The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of a failure of application of uniform national standards of obscenity.” Id. at 106.
28. Sable, 492 U.S. at 124.
29. Id. at 126.
30. Id.
31. Id. at 128.
the compelling interest, noting that no evidence had been presented to support this conclusion. The statute therefore denied adult access to indecent phone messages in a manner which far exceeded the precautions necessary to protect children from receiving those messages.

In an attempt to support the validity of the statute, the government cited *Pacifica* as an example of the Supreme Court upholding the regulation of indecent programming. The Court rejected this comparison, noting that the *Pacifica* Court emphasized the narrowness of that decision. The Court further differentiated between the contexts of the two decisions. *Pacifica* did not involve a total ban on indecent broadcasting. Rather, the FCC wanted to broadcast indecent programming during time periods that would be less likely to promote exposure to children. Section 223(b), meanwhile, mandated an outright ban on the dial-a-porn service. In addition, the media of broadcasting and telephone communications inherently differ in degrees of pervasiveness. Whereas radio broadcasting is extremely pervasive and intrudes into the privacy of the home, making a telephone call involves an affirmative action, thus reducing the risk that an unwilling or underage caller might accidentally be exposed to sexually explicit messages.

III. REGULATING THE CABLE TELEVISION MEDIUM

A. *The Cable Communications Policy Act of 1984*

Cable television channels originated in the late 1960s, as cable operators received franchises from local governments. As the cable industry grew, Congress enacted the Cable Communications Policy Act in 1984 in an effort to "promote competition in the delivery of diverse sources of video

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32. *Id.* at 128–29. The lack of evidence supporting this conclusion was due to the fact that the FCC implemented these safeguards in 1988, and the effects of these measures have not yet been calculated. *Sable*, 492 U.S. at 128.

33. *Id.* at 131. Justice White, delivering the opinion of the court, described the effect of section 223(b) as another case of "bum[ing] the house to roast the pig." *Id.* (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).

34. *Pacifica*, 438 U.S. at 733.

35. *Sable*, 492 U.S. at 127–28. The Court addressed inadvertent exposure by children to indecent programming, stating: "Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it." *Id.* at 128. In regards to children who intentionally seek out those messages, the Court conceded: "It may well be that there is no fail-safe method of guaranteeing that never will a minor be able to access the dial-a-porn system." *Id.* at 130.
programming and to assure that the widest possible diversity of information sources are made available to the public . . . ."  

The Act required the cable operators to set aside a certain number of channels, depending upon the total number of channels available in that area, for commercial lease by unaffiliated third parties.  

These channels reserved for private parties became known as leased access channels. The Act further permitted local governments to require operators to set aside certain channels for "public, educational, or governmental use." These channels became known as public access channels. When Congress initially enacted the Act, it forbade cable operators from regulating programming on both leased access and public access channels.

B. The Cable Television Consumer Protection and Competition Act of 1992

Years later, Congress confronted what it believed to be a serious threat to the well-being of the American public. Senator Jesse Helms of North Carolina explained "that cable companies are required by law to carry, on leased access channels, any and every program that comes along—no matter how offensive and disgusting." These programs often included indecent material of a sexually explicit nature. Congress was concerned that "early and sustained exposure to hard core pornography can result in significant physical, psychological, and social damage to a child."  

37. 47 U.S.C. § 532(b) (1988). The terms of section 532 require cable operators with 36 or more channels to designate 10% for commercial lease and 55 or more channels to designate 15%. Id. Cable operators with fewer than 36 active channels are exempt from these requirements. Id.
39. Public access channels are also called PEG channels.
40. See 47 U.S.C. §§ 531(e), 532(c)(2).
41. 138 CONG. REC. S646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms). Senator Helms continued: "The end result is perverted and disgusting programs mixed with religious and health shows. These leased access channels were intended to promote diversity, but instead they promote perversity." Id.
42. 138 CONG. REC. S649 (daily ed. Jan. 30, 1992) (statement of Sen. Coats). In support of this correlation, Senator Coats referred to the sexually exploited child unit of the Los Angeles Police Department who have "long known that pornography is often employed by offenders in the extrafamilial sexual victimization of children." Senator Coats also cited a study conducted by Dr. Zillman of Indiana University, in which pornography was reported to promote the victimization of women and a more lenient view of rape and bestiality. Id.
In response to the growing threat to American children, Congress enacted sections 10(a), 10(b), and 10(c) of the 1992 Cable Communication Policy Act ("Cable Act"). Section 10(a) of the Cable Act permitted cable operators to enforce "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" on leased access channels.\(^{43}\) Section 10(b) required cable operators who permit indecent programming on leased access channels to place the programming on a separate channel and to block a subscriber's access to that channel until the subscriber requests in writing that the channel be unblocked.\(^{44}\) The plague of indecent programming was not limited to leased access channels. Section 10(c) further permitted cable operators to prohibit the use of public access channels for any programming which contained obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.\(^{45}\) The section concerning public access channels was not accompanied by a segregate and block requirement for those indecent programs the operator chooses not to ban.\(^{46}\)

IV. JUDICIAL HISTORY OF DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. v. FCC

A. Alliance for Community Media v. FCC: The Panel Decision

In Alliance for Community Media v. FCC,\(^{47}\) four groups of cable programmers, listeners, and viewers petitioned for review of sections 10(a), 10(b), and 10(c) of the Cable Act. The petitioners were individually comprised of representatives from: 1) Alliance for Community Media, Alliance for Communications Democracy, and People for the American Way; 2) Denver Area Educational Telecommunications Consortium; 3) American Civil Liberties Union; and 4) New York Citizens Committee for Responsible Media, and Media Access New York, Brooklyn Producers’ Group. Each filed suit seeking review of the statute. The four petitions were consolidated

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44. Id. § 532(j).
45. Id. § 531.
46. Id.
and heard by a panel consisting of three United States Court of Appeals judges on September 14, 1993. The panel identified two primary constitutional issues that could be extrapolated from the case. First, when the government passes a law requiring cable operators to reserve a certain number of access channels for general use without regard to content, may the government then constitutionally permit cable operators to prohibit indecent programming from being televised?\

Second, if cable operators do not exercise their power to ban indecent programming, may the government require the cable operator to segregate and block indecent programming on access channels? The panel rejected the government's argument that the statute authorizing cable operators to ban indecent programming does not implicate the First Amendment because no state action exists. The government claimed that the action is being performed by private individuals, namely the cable operators, and not the government. The panel asserted that a private individual may be subject to First Amendment scrutiny if the state significantly encourages the private individuals to commit the act in question. The panel determined that sections 10(a) and 10(c) constituted an adequate amount of encouragement on the part of the government and therefore involved state action.

The panel then turned to the sections of the Cable Act themselves to determine what level of scrutiny should apply. Sections 10(a) and 10(c) attempt to regulate and prohibit programming based solely on whether that programming may be deemed indecent. These sections were therefore

48. Id. at 816.
49. Id. at 817.
50. Id. at 818.
51. Id.
52. Alliance I, 10 F.3d at 818. In support of this assertion, the panel cited Franz v. United States, 707 F.2d 582, 592 (D.C. Cir. 1983), in which the court held that the government's encouragement, through the witness protection program, of a mother's decision to keep children away from their father constituted state action. Id. The Franz court stated:

It is clear that the defendants, by accepting Catherine and the children into the program along with Allen, are largely responsible for the success of Catherine's effort to deny William access to his offspring. Without the aid of the administrators of the program in providing her with a new identity, Catherine almost certainly would not have been able to frustrate William's attempts to exercise and enforce his visitation rights; with that aid, she has been able to act with impunity.

Id. at 591–92.
53. Alliance I, 10 F.3d at 818.
interpreted by the court as content-based restrictions on free speech.\textsuperscript{54} The restrictions may have been constitutionally permissible, however, if the means promoted a compelling interest and constituted the least restrictive means to promote that interest.\textsuperscript{55}

The protection of children from indecent materials has long been recognized by the court as a compelling interest.\textsuperscript{56} The panel was not convinced, however, that sections 10(a) and 10(c) provided the least restrictive means to promote this interest. The total denial of access to indecent material, a ban which would affect children and adults alike, could result in the adult television viewing population receiving only programming that is fit for children.\textsuperscript{57} The panel further pointed to the fact that Congress has provided a less restrictive means to promote its objective within the text of the Cable Act itself.\textsuperscript{58} The panel asserted that by providing the cable operator with the choice of either totally banning indecent programming or segregating that programming to a separate channel and blocking it, Congress has suggested that there may exist a less restrictive but completely adequate alternative to an outright ban.\textsuperscript{59} Sections 10(a) and 10(c), therefore, did not constitute the least restrictive means of promoting a compelling interest and did not withstand strict scrutiny by the panel.

While analyzing section 10(b), the panel pointed out that a restriction on speech may not "single out a class of speakers on the basis of criteria that are wholly unrelated to the interest sought to be advanced."\textsuperscript{60} The panel determined that leased access channels were being singled out and regulated in such a manner, while other commercial channels were left relatively undisturbed.\textsuperscript{61} This discrepancy was unacceptable. Nonetheless, the panel

\textsuperscript{54} Id. at 822–23.

\textsuperscript{55} Id. at 823 (citing Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)).


\textsuperscript{57} Alliance I, 10 F.3d at 823 (citing Butler v. Michigan, 352 U.S. 380, 383 (1957)).

\textsuperscript{58} Id. at 823–24.

\textsuperscript{59} Id.

\textsuperscript{60} Id. at 825. The panel drew an analogy between this case and City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), in which the removal of commercial newsstands for the purpose of promoting safety and aesthetics was found to violate the First Amendment because noncommercial news racks causing the same problems remained unregulated. Id. at 430–31.

\textsuperscript{61} Alliance I, 10 F.3d at 826.
Ritchie declined to strike down the section, choosing instead to remand it to the FCC to justify this preferential treatment.  

B. Alliance for Community Media v. FCC: The En Banc Decision

In reviewing the panel decision, the United States Court of Appeals, sitting en banc, determined that the constitutionality of sections 10(a) and 10(c) turned on the absence or presence of state action. While acknowledging that sections 10(a) and 10(c) promoted cable operators' free speech by empowering them with greater editorial control, the court questioned how these same sections impair the petitioners' freedom of speech. The court viewed the power struggle between cable operators and programmers as an inherent characteristic of cable television. The more discretion a cable operator has over what programs will be aired, the less power the programmer has to choose what programs to air. The court argued that to hold that the restoration of editorial control that has resulted from the enactment of the statute is automatically state action would cripple Congress' ability to correct previous mistakes and prevent Congress from attempting to regulate for good cause. Furthermore, section 10(a) does not mandate the prohibition of indecent programming. Rather it gives cable operators a choice. In the eyes of the court, the regulations prescribed by the Cable Act are not an exercise of governmental authority but are instead an empowerment of individual discretion. The court determined that this empowerment did not constitute state action and the section did not warrant First Amendment

62. Id. at 831.
64. Id. at 114. The court used stronger language to characterize the petitioners' position, stating that "petitioners are merely complaining about section 10(a)'s and section 10(c)'s restoring to cable operators' their option to reject indecent programming on their cable systems." Id.
65. Id. at 115.
66. Id. During the debates over the Cable Television Consumer Protection Act, Senator Helmes addressed the ability of Congress to correct its own mistakes by stating:

Congress undoubtedly meant well in requiring cable operators to operate public and leased access channels as a public forum open to any and all speakers. Even in a "traditional public forum" [e.g., a public street], however, . . . the privacy of the home is at stake. If Congress is serious about correcting abuses in the provision of cable television programming, it cannot continue to ignore the problem of pornographic programming on public and leased access channels.

protection. Sections 10(a) and 10(c), consequently, were upheld in their entirety.

In analyzing section 10(b), the court turned to principles established in *FCC v. Pacifica Foundation* and *FCC v. Sable Communications of California*. From these cases, the court derived two applicable tenets: 1) the constitutionality of regulating indecent programming is dependent upon a medium's characteristics; and 2) the government must strive to accommodate both the interest of society by limiting children's exposure to indecent materials and the interest of adults who choose to obtain and utilize those materials. Cable television programming is similar to radio broadcasts in many aspects, noted the court. Both media are incapable of maintaining an adequate early warning system that would alert the audience of upcoming indecent programming, due to the constant tuning in and out of the listeners and viewers. In addition, both radio broadcasts and leased access channels come automatically into the home of the audience, without additional subscription or request beyond what is already present in most homes. For these reasons, the court determined that alternative methods of protecting children from indecent broadcasts, such as airing indecent programs late at night or viewer controlled channel blocking systems, do not adequately combat the pervasiveness of the cable television medium. Thus, the court determined that section 10(b) was the least restrictive means to achieve the established compelling government interest and therefore, withstood strict scrutiny.

In response to petitioners' allegation that section 10(b)'s segregate and block system discriminates against leased access channels, the court pointed out that little would change from the perspective of the viewer if section 10(b) were implemented. The only difference is that prior to the Cable Act, indecent programming was broadcast into the subscriber's home unless it

67. *Alliance II*, 56 F.3d at 123.
68. *Id.* at 124.
69. *Id.*
70. *Id.*
71. *Id.* Justice Randolph, writing the opinion, portrayed the unwary cable subscriber as analogous to the motorists in *Pacifica* by stating that "[a] cable subscriber no more asks for such programming than did the offended listener in *Pacifica* who turned on his radio." *Alliance II*, 56 F.3d at 124.
72. *Id.* at 125. The court denounces two alternatives, voluntary blocking systems and lock boxes, stating the former are certain to cause a programmer error due to the constant maintenance required, and the latter would block leased access programming altogether. *Id.*
73. *Id.*
was affirmatively blocked out.\textsuperscript{74} Under section 10(b), the indecent pro-
gramming is not broadcast into the subscriber's home unless it is affirma-
tively invited in.\textsuperscript{75} Therefore, the court decided that no discrimination was
being perpetrated through section 10(b) of the Cable Act.

The court rejected the petitioners' argument that section 10(b)'s
allowance of a thirty day period in which the cable operator must unblock a
segregated channel at the subscriber's request constituted a prior restraint on
free speech.\textsuperscript{76} The programming will air eventually, reasoned the court, and
the subscriber has no basis to demand immediate unblocking.\textsuperscript{77} The court
analogized this waiting period to that often endured while waiting for cable
television to be initially hooked up in one's home, asserting that both of
these waiting periods are completely acceptable.\textsuperscript{78} The court finally rejected
the petitioners' claim that section 10(b) is void for vagueness because it
defers responsibility to the leased access programmer to determine which
programs are indecent, thereby providing no definitive standard to identify
those programs affected by the Cable Act.\textsuperscript{79} The court found that the FCC
definition was similar to the subjective standard established in \textit{Pacifica} and
adequately sets forth an acceptable guideline that would aid the programmer
in making that determination.\textsuperscript{80} The court determined that section 10(b)
satisfied the least restrictive means test, did not single out leased access
channels for regulation, did not constitute a prior restraint on free speech,
and was not void for vagueness. Section 10(b) was consequently deemed
constitutional, and all of the sections in question were found consistent with
the Constitution by the United States Court of Appeals.

V. \textit{DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM,
INC. V. FCC}

A. Justice Breyer: Setting a New Standard

Two of the cases challenging the Cable Television Consumer Protection
and Competition Act of 1992, \textit{Denver Area Educational Telecommu-
itions Consortium, Inc. v. FCC and Alliance for Community Media v. FCC, were consolidated and heard by the United States Supreme Court as Denver Area Educational Telecommunications Consortium, Inc. v. FCC. Justice Breyer wrote a plurality opinion concerning sections 10(a) and 10(c), and a majority opinion concerning section 10(b). Turning first to section 10(a), Justice Breyer, joined by Justice Stevens, Justice O’Connor, and Justice Souter, (the “Breyer Group”), believed the threshold determination in deciding whether section 10(a) violated the First Amendment to be whether the action being scrutinized could be considered state action. The United States Court of Appeals found no state action being perpetrated by section 10(a), citing an insufficiently close nexus between the government action and the cable operators to make such a determination.

The plurality overturned the Court of Appeals finding that section 10(a) does not constitute state action but rather reaffirms the authority of the individual cable operators to exercise their choice of programming. Cable operators are intertwined with government, argued Justice Breyer, as they exist with government permission and utilize government facilities, i.e. streets and rights of way, to string and lay cables. In addition, most communities are served by only one cable system operator. If the sections in question were upheld, cable operators could conceivably yield a great amount of censorship power, as there usually are no alternatives for cable viewers who could be subject to the editorial whims of the cable operator. According to Justice Breyer, these characteristics establish the action of cable operators as a government function.

Freedom of speech is a constitutionally protected right. The essence of that right, according to Justice Breyer, “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.” Justice Breyer noted, however, that the Court’s interpretation of this protection has not rendered

82. Id. at 2382.
83. Alliance II, 56 F.3d at 113.
85. Id. at 2383.
86. Id.
87. Id.
88. Id. at 2384.
either Congress or the states powerless to address societal problems.\footnote{Denver, 116 S. Ct. at 2384 (citing FCC v. Pacifica Found., 438 U.S. 726 (1978); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).} In the plurality opinion, Justice Breyer discussed at length the necessity for flexibility while evaluating First Amendment protection cases. Although several analogies existed between this case and other cases involving the communication media, the Breyer group refused to accept an immutable standard by which to judge all such questions of constitutionality.\footnote{Denver, 116 S. Ct. at 2385. Justice Breyer believed the tradition of 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 formulae so rigid that they become a straightjacket that disables Government from responding to serious problems." \textit{Id.}} Rather, the question as posed by Justice Breyer was whether section 10(a) addressed "an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech."\footnote{Id. at 2385.}

Justice Breyer acknowledged that the issue addressed by this case is extremely important and is one that "this Court has often found compelling—the need to protect children from exposure to patently offensive sex-related material."\footnote{Id. at 2386 (citing Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989); New York v. Ferber, 458 U.S. 747 (1982); Ginsberg v. New York, 390 U.S. 629, 639–40 (1968)).} In \textit{FCC v. Pacifica Foundation},\footnote{438 U.S. 726 (1978).} for example, the Supreme Court upheld the prohibition by the FCC of an indecent broadcast by a radio station, finding that such a prohibition did not violate the station's First Amendment rights.\footnote{Id. at 750.} Justice Breyer identified several similarities between \textit{Pacifica} and \textit{Denver}: 1) the accessibility of both media to children; 2) the pervasiveness of both media in the lives of the American public; 3) the lack of warning prior to the broadcast of indecent material; and 4) the availability of such materials on tapes and records and at theaters and nightclubs.\footnote{Denver, 116 S. Ct. at 2386–87.}

As public media, both radio and television are easily accessible to adults and children. A minuscule number of American homes are without a television, and a large number of those with television are subscribers to
Furthermore, the technology of cable television is user-friendly, as small children can easily turn it on and off. As previously noted, George Carlin’s monologue in Pacifica was aired at about two o’clock in the afternoon by a New York radio station and was heard by a motorist and his young son. This occurrence was illustrative to the court of common listening practices and was one factor that influenced the Court’s decision to regulate programming. The Court reasoned:

Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.

The listening habits of the audience added an additional degree of difficulty in protecting listeners from unwanted material in Pacifica. In a similar analysis, Justice Breyer concluded that cable viewers sample more channels than viewers without cable television before watching a program for a sustained period of time, making them even more susceptible to inadvertently viewing unwanted and indecent programming.

Justice Breyer further evaluated section 10(a) in light of the ban in Pacifica, finding it less restrictive than the latter, and therefore constitutional in light of case precedent. Section 10(a) is permissive and allows cable operators a certain degree of flexibility. This section does not order an outright ban but rather allows the cable operators to reschedule certain programs to serve the needs of its adult viewing audience, while protecting its younger viewers. Although cable operators retain the discretion to ban indecent programming, they may or may not choose to do so. Justice Breyer noted:

[T]he same may be said of Pacifica’s ban. In practice, the FCC’s daytime broadcast ban could have become a total ban, depending upon how private operators (programmers, station owners, net-

96. Id. Nearly 56,000,000 homes, more than 60% off all homes with television, have cable (citing H.R. CONF. REP. No. 862, 102d Cong. 2d Sess. 56 (1984)).
98. Id. at 748–49.
100. Id. at 2387.
101. Id.
works) responded to it. They would have had to decide whether to reschedule the daytime show for nighttime broadcast in light of comparative audience demand and a host of other practical factors that similarly would determine the practical outcomes of the provisions before us. 102

The result is that the uncertainty as to the "practical consequences" of both regulations makes it difficult to determine whether the regulation imposed by section 10(a) of the Cable Act is any more severe than the FCC order in *Pacifica*. 103 This similarity with the *Pacifica* ban was one factor convincing the Breyer Group of section 10(a)'s constitutional validity.

The petitioners also argued that section 10(a) is unconstitutional because of the public forum doctrine. "Public forums" are places which have been created by the government for use by the public as a forum for expressive and creative activity. 104 In a public forum, "all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject." 105 The government's reasoning, therefore, was that leased access channels are public forums, as they have been opened up for use by the public for television programming. The petitioners added "that the statute's permissive provisions unjustifiably exclude material, on the basis of content, from the 'public forum' that the government has created in the form of access channels." 106

102. *Id.*
103. *Id.*
104. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). *Perry* characterizes public forums as "places which by long tradition or government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed." *Id.* at 45. The *Perry* Court continued:

In a public forum, by definition, all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject.

When speakers and subjects are similarly situated, the State may not pick and choose. Conversely on government property . . . not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used. As we have explained above, for a school mail facility, the difference in status between the exclusive bargaining representative and its rival is such a distinction.

*Id.* at 55.
105. *Id.*
Justice Breyer rejected the application of the public forum doctrine to this case. 107 First, claimed Justice Breyer, the public forum doctrine should not be "imported wholesale into the area of common carriage regulation." 108 Throughout the plurality opinion, Justice Breyer displayed reluctance to analogize between this case and different areas of the law. The evolving and expanding state of the telecommunications field, reasoned Breyer, hinders the application of previously developed doctrines to such a changing arena. 109 The public forum doctrine is further inapplicable, as the public forum "is not required to indefinitely retain the open character of the facility." 110 The parameters of a public forum have not yet been defined, added Justice Breyer, noting:

Our cases have not yet determined, however, that the Government's decision to dedicate a public forum to one type of content or another is necessarily subject to this 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. 111

The public forum doctrine, therefore, even if applicable, would not automatically render section 10(a) constitutional.

Rather than address these potentially problematic issues, Justice Breyer decided that the Court need not necessarily address the public forum issue to resolve this case. 112 This is because:

[T]he 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 common carrier. 113

107. Id.
108. Id. at 2389.
109. Id. at 2388–89.
110. Id. at 2389 (quoting Perry, 460 U.S. at 46).
111. Denver, 116 S. Ct. at 2389.
112. Id. at 2388.
113. Id. at 2389.
According to the Breyer Group, this issue need not be decided in terms related to the public forum doctrine. Justice Breyer stated that "the government's interest in protecting children, the 'permissive' aspect of the statute, and the nature of the medium," sufficiently justifies upholding section 10(a) of the Cable Act, and the "label" under which this case is decided is irrelevant.

Finally, Justice Breyer rejected the petitioners' argument that the section's definition of indecent materials is void for vagueness, as it grants too much editorial authority to the cable operator. A statute is void for vagueness if men of common intelligence must necessarily guess at its meaning and differ as to its application. Section 10(a) does provide a significant degree of leeway, as it permits cable operators to prohibit "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." Justice Breyer found this definition to be similar to that used in Miller v. California, in which obscene material was defined in terms of:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The Breyer Group found that each of these regulations are "vague," in the sense that they offer no strict guidelines by which to judge obscenity and indecency but rather fit into "the category of materials that Justice Stewart

114. Id.
115. Id.

[T]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law.

Id. at 391.
118. 47 U.S.C. § 532(h).
120. Id. at 24.
thought could be described only in terms of "I know it when I see it." The identification of these materials therefore depends in large part on degree, context, and time. Justice Breyer therefore decided that the "vagueness," which the petitioners fault as rendering section 10(a) unconstitutional, is a necessary lack of strict guidelines that must be accepted when evaluating materials of this kind.

The Breyer Group further argued that the "vagueness" of section 10(a) further protects against overbroad application by permitting cable operators to ban programming only pursuant to a written policy drawn up by the cable operator. This section provides some degree of uniformity, as it required the identical application of the policy to all programs, thus diminishing the threat of arbitrary censorship by misguided cable operators.

The Breyer Group then justified the qualifier within the statute which allows the cable operator to prohibit programming which he "reasonably believes" to be indecent. This qualifier, claimed Justice Breyer, is designed not to expand the category of programming affected by the statute, but rather to provide some degree of justification for an honest, good faith mistake by the cable operator. Section 10(a), therefore, was not rendered unconstitutional for vagueness by the plurality.

Justice Breyer was joined by Justice Stevens, Justice O'Connor, Justice Kennedy, Justice Souter, and Justice Ginsberg in a majority opinion which found section 10(b) unconstitutional. Section 10(b) constitutes a significantly more aggressive attack on indecent cable television programming. Whereas section 10(a) permitted cable operators to block indecent programming, section 10(b) requires cable operators to segregate "patently offensive" sexually explicit programming to a particular channel and to block that channel. The channel may be unlocked only by a written request from the cable subscriber. In addition, leased access channel programmers would be required to notify cable operators of upcoming programming considered

121. Denver, 116 S. Ct. at 2390 (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).
122. Id.
123. 47 U.S.C. § 532(h).
125. Id. The Court further claimed the reasonableness section constrains the cable operator as much as it protects them. An operator would have difficulty proving an exercise of discretion was reasonable, if a similar exercise had been deemed unreasonable by an earlier court decision. Id.
127. Id.
Ritchie: Confronting Indecent Cable Television Programming: Balancing the

patently offensive thirty days prior to air time. The government argued that this "segregate and block" policy is constitutional because it provides the least restrictive means of addressing a compelling interest, this being "the physical and psychological well-being of minors." Justice Breyer rejected this argument, finding section 10(b) to be much more extensive and restrictive than necessary.

In support of this, the majority observed that current methods of protecting children from inadvertent exposure to indecent programming already exist and are much less intrusive into adult viewing practices. Among the current methods are the requirement of cable operators to scramble programming on channels "primarily dedicated to sexually-oriented programming," the ability of any cable subscriber to have channels blocked at their request, and the application of the V-chip which, when installed in a television, automatically blocks excessively violent or sexual programs.

Justice Breyer further questioned how section 10(b) is less restrictive than a phone call based system which would block channels by subscriber request, when in fact each method would achieve the same end, the protection of younger viewers from adult-oriented programming. Therefore, section 10(b) imposed an unnecessarily great restriction on free speech and was struck down by the majority.

Finally, Justice Breyer was joined by Justice Stevens and Justice Souter in a plurality opinion finding section 10(c) unconstitutional. The final section challenged, section 10(c), is similar in content to section 10(a), as it also permitted the cable operator to block offensive programming. Section 10(c), however, was directed at public access channels, whereas section 10(a) affects only leased access channels. Justice Breyer observed that public access channels have generally been reserved to the city that has awarded the cable franchise to a particular cable operator as partial consideration for the franchise. The cable operators have historically had very little editorial control over the content of public access channel programming. These channels have usually been managed by various private and

128. Id.
129. Denver, 116 S. Ct. at 2391.
130. Id.
131. Id. at 2392.
132. Id.
133. Id.
134. Denver, 116 S. Ct. at 2394.
135. Id.
public entities, often composed of community leaders and sponsors. The result of these characteristics, according to the Breyer Group, is that section 10(c) did not restore any power to the cable operator over public access programming. This is because very little power, if any, ever resided within the cable operator regarding public access channel programs.

Justice Breyer also noted that there already exists a policing agency over public access programming, usually a supervising board or government access manager. This agency would likely monitor the content of programming and avoid airing offensive programming when easily accessible to children. The function of the cable operator as a gatekeeper to offensive materials would, therefore, be redundant, as that function is already being performed by the governmental agency in control of the public access channel. The Breyer Group feared that by empowering the cable operator to decide which programs are not offensive when the interests of the children are already being safeguarded, there was a risk that programming which could be considered "borderline" could be prevented from airing.

As a result of the preceding analysis, section 10(a) was found constitutional, and sections 10(b) and 10(c) were deemed unconstitutional. In rendering its final judgment, the plurality had to consider whether sections 10(a), 10(b), and 10(c) were severable, or whether the three sections were to be interpreted as an inseparable package, all or none of which must pass or fail. In making this determination, the Breyer Group looked to the legislative intent of Congress and asked whether Congress would still have passed section 10(a) had it known the other two sections would be struck down. The Breyer Group felt that sections 10(a) and 10(c) clearly stand alone, as each deals with a separate type of cable channel, specifically leased access and public access.

Sections 10(a) and 10(b) have a tighter nexus. Section 10(b) requires the cable operator who was exercising his right under section 10(a) to either ban offensive programming or segregate and block it. Absent section 10(b), cable operators would be afforded greater discretion over programming deemed patently offensive. Justice Breyer alleged that by striking

136. Id.
137. Id.
138. Id. at 2395.
139. Denver, 116 S. Ct. at 2395. The Court notes this misuse could occur either from the use or threatened use of the cable operator's veto power. Id.
140. Id. at 2397.
141. Id.
down section 10(b), the majority may have promoted the exercise of free speech, as the cable operator will no longer have to bear the cost of segregating and blocking channels which they decide not to ban, increasing the likelihood that the operator will choose to ban fewer programs.\textsuperscript{143} Thus, given Congress' stated objective, there was no basis for Justice Breyer to conclude Congress would have preferred no regulation as compared to section 10(a) alone.\textsuperscript{144} Section 10(a) was therefore severable and deemed constitutionally valid by the plurality.

B. Justice O'Connor: Keeping an Eye on the Children

Justice O'Connor agreed with the plurality opinion that section 10(a) was constitutionally valid and section 10(b) was not.\textsuperscript{145} Justice O'Connor disagreed with the majority decision striking down section 10(c) in spite of several similarities between sections 10(a) and 10(c); similarities which she believed warranted upholding section 10(c) for the same reasons which required a finding that section 10(a) was constitutional.\textsuperscript{146} Both sections attempt to serve a vital interest, the protection of children from indecent materials; both sections are permissive as neither mandate an outright ban of indecent programming but rather leave the power of discretion up to the cable operator; and both sections are within the degree of restrictiveness allowed in \textit{Pacifica}.\textsuperscript{147}

Justice O'Connor disagreed with the determination that because sections 10(a) and 10(c) are directed at two different classifications of cable channels, leased access and public access, this differentiation was significant enough to warrant different outcomes in terms of constitutionality. The interest at stake, the protection of children, remained the same for each section, and to Justice O'Connor this interest was significant and compelling enough to outweigh any differences in the origins of the channels in question.\textsuperscript{148} The fact that public access programming is usually subject to a certain amount of policing by the manager or agency in charge was of little significance, and was of too speculative a nature to justify deeming section 10(c) unconstitutional.\textsuperscript{149}

\begin{footnotes}
\textsuperscript{143}. \textit{Denver}, 116 S. Ct. at 2397.
\textsuperscript{144}. \textit{Id}.
\textsuperscript{145}. \textit{Id}. at 2403 (O'Connor, J., concurring in part and dissenting in part).
\textsuperscript{146}. \textit{Id}.
\textsuperscript{147}. \textit{Id}.
\textsuperscript{148}. 116 S. Ct. at 2404.
\textsuperscript{149}. \textit{Id}.
\end{footnotes}
C. Justice Kennedy: Adherence to Strict Scrutiny

Justice Kennedy, joined by Justice Ginsberg, concurred that sections 10(b) and 10(c) are unconstitutional but disagreed with the conclusion that section 10(a) is constitutionally valid. The primary criticism expressed by Justice Kennedy concerned not only the plurality decision, but the method of reasoning, or lack thereof, used to reach that conclusion. Justice Kennedy criticized the plurality for “balking” at taking the next logical step after determining that the sections in question constitute state action. This step, stated Justice Kennedy, is the determination of what standard is applicable to decide if the sections are consistent with the Constitution. According to Justice Kennedy, the regulations in the Cable Act were attempts by government to identify certain types of speech and exclude them from a public forum, specifically public access and leased access channels. It is repugnant to the Constitution to allow any content-based discrimination against free speech by a government body, unless that discrimination can withstand strict scrutiny. According to Justice Kennedy, none of the sections withstand strict scrutiny, and all should be struck down by the Court.

Justice Kennedy found it disturbing that the plurality declined to adopt the strict scrutiny standard. Whereas Justice Breyer was reluctant to declare a rigid formula when confronting this First Amendment issue, Justice Kennedy claimed the utilization of a strict scrutiny test has often been used effectively by the Court and that such a test would insure the protection of free speech without hindering the government’s efforts to address societal problems. Justice Kennedy feared the Court’s reluctance to declare in advance that the standard of judicial review will result in inequities in the decision making process, unfairness to the petitioners and respondents who

150. Id. at 2404 (Kennedy, J., concurring in part and dissenting in part).
151. Id. at 2405.
152. Id.
153. Id.
155. Id.
156. Id. Justice Kennedy defended strict scrutiny by stating: “Indeed, if strict scrutiny is an instance of ‘judicial formulae so rigid that they become a straitjacket that disables Government from responding to serious problems,’ this is a grave indictment of our First Amendment jurisprudence, which relies on strict scrutiny in a number of settings where context is important.” Id. at 2406 (citation omitted).
157. Id. Kennedy claims that strict scrutiny ensures governmental solutions and does not sacrifice free speech to a greater extent than is necessary to achieve a compelling goal. Denver, 116 S. Ct. at 2406.
attempt to predict court decisions, and irregularities among similar cases dependent upon minute changes in situation, technology, and popular opinion. The standard which the plurality ultimately adopted was whether the Cable Act "properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech." According to Justice Kennedy, this standard represents little more than a futile semantics game, as it is remarkably similar to the established strict scrutiny test, but does not commit to the historical language of the latter. The result is confusion and disarray within First Amendment litigation, a result with which Justice Kennedy is dissatisfied.

In regard to section 10(c), Justice Kennedy argued that public access channels are a public forum. Public access channels are within the definition of "public forum" set forth by the Court in 1992. The Court has previously held a public forum to be "property that the State has opened for expressive activity by part or all of the public." Public access channels have been called the "electronic soapbox of the next—soon to be current—communication age," an indication of cable television's emerging role as an expressive and accessible medium. Once the existence of public access channels as a public forum had been established, it became clear to Justice Kennedy that the public expressive activity being broadcast on those channels may not be regulated on the basis of content by the government without withstanding strict scrutiny.

The result of this scrutiny, Justice Kennedy argued, is that section 10(c) must be declared unconstitutional. According to Justice Kennedy, Congress cannot empower cable operators with editorial control over public

158. Id.
159. Id. at 2385.
160. Id. at 2406–07.
161. International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992) (holding an airport terminal, operated by a public authority, is not a public forum; thus a ban on solicitation must satisfy only a reasonableness standard). The Court further stated:

"[I]ndividuals have a right to use "streets and parks for communication of views,"... such a right flowed from the fact that "streets and parks... have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."

Id. at 679 (quoting Hague v. Committee for Indus. Org., 307 U.S. 496, 515–16 (1939)).
164. Id.
access channels because the nature of those channels as public forums prevents the vesting of editorial rights in cable operators in the first place.\textsuperscript{165} Although a compelling interest does exist in protecting children from indecent programming, section 10(c) is not narrowly tailored to achieve this end.\textsuperscript{166} Some cable operators may choose not to ban obscene programming, thus leaving some children unprotected and failing to achieve, in full, the prescribed goal.\textsuperscript{167} In addition, adults will be inadvertently victimized by a comprehensive ban. Section 10(c), therefore, represents too intrusive a method to be characterized as narrowly tailored.\textsuperscript{168}

Justice Kennedy began his analysis of section 10(a) by drawing an analogy between cable television programming and indecent telephone communication, as explored in\textit{ Sable}.\textsuperscript{169} Justice Kennedy asserted that the strict scrutiny which applied to laws prohibiting a common carrier from transmitting phone sex over the telephone wires should also be applied to obscene cable programming.\textsuperscript{170} Whereas the former was an attempt by Congress to preclude the transmission of protected speech, section 10(a) is an attempt by Congress to permit a carrier to ban certain forms of speech. Justice Kennedy further stated that the access rules plainly impose common carrier obligations on cable operators, noting that common carriers serve much the same function as a public forum and are deserving of the same level of protection.\textsuperscript{171} This is because each strives to ensure a means of communication free from restriction and censorship.\textsuperscript{172}

The analogy between common carriers and public forums formed the foundation for Justice Kennedy’s analysis, a foundation which he berates the plurality for refusing to acknowledge:

The plurality acknowledges content-based exclusions from the right to use a common carrier could violate the First Amendment. It tells us, however, that it is wary of analogies to doctrines developed elsewhere, and so does not address this issue. This newfound

\begin{thebibliography}{9}
\bibitem{165} Id.
\bibitem{166} Id.
\bibitem{167} Id.
\bibitem{168} \textit{Denver}, 116 S. Ct. at 2416.
\bibitem{169} Id. at 2412 (citing Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 131 (1989)).
\bibitem{170} Id.
\bibitem{171} Id.
\bibitem{172} Id.
\end{thebibliography}
aversion to analogical reasoning strikes at a process basic to legal analysis.\textsuperscript{173} 

If the plurality were to apply an analysis based on comparing public forums to common carriers, it would find content-based restrictions on public forum expressions have been permitted, but only when those restrictions were necessary to achieve a specific institutional goal.\textsuperscript{174} This limitation on the ability to restrict public forums assures the people that a legitimate purpose exists for the limitation and inhibits arbitrary and unjustified restrictions by government.\textsuperscript{175} The restrictions imposed by section 10(a) warrant strict scrutiny, as it is an attempt by government to inhibit forms of expression it feels are indecent and unnecessary.\textsuperscript{176} Justice Kennedy stated that section 10(a) does not represent a sufficient governmental interest, that of restoring editorial discretion over leased access channels to cable operators, to warrant upholding this statute.\textsuperscript{177}

In addition to faulting the plurality for failing to adopt a strict scrutiny standard when evaluating the constitutionality of these sections, Justice Kennedy further disagreed with the conclusion reached by the plurality.\textsuperscript{178} Among the reasons for finding section 10(c) constitutional, the plurality noted the tendency of public access channels to be “subject to complex supervisory systems of various sorts, often with both public and private elements.”\textsuperscript{179} Justice Kennedy questioned the effectiveness, if not the existence, of these safeguards in public access channels, noting that “[m]ost access centers surveyed do not prescreen at all, except, as in [two named localities], a high speed run-through for technical quality.”\textsuperscript{180}

Although Justice Kennedy doubted the validity of these claims, the fact that the plurality relied upon these facts indicates an even greater flaw in the plurality’s reasoning concerning section 10(a). Justice Kennedy acknowledged that the policies, if indeed inherent in public access programming, would withstand strict scrutiny as they are narrowly tailored to protect children from indecent programming.\textsuperscript{181} Such a system, if implemented in

\textsuperscript{173} Denver, 116 S. Ct. at 2413.

\textsuperscript{174} Id.

\textsuperscript{175} Id. at 2414.

\textsuperscript{176} Id.

\textsuperscript{177} Id. at 2416.

\textsuperscript{178} Denver, 116 S. Ct. at 2417.

\textsuperscript{179} Id. at 2394.

\textsuperscript{180} Id. at 2417 (citation omitted).

\textsuperscript{181} Id.
leased access channel programming, would achieve the same goal, and thus serve the same compelling interest, and constitute a less intrusive measure of policing than that presented in section 10(a). Given this less intrusive and more narrowly tailored means, Justice Kennedy concluded that section 10(a) should be declared unconstitutional.

D. Justice Thomas: Supporting the Cable Operators

Justice Thomas, joined by Chief Justice Rhenquist and Justice Scalia, agreed with the plurality's finding that section 10(a) is constitutionally valid, but disagreed with the conclusion that the remaining two sections, 10(b) and 10(c), are constitutionally invalid. Justice Thomas, like Justice Kennedy, disparaged the plurality for refusing to declare a definite standard by which to judge the First Amendment validity of the sections in question. The Court has attempted to declare such a standard in previous cases, and Justice Breyer's refusal disregarded the reasoning of that previous declaration. Justice Thomas further discounted the standard adopted by Justice Breyer as "heretofore unknown" and "facially subjective" and faulted this standard for inviting a "balancing of asserted speech interests to a degree not ordinarily permitted." Justice Thomas also expressed a need for adherence to precedents, precedents which were not of his making but must, nonetheless, provide form and focus for current cases.

Justice Thomas began his opinion regarding the substance of the statute by noting the distinctions between the print, broadcast, and cable television media that the Court has made in previous decisions. Justice Thomas noted that the level of government control that has been exercised over broadcasting has been struck down as unconstitutional when attempted to be exercised over newspaper reporting. This discrepancy has 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." However, Justice

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182. Id.
183. Denver, 116 S. Ct. at 2417.
184. Id. at 2419 (Thomas, J. concurring in part and dissenting in part).
185. Id. at 2422.
186. Id.
187. Id. at 2419.
188. Denver, 116 S. Ct. at 2419.
189. Id. at 2420.
Thomas recognized a trend in recent decisions towards affording cable the same protections as those enjoyed by print and non-broadcast media. Based on this principle of higher scrutiny for cable operators, Justice Thomas further discounted the petitioners' claims that their rights have been infringed upon by the Act. The petitioners have to realize, stated Justice Thomas: "[T]hat cable access is not a constitutionally required entitlement and that the right they claim to leased and public access has, by definition, been governmentally created at the expense of cable operators' editorial discretion." The provisions, therefore, restrict the exercise of free speech by cable operators and actually expand the exercise of free speech by cable programmers who have no constitutional right to speak here.

A First Amendment challenge must be made by the party whose constitutionally protected free speech has been circumvented. Justice Thomas felt it is the cable operator, and not the access programmer, whose freedom of speech has been inhibited by these sections. Justice Thomas stated 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." Justice Thomas determined that sections 10(a) and 10(c) are not infringements upon the programmers' ability to freely speak, but are instead restorations of the editorial discretion cable operators would have had but for government regulations that required them to allow leased and public access programmers to program at their pleasure. Justice Thomas further noted that cable operators have retained the right to exercise editorial control over both types of channels, although historically, they have not done so with public access channels.

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192. Id.
193. Id. at 2425. The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962).
194. Denver, 116 S. Ct. at 2425.
195. Id. at 2424.
196. Id.
197. Id. at 2425. Justice Thomas faults the plurality for mistaking the inability to exercise a right for the absence of the right altogether. Although cable operators have not historically exercised their editorial control, that absence does not diminish the operator's power to do so. Id.
petitioners in these cases, concluded Justice Thomas, cannot reasonably request the Court to strictly scrutinize the statutes in question in such a manner that diminishes the cable operator's discretion while maximizing the programmer's ability to program at will.\(^{198}\)

Justice Thomas rejected the argument that section 10(c) is invalid because it imposes a content-based restriction on the right to speak in a public forum, specifically public access channels.\(^{199}\) Cable systems, noted Justice Thomas, are not public property but rather are privately owned and managed entities.\(^{200}\) Furthermore, the additional obligations imposed on the private cable operators, i.e., access scheduling and production assistance, characterize public access channels as very different from traditional public fora, effectively rebutting any claim made by the petitioners that public access channels might be considered a public forum.\(^{201}\) As such, the public forum doctrine governs access only to private property and does not extend to property, such as public access channels, that is outside the scope of governmental control. Sections 10(a) and 10(c), therefore, were both deemed constitutionally valid by Justice Thomas.\(^{202}\)

Analyzing section 10(b), Justice Thomas believed it must be subject to strict scrutiny, as the section places a content-based restriction on private speech programming by requiring cable operators to segregate and block indecent programming.\(^{203}\) Justice Thomas asserted that the government may reinforce parental authority to guide the moral and spiritual well-being of their children.\(^{204}\) The alternatives which the plurality asserts are as equally

\(^{198}\) Denver, 116 S. Ct. at 2425.

\(^{199}\) Id. at 2426.

\(^{200}\) Id.

\(^{201}\) Id. at 2428.

\(^{202}\) Id. at 2432.

\(^{203}\) Denver, 116 S. Ct. at 2429.

\(^{204}\) Id. As examples of parental reinforcement, Justice Thomas cited Ginsberg v. New York, 390 U.S. 629 (1968), which prohibited the sale of indecent literature to minors and imposed default rules intended to protect children from telephone pornography. Id. at 639. The Ginsberg Court noted:

The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in [the statute challenged] upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.

Id.
effective as section 10(b) in protecting children, i.e., lock boxes and V-chips, are not adequate alternatives and do not support parental authority as effectively as the section in question.\textsuperscript{205} Questionable programs are likely to be shown with little or no warning. This attribute of television programming makes it virtually impossible for a parent to supervise and adjust such devices in accordance with indecent programming.

The plurality further struck down section 10(b) for fear that the written requests necessary for the cable subscriber to gain access to indecent programming will result in societal stigma, and a subsequent reluctance for viewers to subscribe to previously available programming.\textsuperscript{206} Justice Thomas questioned this assumption, as the text of section 10(b) does not mention the creation or governing of such a list.\textsuperscript{207} Justice Thomas believed this to be an unsupported assumption, one which attributed to section 10(b) evils which it did not possess. The requirement of a written rather than oral request for access to blocked channels has advantages as well, i.e., preventing fraudulent attempts on the part of minors to gain access to channels deemed unsuited for children by their parents.\textsuperscript{208}

\textbf{VI. CONCLUSION}

\textbf{A. Keeping an Eye on the Future}

The division within the Supreme Court in deciding \textit{Denver} illustrates the complexity and the importance of this issue. \textit{Denver} concerns not only cable television viewing, but also addresses the ability of the government to intrude into the private lives of American citizens. Justice Breyer, writing the plurality opinion, expressed reluctance in applying previous decisions and tests to an area of communications that is constantly changing such as cable television.\textsuperscript{209} Other Justices, however, comfortably rely on precedent and established levels of scrutiny in making their own determinations as to the constitutionality of these regulations.\textsuperscript{210} The difference between these

\textsuperscript{205.} \textit{Denver}, 116 S. Ct. at 2429.
\textsuperscript{206.} \textit{Id.} at 2392.
\textsuperscript{207.} \textit{Id.} at 2430.
\textsuperscript{208.} \textit{Id.}
\textsuperscript{209.} \textit{Id.} at 2385. Justice Breyer stated that “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.” \textit{Denver}, 116 S. Ct. at 2385 (citations omitted).
\textsuperscript{210.} \textit{See id.} at 2404 (Kennedy, J. concurring in part and dissenting in part).
methods of reasoning indicates the difficulty of weighing two very important interests: the protection of children from sexually explicit communications and the protection of First Amendment rights coveted by American citizens. Justice Breyer avoided the difficulty of addressing this unique case with pre-existing precedent by creating his own constitutionality test. This method, no doubt, seemed appropriate to Justice Breyer because no medium is as pervasive or as diverse as cable television. Other Justices, however, believed that precedent must be followed to assure just rulings in accordance with established doctrine.

As technology continues to evolve, however, new problems will certainly arise as to what may or may not be communicated over new media. For instance, the relatively new forum of cyberspace will most likely become an area of concern. One author has commented that "[w]hile cyberspace offers great educational opportunities for child and adult users alike, the minimal effort needed to gain access to cyberspace haunts those Americans concerned about the availability and accessibility of cybersmut to children." With this new issue on the horizon, it is impossible to predict how it will be resolved given the plurality’s recent aversion to established principles.

Furthermore, the American public deserves to know on what grounds their constitutional arguments will be evaluated, a point raised by Justice Kennedy. Justice Breyer, no doubt, considered his analysis innovative and flexible, attempting to do justice to all media by recognizing the uniqueness of the cable communication forum. In fact, the plurality has decided this issue in a vacuum, seriously debilitating the impact this decision will have on future First Amendment litigation.

211. Id. at 2385. This test was articulated by Justice Breyer as follows: "[W]e can decide this case more narrowly, by closely scrutinizing § 10(a) to assure that it properly addresses an extremely important problem, without imposing, in light of relevant interests, an unnecessarily great restriction on speech." Id.

212. Id. at 2385–86.

213. Denver, 116 S. Ct. at 2406. Justice Kennedy stated that “[s]tandards 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.” Id.


216. Id. at 2385.
B. The Benefits of Parental Authority

The protection of children is a compelling interest, indeed.\textsuperscript{217} In upholding regulations which seek to protect children, however, the Court runs the risk of diminishing the availability of materials to such an extent that adults will be reduced to watching only those programs which are fit for children. One commentator has noted:

\begin{quote}
Solicitude for children, then, justifies neither the regulation of indecency on television nor different regulation for broadcasting and cable. Such regulation inevitably abridges adults’ first amendment rights, improperly usurps a discretionary parental function with broad governmental fiat, and ignores less restrictive means to protect children equally available in broadcasting and cable.\textsuperscript{218}
\end{quote}

The passage of the Cable Act was an attempt by Congress to protect children.\textsuperscript{219} Yet during all of the proceedings concerning this Act, both legislative and judicial, very little consideration was given to the parents. Certainly parents are charged with the physical and psychological safety of their children. The Cable Act is an effort to usurp this function and replace the traditional role of parenting with government mandates. The power of effective parenting has been described by one author:

\begin{quote}
In the home . . . parents are in a better position to make individualized judgments regarding household viewing habits of both sexual material and graphic violence. The Supreme Court long has deferred to a parent’s right to control the development and upbringing of his children. Thus, parental control is not only the most effective method, but the most protective of first amendment rights.\textsuperscript{220}
\end{quote}

The plurality virtually ignored the role of parents in deciding this issue, apparently assuming parents are either unwilling or unable to supervise their children. While the Breyer Group questioned the effectiveness of current technological devices that may limit television viewing by children, the

\begin{footnotes}
\textsuperscript{217} See, e.g., Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989).
\textsuperscript{219} 138 CONG. REC. S645 (daily ed. Jan. 30, 1992). The stated purpose for the Act is “[t]o protect children from indecent cable programming on leased access channels.” \textit{Id.}
\end{footnotes}
combination of parenting and technology may provide the answer. One author articulated the potential of coupling present technology with effective parenting in addressing this problem with:

When children are unsupervised, program guides and the electronic technology available for both cable and broadcasting can provide the desired control. Indeed, the availability of a simple lock to prevent all unsupervised television watching, even without more refined technology, should be an adequate, less restrictive means of control sufficient to preclude any broader government regulation. 221

It would be naive to assume that every child is continually supervised by his or her parents. The economic and domestic situation of most American families precludes this possibility. Certainly, however, this should be a consideration when weighing the interest of society in protecting children from inadvertent exposure to indecent programming against another interest as compelling as free speech. In upholding section 10(a) of the Cable Act, the plurality has infringed upon the rights of adult viewers to watch what they want on cable television. Although this measure seems the least severe alternative to Justice Breyer, it is an infringement nonetheless. The plurality has overlooked the most effective protective measure, however, the measure that comes at no cost to every person. The plurality has overlooked the responsible parents.

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221. Winer, supra note 218, at 522–23.