

**"THE SPECTRE OF A 'WIRED' NATION":  
DENVER AREA EDUCATIONAL  
TELECOMMUNICATIONS CONSORTIUM V. FCC AND  
FIRST AMENDMENT ANALYSIS IN CYBERSPACE**

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## I. CABLE'S FIRST AMENDMENT NETHERWORLD AND FUTURE REGULATION OF MEDIA TECHNOLOGIES

*In the past half century a communications revolution has seen the introduction of radio and television into our lives, the promise of a global community through the use of communications satellites, and the spectre of a "wired" nation by means of an expanding cable television network with two-way capabilities.<sup>1</sup>*

*[A]s broadcast, cable, and the cyber-technology 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.<sup>2</sup>*

The First Amendment transmits a constant signal to the people of the United States, their governments at all levels, and the world at large that our citizens have a fundamental right to free speech. But the Amendment's absolutist language<sup>3</sup> has never been held by the Supreme Court to mean that any governmental action that could be characterized as a limitation on speech is unconstitutional,<sup>4</sup> despite Justice Hugo Black's famous fundamentalist insistence that it indeed embodies an absolute.<sup>5</sup> Classic examples of permissible speech regulations include the antifraud and registration provisions of the securities acts,<sup>6</sup> as well as prohibitions

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1. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 248-49 (1974).

2. *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2402 (1996) (Souter, J., concurring).

3. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

4. See *FCC v. Pacifica Found.*, 438 U.S. 726, 744 (1978) ("The order must therefore fall if, as Pacifica argues, the First Amendment prohibits all governmental regulation that depends on the content of speech. Our past cases demonstrate, however, that no such absolute rule is mandated by the Constitution.").

5. "It is my belief that there are 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes.'" Hugo Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 867 (1960).

6. The former reflects the usual and entirely uncontroversial regulation of chosen speech prohibiting knowingly false statements that induce reliance (whether actual or constructive), while the latter moves into the "compelled speech" realm, at least some of which is constitutionally proscribed. See, e.g., *Riley v. National Fed'n of the Blind, Inc.*, 487 U.S. 781 (1988). For another view on the matter, see Aleta B. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223 (1990).

on incitement,<sup>7</sup> conspiracy,<sup>8</sup> obscenity,<sup>9</sup> and child pornography.<sup>10</sup> But while it is not a trump card that prevents all government attempts to regulate speech,<sup>11</sup> the First Amendment does clearly demand that any regulation or limitation of speech meet a high justificatory threshold. It thus gives speakers a powerful legal weapon against government attempts to squelch or channel speech, especially when the attempts are made primarily because of what the speaker wants to communicate.

As this parade of examples illustrates, many speech restrictions have passed muster with the Supreme Court, though only after a strict examination to ferret out improper purposes. But none have done so in a more prominent and important way in the modern world than the limitations on broadcast television and radio. For instance, current First Amendment doctrine holds that placing certain relatively neutral conditions such as "public interest" requirements on private broadcasters granted licenses by the Federal Communications Commission is an entirely acceptable government action under the First Amendment.<sup>12</sup> This apparent intrusion into what many see as the heart of the Amendment — that the government should not be involved in picking "appropriate" content for its citizens to experience — is justified by the Supreme Court on the grounds both that the electromagnetic spectrum suitable for television and radio is scarce<sup>13</sup> and that the broadcast media are pervasive.<sup>14</sup>

While broadcast regulation has continued to be justified primarily under the banners of scarcity and pervasiveness, the constitutionality of regulatory intrusions into other media used to transmit speech remains unsettled. Because it looks almost exactly like broadcast television, and in the case of many cable channels is merely the retransmission of

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7. See, e.g., *Feiner v. New York*, 340 U.S. 315, 320 (1951). But see, e.g., *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

8. See, e.g., 18 U.S.C. § 2385 (1994); *Dennis v. United States*, 341 U.S. 494, 503 (1951).

9. See 18 U.S.C. §§ 1464-65 (criminalizing obscene material); *Miller v. California*, 413 U.S. 15, 24 (1973) (describing the three-part test for obscenity); *ACLU v. Reno*, 929 F. Supp. 824, 829 (E.D. Pa. 1996) (noting that Communications Decency Act's antiobscenity provisions are redundant).

10. See, e.g., 18 U.S.C. §§ 2251-52 (criminalizing child pornography); *New York v. Ferber*, 458 U.S. 747, 764 (1982) (holding that child pornography is entirely outside the protections of the First Amendment, in part because it is evidence of a crime).

11. The notion of rights as trumps is of course Ronald Dworkin's. See Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 153 (Jeremy Waldron ed., 1984).

12. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (collecting cases and statutory provisions).

13. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375-77 (1969) (describing the state of radio frequency allocation before 1927 and the reasons for establishing federal regulation).

14. See *Pacifica*, 438 U.S. at 748.

broadcast television, perhaps no area of First Amendment law is more contentious than that defining proper governmental power over cable television.

The constitutional status of cable television regulation is particularly unsettled because it operates in a netherworld, outside of but related to each of three paradigmatic regulatory regimes. In the most familiar, oversight of newspapers, magazines, and other print sources of information is severely limited.<sup>15</sup> In the equally familiar one just mentioned, the government has extensive authority over management and regulation of broadcast television and radio.<sup>16</sup> Finally, the also extensive, but content-limited authority over the telephone industry presents a third potential cable analogue.<sup>17</sup> In cable's netherworld, First Amendment and property rights claims are often predicated on analogies to the editorial rights of newspapers and magazines<sup>18</sup> or assertions about ownership of the distribution medium.<sup>19</sup> Clashing with these generally libertarian ideas are countervailing principles supporting government

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15. See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974) (classifying the costs of printing and producing compelled speech as an improper penalty under the First Amendment); *id.* at 258 (describing deference to newspaper editorial discretion required by the First Amendment). The government's lack of power to regulate the print media goes so far as to impose special evidentiary burdens on public figures in traditional state common law suits for libel, see *New York Times v. Sullivan*, 376 U.S. 254 (1964), and intentional infliction of emotional distress, see *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). In other words, we are so fearful of government power in this realm that we put special burdens on private parties prosecuting actions to recover their good name in service of a belief that public debate should be "uninhibited, robust, and wide open." *Sullivan*, 376 U.S. at 270. Although the Supreme Court clearly extended the *Sullivan* holding to the broadcast media in their news gathering capabilities, see *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), significant content-based regulations are still available in the broadcast area. See, e.g., *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 117-18 (1973) ("A broadcast licensee has a large measure of journalistic freedom but not as large as that exercised by a newspaper."); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (upholding the FCC's "fairness doctrine" requiring a right of reply to statements made over the airwaves). Content-based regulations aimed at balance and the diversity of views like the fairness doctrine have been explicitly rejected in the print media. See *Miami Herald*, 418 U.S. at 258.

16. See, e.g., *Red Lion*, 395 U.S. at 375-77.

17. See, e.g., *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1479-80 (D.C. Cir. 1994) (explaining FCC regulation of common carriers); *Dial Info. Servs. Corp. v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991).

18. See, e.g., *Denver Area Educ. Telecomm. Consortium v. FCC*, 116 S. Ct. 2374, 2383 (1996) (plurality opinion); *id.* at 2419 (Thomas, J., concurring and dissenting); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637, 644 (1994); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986). See generally Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 DUKE L.J. 329 (1988).

19. See *Denver Area*, 116 S. Ct. at 2424 (Thomas, J., concurring and dissenting) (characterizing the consideration of leased access and public access channels solely as one of a right of access to cable operators' private property).

control. Regulatory advocates point out these enterprises' essentially commercial character as well as the longstanding special fetters placed on broadcasters through licensing in order to ensure that the airwaves are truly used in the public interest.<sup>20</sup> The advocates also emphasize particularly compelling government interests such as protecting children from indecent material in their call for regulation.<sup>21</sup>

This clash creates static in the transmission of the First Amendment's clear signal forbidding government abridgment of free speech, static that is amplified in cable's strange situation. Many questions based on these claims naturally arise in this noisy environment. To what extent are cable operators analogous to newspaper editors, given their more limited role in selecting channels for their subscribers? May cable franchise holders, like newspaper distributors and broadcast franchisees, rely on their ownership of the content delivery mechanisms to exclude others? Or are cable companies actually more like telephone companies who must provide at least some access on a nondiscriminatory, economically regulated basis? Alternately, is cable so unique as to need a sui generis regulatory regime that draws on these or other analogies?

The preexisting static has been amplified by new competitive threats to the cable industry, which have emerged in part because of the digitization of media. Specifically, digitization of media has facilitated the successful entry into television markets by satellite broadcasters,<sup>22</sup> telephone companies,<sup>23</sup> and other media purveyors.<sup>24</sup> It also raises the reality and expanding possibility that consumers will abandon television for "shows" on the Internet and World Wide Web, or that these different delivery mechanisms will combine.<sup>25</sup> Increased competition and

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20. See *Much Still To Be Done on TV Program Ratings*, WARREN'S CABLE REGULATION MONITOR, Jan. 6, 1997 (comments of Alliance for Community Media Executive Director Barry Forbes), available in Lexis, News Library, Cumwv File; see also *FCC v. League of Women Voters*, 468 U.S. 364, 375-76 (1984) (discussing spectrum scarcity and public interest obligations).

21. See David G. Savage, *Court OKs Blocking Adult TV Fare*, L.A. TIMES, Mar. 25, 1997, at A1; see also *Ginsburg v. New York*, 390 U.S. 629, 639-40 (1968) (noting the state's compelling interest in protecting its youth).

22. See Jack Egan, *For Satellite Television, the Limit Is the Sky*, U.S. NEWS & WORLD REP., Mar. 3, 1997, at 54 (noting that the direct broadcast satellite industry has more than 4.5 million subscribers).

23. See *F.C.C. Ruling Helps RCN's Plans for Video Via Telephones*, N.Y. TIMES, Dec. 11, 1996, at D4 (noting progress of RCN, Inc.'s plans to offer video via leased lines in Boston and New York).

24. See, e.g., Mark Landler, *Rich, 82, and Starting Over*, N.Y. TIMES, Jan. 5, 1997, § 3 (Money & Business) at 1, 9 (discussing John Kluge's business focus on "wireless cable," the provision of cable TV services through Earth-based microwave antennae).

25. Examples of the competition and convergence are legion already. See, e.g., John Markoff, *Microsoft to Buy WebTV, Blending PC's, TV's and the Internet*, N.Y. TIMES, Apr. 7, 1997, at D1. I use the word "possibility" here only to denote that Internet distribution

convergence draw into question a media oversight claim that has been uncontroversial since *Associated Press v. United States*:<sup>26</sup> regulation of the economic structure of an industry that transmits speech is almost unproblematic under the First Amendment, while content-based regulation remains proscribed.<sup>27</sup> Competition does this by making preferential treatment for one medium over another suspect as a content-based restriction on the speech of the disadvantaged entity, especially if the industry is indirectly required to subsidize its competitors.<sup>28</sup> This controversy has again played itself out primarily in the cable medium, with cable operators claiming the Congressional mandate that they carry local broadcast stations violates their First Amendment rights.<sup>29</sup>

With the First Amendment's signal deteriorating because of the radical changes in media technologies, many observers hoped that the Supreme Court in the 1995 Term would clarify the Amendment's contours when it again examined how its protections apply to cable television in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC* (hereinafter *Denver Area*).<sup>30</sup> In that case, the Court reached a number of First Amendment issues in answering the particular questions at hand: Could Congress empower cable operators to block or restrict "leased access" and "public, educational, or governmental" channels carrying "indecent" programming? Could Congress require them to segregate indecent programming onto one channel, and to block that channel for subscribers who did not write to request it?<sup>31</sup>

Among the issues addressed in *Denver Area* were how the First Amendment's most critical restrictions on government operate in a private environment rife with government regulation, and the conver-

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mechanisms are not yet viable competitors to broadcast and cable distribution mechanisms, and are often used as adjuncts to them. For examples of sites used as adjuncts to cable broadcasting, go to the CNN <<http://cnn.com>> or MSNBC <<http://www.msnbc.com>> sites. Sites such as these may soon compete directly with television programs for viewers' attention. See Bill Carter, *Does More Time on Line Mean Reduced TV Time?*, N.Y. TIMES, Jan. 31, 1997, at D5 (noting Nielsen/America Online study showing that households that subscribe to America Online watch less television).

26. 326 U.S. 1 (1945).

27. See *id.* at 7 (upholding application of Sherman Act to combination of publishers).

28. For a discussion of this in the cable context, see the analysis of the "must carry" provisions of the 1992 Cable Act in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994).

29. This claim was recently rejected in a narrow upholding of the "must carry" regulations of the 1992 Cable Act. See *Turner Broad. Sys. Co. v. FCC*, 117 S. Ct. 1174 (1997).

30. 116 S. Ct. 2374 (1996).

31. The operators would normally have no editorial discretion over these channels because of federal law designed to protect competition and the local agreements under which they received the original franchise. See H.R. REP. NO. 98-934, at 30 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4667.

gence of different bodies of law — the content-based prohibitions of the First Amendment, the status of cable systems as private property,<sup>32</sup> and economic regulation of what was once perhaps a natural monopoly.<sup>33</sup> But instead of boosting and clarifying the First Amendment's signal, a badly fractured Court may have merely amplified the preexisting static.<sup>34</sup> Justice Breyer's plurality opinion arguably further degraded the signal by undermining the applicability of settled First Amendment tests. The other Justices' opinions drew into question the ability of the Court to find a rationale in this area that could command a majority. The *Denver Area* Court again visited the question of whether special First Amendment treatment was appropriate for cable, most fully dealt with in *Turner Broadcasting System, Inc. v. FCC*,<sup>35</sup> and decided primarily that it was not. But the Court did so on very limited grounds and in a very ambiguous way. Explicitly pointing both to doctrinal and regulatory confusion, and to the radical evolution of telecommunications technology, the Court deliberately avoided definitive pronouncements.<sup>36</sup>

A lack of clarity is particularly problematic right now, for as Justice Souter notes in the second quotation that begins this Note, we are rapidly moving into cyberspace and approaching the use of a common receiver for digital information. By shrinking from precise answers about the proper level of scrutiny to apply to actions that might affect cable operators' and programmers' First Amendment rights, the Court offered only limited guidance for the coming cyberspace cases.

Still, some guidance may be — and must be — discernible, as the time for consideration has arrived. Currently before the Court is the

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32. Almost all cable television system operators began as exclusive providers for particular areas operating under franchise agreements reached with local governments. See *Denver Area*, 116 S. Ct. at 2379; H.R. REP. NO. 98-934, at 30 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4667. The 1992 Cable Act barred exclusive contracts, see 47 U.S.C. § 541(a)(1) (1994), but the practical cable infrastructure requirements have prevented much land-line competition. Staunch competition has come, however, from direct broadcast satellite companies, which now boast more than 4.5 million members. See Egan, *supra* note 22.

33. See *Community Communications Co. v. Boulder*, 455 U.S. 40, 45 n.6 (1982) (discussing consulting report warning city of cable systems' tendency to become a natural monopoly). On antitrust law and the press, see generally *Associated Press v. United States*, 326 U.S. 1 (1945).

34. Reaction from lower courts has not been terribly positive. See, e.g., *Playboy Entertainment Group, Inc. v. United States*, 945 F. Supp. 772, 784 (D. Del. 1996) ("In the aftermath of the *Denver Consortium* decision, it is clear only that we should apply either strict scrutiny or something very close to strict scrutiny when a content-based law, applicable in the cable television context, is challenged on grounds that it violates the First Amendment."), *aff'd mem.*, 117 S. Ct. 1309 (1997).

35. 512 U.S. 622 (1994).

36. *Denver Area*, 116 S. Ct. at 2385; see also *id.* at 2402 (Souter, J., concurring).



constitutionality of the Communications Decency Act ("CDA"),<sup>37</sup> controversial legislation regulating speech over the Internet, still another communications medium that stands in a netherworld outside the traditional "boxes." If the CDA is struck down, there are potential progeny in the wings to challenge the idea that government has no role in guiding content availability in cyberspace.<sup>38</sup> Also, the constitutionality of content-control devices and associated rating schemes arising from the "V-chip" agreement reached between broadcasters and the Clinton Administration in 1996, and included in the massive overhaul of the 1934 Telecommunications Act<sup>39</sup> may eventually reach the Court. Because of the convergence Justice Souter notes, this will also effectively be a cyberspace case. Finally, the rapid convergence of media technology poses a third set of questions that strike at the heart of the Supreme Court's medium-specific analysis of First Amendment claims.<sup>40</sup> In an era when "bits are bits"<sup>41</sup> and all media is rapidly becoming the transmission and reassembly of those bits, how much should the particulars of how those bits are put back together and displayed determine the First Amendment rights of the content producer or transmitter — the "bit arranger" or compiler — to transmit what she chooses? Should those particulars determine the First Amendment rights of the recipient to receive the information?<sup>42</sup> Should the pervasiveness of a medium make a difference in determining constitutional protections? If so, how should "pervasiveness" be defined? Does it — should it — make a difference whether a medium's architecture is constructed to give individual citizens the power to select their own programming from diverse sources, as opposed to having to accept only what mass-broadcasters choose to give them?

In attempting to arrive at some possible answers to these broad questions raised by *Denver Area* and the rapid change that has surrounded it, Part II of this Note describes how the Court dealt with the

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37. See Telecommunications Act of 1996, Pub. L. No. 104-104, tit. 5, 110 Stat. 56, 133-43 (1996) (to be codified in scattered sections of 18 U.S.C. & 47 U.S.C.).

38. See, e.g., Internet Freedom and Child Protection Act of 1997, H.R. 774, 105th Congress (sponsored by Rep. Zoe Lofgren). The Act would mandate that Internet service providers make filtering software available to all subscribers.

39. See Telecommunications Act of 1996, Pub. L. No. 104-104, tit. 5, 110 Stat. 56, 133-43 (1996) (to be codified in scattered sections of 18 U.S.C. & 47 U.S.C.).

40. See Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719 (1995); see, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978) (explaining special characteristics of broadcast media justifying restriction of indecent speech).

41. NICHOLAS NEGROPONTE, *BEING DIGITAL* 48-49 (1996) ("TV benefits most from thinking of it in terms of bits. Motion pictures, too, are just a special case of data broadcast. Bits are bits.").

42. See Krattenmaker & Powe, *supra* note 40.

particular issue of cable television franchisees' power to limit transmission of indecent materials over leased- and public-access channels. Part III examines the implications of *Denver Area* and related issues for whether the CDA and V-chip are constitutionally permissible. I contend that the CDA is and will probably be found unconstitutional and that the V-chip requirement passes constitutional muster, in large part because the latter is truly focused on the "secondary effects" of speech, and not the speech itself. In Part IV, I argue that medium-specific analysis may be — and should be — on the wane, conducting a slightly broader examination of questions about First Amendment theory. There, I examine the First Amendment's limits on government power to affect the transmission of speech in cyberspace by controlling the architecture of the medium, and suggest that the Court must explicitly choose a coherent path to avoid the ad hocery and splintered holdings of cases like *Denver Area*.

## II. PIECING TOGETHER *DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. V. FCC*

In *Denver Area*, the Supreme Court addressed the First Amendment in the cable television context for only the second time since the reregulation of the cable industry in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").<sup>43</sup> In an environment ripe with change and toward the end of a long process that resulted in substantial repeal of many cable television regulations passed in 1992 and a general Congressional overhaul of the Telecommunications Act of 1934, the *Denver Area* Court fractured along many different lines, resulting in six opinions operating on diverse rationales.<sup>44</sup> Within this collage of approaches and findings, this Part will first explain the provisions at issue, some precedential background, and the Court's actual finding, and then explore how particular opinions analyzed the case.

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43. Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified in scattered sections of 47 U.S.C.) [hereinafter 1992 Cable Act]. The industry had been substantially deregulated in 1984. See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified in scattered sections of 47 U.S.C.).

44. The case was argued before the Court on February 21, 1996, shortly after President Clinton signed the Telecommunications Act of 1996 on February 8.

*A. The Case Itself, Critical Precedent, and First Amendment Fault Lines*

1. The Case Itself

At issue in *Denver Area* were three provisions of the 1992 Cable Act that either allowed or required cable operators to regulate "indecent" material on their systems' "leased access" or "public access" channels. As part of the structural regulation imposed on the cable industry, the 1992 Cable Act requires cable operators to lease out a certain number or percentage of channels to entities not in their control, thus avoiding the monopoly problem created by exclusive franchises in most areas served by cable.<sup>45</sup> Also, as a condition of many franchise agreements, local governments can reserve cable channels for public access, educational, and governmental programming (often called "PEG channels").<sup>46</sup> The 1992 Cable Act expressly allowed local arrangements over PEG channels, though their existence on cable franchises across the nation had antedated any federal action.<sup>47</sup> Generally, cable operators are not permitted to regulate the content of channels not in their direct control,<sup>48</sup> such as leased access and PEG channels. The provisions at issue in

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45. See generally Richard Katz, *No Lease on Life? Proposed Changes on Cable-Television Leased-Access Rules*, MULTICHANNEL NEWS, Apr. 1, 1996, at 1.

46. See 1992 Cable Act § 5. See also Cable Communications Policy Act of 1984, 47 U.S.C. § 531(b) (1994). The "E" and "G" of the PEG channels were not directly at issue, as educational and governmental channels are usually regulated differently from the public access channels. Where public access airtime is often essentially unregulated in that it is available on a first-come, first-served basis, education and government channels are generally turned over to local educational institutions and governmental bodies, respectively. See Brown Deer Cable Television Franchise Ordinance § 33(c), reprinted in Barry Orton, *Overview of the 1996 Act's Impact on Cable Regulation*, in CABLE TELEVISION LAW 1996 UPDATE, at 57, 96 (PLI Patents, Copyrights, Trademarks & Literary Property Course Handbook Series No. 459, 1996).

47. The inclusion of PEG channels on local cable systems has provided an expressive outlet for many who otherwise lack access to mass media. It has also presented opportunities for the parody of various cultural phenomena. For example, the tremendously successful comedic characters of Mike Myers's *Wayne's World* were hosts of a show on a suburban Chicago public access cable channel. See generally WAYNE'S WORLD (Paramount Pictures 1992).

48. See 47 U.S.C. § 532(c)(2) (1994). Most channels on a cable operator's system are under direct control, though the PEG and leased access channels often comprise significant portions of an operator's offerings. The exceptions not mentioned here are those broadcast stations a cable operator must carry under the 1992 Cable Act. The Supreme Court already considered the constitutionality of the "must carry" provisions in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994). After more fact finding was done on remand, see *Turner Broad. Sys., Inc. v. FCC*, 910 F. Supp. 734 (D.D.C. 1995), the Court recently decided that Congress had acted within its power under the First Amendment. See *Turner Broad. Sys., Inc. v. FCC*, 117 S. Ct. 1174 (1997).

*Denver Area*, however, created exceptions to that rule, allowing cable operators to refuse "indecent" material, defined as programming that the "operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner."<sup>49</sup> These provisions were added to the 1992 Cable Act primarily at the behest of Senator Jesse Helms, who complained about the indecent and arguably obscene material on cable television, especially over PEG channels.<sup>50</sup> Section 10(a) was designed to give the cable operator discretion to refuse to broadcast such programming on leased access channels.<sup>51</sup> Section 10(b) was intended to require cable operators who do accept indecent programming to segregate that programming onto one channel and presumptively block its reception by subscribers.<sup>52</sup> To receive the channel, cable subscribers would have been required to write to the cable company and request removal of the block.<sup>53</sup> Finally, section 10(c) was intended to permit cable operators to block transmission of indecent programming on PEG channels.<sup>54</sup>

The Court upheld section 10(a)'s delegation of the right to refuse indecent programming on leased access channels as acceptable under the First Amendment, but found sections 10(b) and 10(c) constitutionally infirm. Only the decision on section 10(b) had a majority for both the result and rationale; the majorities for upholding section 10(a) and overturning section 10(c) were cobbled together from Justices who held very different views regarding First Amendment limits on government cable television regulation.

## 2. Relevant Precedent: *Pacifica*, *Sable*, and *Turner Broadcasting*

There has rarely been controversy over whether the government may bar the narrowly-defined category of "obscene" material<sup>55</sup> in any medium, including print. But regulation of merely "indecent" speech has posed some of the most difficult questions about how to stay true to the First Amendment while allowing some protection for children from material they may be too young to experience. A number of prior cases

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49. 1992 Cable Act § 10(a)(2), 47 U.S.C. § 532(h) (1994).

50. See 138 CONG. REC. S642-01 (daily ed. Jan. 30, 1992) (statement of Sen. Helms).

51. See 1992 Cable Act § 10(a), 47 U.S.C. § 532(h) (1994).

52. See 1992 Cable Act § 10(b), 47 U.S.C. § 532(j) (1994).

53. See *id.*

54. See 1992 Cable Act § 10(c), 47 U.S.C. § 532(h) (1994).

55. See, e.g., *Miller v. California*, 413 U.S. 15, 24 (1973) (setting forth three-part test for obscenity, under which the work in question must: 1) taken as a whole, appeal to a prurient interest in sex; 2) portray sexual conduct in a patently offensive way; and 3) have no serious literary, artistic, political, or scientific value); see also *Roth v. United States*, 354 U.S. 476 (1957).

have addressed the "indecentcy" issue in the mass media context, but none more clearly than *FCC v. Pacifica Foundation*<sup>56</sup> and *Sable Communications of California, Inc. v. FCC*.<sup>57</sup>

*Pacifica* dealt with the mid-afternoon New York City radio broadcast of George Carlin's famous "Seven Dirty Words" monologue, in which he repeatedly uses concededly profane (though not constitutionally obscene) words, in part to satire social convention against their use.<sup>58</sup> In reaching the conclusion that the FCC could properly restrict such a broadcast, the Court emphasized two critical factors. First, the broadcast media "have established a uniquely pervasive presence in the lives of all Americans,"<sup>59</sup> including especially their presence in the home.<sup>60</sup> Second, "broadcasting is uniquely accessible to children, even those too young to read. . . . *Pacifica*'s broadcast could have enlarged a child's vocabulary in an instant."<sup>61</sup> Despite these potentially sweeping rationales, the Court did stress its narrow holding and expressly focused on the FCC's emphasis on the time of the broadcast.<sup>62</sup> Even with such a qualification, *Pacifica* gives a strong argument for upholding restrictions on speech likely to reach children, at least as long as it is unfiltered by some mechanism other than a simple radio or television tuner.

*Sable* addressed so-called "dial-a-porn" operations, which allow phone customers to dial particular numbers to hear sexually explicit talk from recordings or live persons.<sup>63</sup> After the Second Circuit struck down FCC regulations governing the transmission of indecent telephone messages to minors three times,<sup>64</sup> Congress banned such transmission

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56. 438 U.S. 726 (1978).

57. 492 U.S. 115 (1989).

58. See *Pacifica*, 438 U.S. at 730 (describing *Pacifica*'s characterization of Carlin's monologue). In the past courts have found mere text or spoken words obscene because of their sexual content. See, e.g., *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (2d Cir. 1934) (overturning district court decision finding Joyce's *Ulysses* obscene); *Commonwealth v. Friede*, 171 N.E. 472 (Mass. 1930) (finding Dreiser's *An American Tragedy* obscene). Under the *Miller* regime, one test is whether the material in question appeals to the "prurient interest." See *Miller v. California*, 413 U.S. 15, 24 (1973). Carlin's monologue could not be said to appeal to the listener's "prurient interest." The only connection between his words and sexual activity was an occasional association of the former with the latter — they never described sexual conduct in any erotic manner whatsoever. See *Pacifica*, 438 U.S. at 751-55 (reprinting transcript of the broadcast).

59. *Pacifica*, 438 U.S. at 748.

60. See *id.* at 748-49.

61. *Id.* at 749.

62. See *id.* at 750.

63. See *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 117-18 (1989).

64. See *Carlin Communications, Inc. v. FCC*, 837 F.2d 546 (2d Cir. 1988); *Carlin Communications, Inc. v. FCC*, 787 F.2d 846 (2d Cir. 1986); *Carlin Communications, Inc. v. FCC*, 749 F.2d 113 (2d Cir. 1984).

altogether.<sup>65</sup> Assessing indecent telephonic speech, the Supreme Court unanimously distinguished *Pacifica*, stating that the case did not completely ban indecent material and citing its notation that broadcasting is "uniquely accessible," while telephonic speech "requires the listener to take affirmative steps to receive the communication."<sup>66</sup> With the requirement of those affirmative steps, the Court held that indecent speech — constitutionally protected for adults — may not be abridged for the sake of protecting children unless the regulation is narrowly tailored to reach only that speech likely to reach children. Because "[p]lacing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message," a more limited, common carrier/print-type regime must prevail.<sup>67</sup>

These cases presented a strongly conflicting background for the *Denver Area* Court, one that was only slightly clarified by its most recent cable case prior to *Denver Area, Turner Broadcasting System, Inc. v. FCC*.<sup>68</sup> In *Turner*, the Court considered whether the "must carry" provisions of the 1992 Cable Act (which require cable operators to provide access to local broadcast stations) violated the free speech rights of cable operators by intruding on their editorial discretion over which channels to carry, and of cable programmers by artificially restricting the market for access to slots on an operator's system.<sup>69</sup> While the Court did not reach a final disposition of the matter,<sup>70</sup> it seemed to reach a conclusion on the First Amendment standard for cable television. The Court expressly evaluated whether the lesser scrutiny of broadcast applied to cable. It concluded that cable does not suffer from the scarcity problem that justifies broadcast restrictions,<sup>71</sup> though it assumed that scarcity and pervasiveness continued to allow for more extensive regulation in the broadcast realm.<sup>72</sup> Considering the cable operators' claims that their First Amendment rights were violated by "must carry," the Court applied intermediate scrutiny, finding the speech-restricting

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65. See 47 U.S.C. § 223(b); Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, § 8(b), 97 Stat. 1467, 1470 (1983).

66. *Sable*, 492 U.S. at 127-28.

67. *Id.* at 128.

68. 512 U.S. 622 (1994). See generally Josephine I. Aiello, *Congressional Cable-Vision: Turner Broadcasting v. Federal Communications Commission*, 8 HARV. J.L. & TECH. 231 (1994).

69. See *Turner*, 512 U.S. at 636-37.

70. The case was remanded to a three-judge district panel for further fact finding, see *Turner Broad. Sys., Inc. v. FCC*, 910 F. Supp. 734 (D.D.C. 1995), and recently reaffirmed, 117 S. Ct. 1174 (1997).

71. See *Turner*, 512 U.S. at 638-39.

72. See *id.*

regulations not directed at content.<sup>73</sup> But under the *Turner* Court's approach, strict scrutiny would seem to apply to a content-based restriction in the cable medium in the same way it does in print.<sup>74</sup>

With the background holdings of these three cases, we can now examine how the *Denver Area* Court treated them. Because of the extraordinarily fractured Court, I first examine each of the six opinions to piece together what a picture of the future of new media regulation might look like. While my commentary on the opinions is predominantly descriptive in this Part, an immediate critique of notions that seem unsupportable is sometimes added to begin the analysis that becomes more prominent in Parts III and IV. The use of four fault lines as organizing principles will, I hope, make examining each opinion a somewhat less burdensome task for the reader, and Figure 1 on page 609 should add some clarity to one of the Court's most confusing cases.

### 3. First Amendment Fault Lines

To explain the *Denver Area* Justices' different views of the regulatory world in an era of change, I will examine their opinions and how they address four specific controversies. A fifth issue, the "void for vagueness" doctrine, is also examined briefly at the end, but is ultimately dismissed as having little significance in modern First Amendment new media jurisprudence.

The first controversy is the debate over the level of scrutiny to be used for cable television regulations, thought to have been resolved with *Turner*, but reopened by the plurality in *Denver Area*. The distinction between evaluating restrictions under strict scrutiny as content-based regulations, or under intermediate scrutiny as structural regulations that could impact content but are not primarily directed at it, affects the height of the legal hurdles that a limitation on speech must clear.<sup>75</sup> In free speech jurisprudence, strict scrutiny and the rigid application of

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73. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *United States v. O'Brien*, 391 U.S. 367 (1968).

74. See *Turner*, 512 U.S. at 641-42.

75. Generally, the hornbook law is that content-based restrictions on speech are subject to "strict scrutiny," meaning that the government interest cited must be "compelling" and the means to achieve it be "narrowly tailored." See, e.g., *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 502 U.S. 105, 116, 121 (1991). When a speech restriction is content-neutral, on the other hand, the government interest must be "substantial" and the means also "narrowly tailored." See *Ward*, 491 U.S. at 799; *O'Brien*, 391 U.S. at 377. The strict scrutiny narrow tailoring requirement is understood to require much more than intermediate scrutiny's generally good fit of action with rationale. See *Turner Broad. Sys., Inc. v. FCC*, 910 F. Supp. 734, 747 (D.D.C. 1996) ("Under intermediate scrutiny, there need not be a perfect fit between the means and the ends as with strict scrutiny analysis.").

previously established standards are the norm because of the general acceptance of the First Amendment's preferred position in the pantheon of constitutional rights.<sup>76</sup> Content-based regulations are seen as potentially the worst First Amendment intrusions, as they place the government in the position of denying citizens' choice in access to speech, which is presumably exactly what the Amendment is designed to avoid.<sup>77</sup> The treatment of indecent speech restrictions as content-based, which they undoubtedly are, has a confusing history to which *Denver Area* adds little clarity. Though there are other ways to characterize the case law, indecency restrictions have not always been held to strict scrutiny, even when they are explicitly recognized as content-based restrictions. In this unclear area, it will be important to examine carefully the Justices' opinions to see if useful information or clarification can be gained from their differing approaches.

The second area of concern is the government's posited interest in restricting speech broadcast over a particular medium. Is the interest some adapted variant of spectrum scarcity (rejected in *Turner*),<sup>78</sup> the pervasiveness of the media and the resulting likelihood that children will see or hear it, the power of cable operators to control a speech "bottle-neck,"<sup>79</sup> or still some other reasoning or combination of reasons? This inquiry will be pursued in two parts. The first is the nature and description of the justification offered for the regulation — what is the compelling government interest that would allow an otherwise barred restriction on speech? The second consists of an examination of the nature of the medium, with a focus on whether a filtering device exists that would allow viewers to receive the informational benefits of the medium while pre-screening unwanted material. Broadcast especially has been singled out for regulation by the Court because of its "pervasiveness." The core of this concept is the idea that there is no way to receive the informational and entertainment benefits of television without risking receiving unwanted indecent material.<sup>80</sup>

The third concern is whether a regulation is narrowly tailored to reach only speech that can constitutionally be proscribed — that it not be overly broad — and the related idea of "underbreadth" or ineffectiveness. While overbreadth is a fairly defined concept, underbreadth review is a policing of the restriction at issue to determine whether it can

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76. On the need for rigid standards in First Amendment adjudication, see Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 453 (1985). On the preferred position of the First Amendment, see, e.g., *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949).

77. See, e.g., ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* (1960).

78. See *Turner*, 512 U.S. at 638-39.

79. *Id.* at 656.

80. See *infra* Part III.A.2.b.iii.



achieve its stated goal. An underbreadth attack on *Denver Area's* indecency regulations, for example, would focus on the fact that the broadcast channels required for inclusion in a cable operator's offerings are not subject to the authority granted to cable operators to police indecency. More significantly, those channels controlled by cable operators themselves are not required to be free of indecency, even if the cable operators exercise their power to block indecency on leased access and PEG channels.<sup>81</sup> Restrictions on speech have always been subject to the requirement that they be narrowly tailored to achieve their goals, and not merely annoyances to those who should legitimately have access to the material in question.<sup>82</sup> Under the discussed approach, the failure to affect certain channels on a system because of the "must carry" requirements, or more importantly, to prevent cable operators from including indecent material on the channels they control if they choose to exclude it from leased access channels, might render the other restrictions constitutionally suspect due to ineffectiveness.<sup>83</sup> On underbreadth, the Court in *R.A.V. v. St. Paul*,<sup>84</sup> held that while governments could regulate "fighting words" or "hate speech," they could not single out particular types of such speech for special obloquy — regulation must be either all or nothing.<sup>85</sup> If such a concept applies to regulation of indecency as well,<sup>86</sup> then the failure of the regulations in question to reach the channels required by the "must carry" regulations, upheld in *Turner*, might render those regulations underinclusive in addressing indecent material and thus unconstitutional.<sup>87</sup>

The final issue is the applicability of public forum analysis and the meaning of property rights in the uncertain area of electronic media and cable television franchising procedures. Is it logical to think of cable

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81. This could lead to exactly the monopolistic, predatory behavior that Congress feared in enacting the 1992 Cable Act, with only those channels in which the cable transmitter has an interest being allowed to broadcast indecent material, and thus to reap the rewards of this lucrative market. See *infra* note 27 and accompanying text.

82. See *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126-27 (1989); *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

83. For a sophisticated example of an underinclusiveness argument, see Charles Nesson and David Marglin, *The Day the Internet Met the First Amendment: Time and the Communications Decency Act*, 10 HARV. J.L. & TECH. 113, 131-33 (1996).

84. 505 U.S. 377 (1992).

85. *Id.* at 386.

86. See, e.g., *General Media Communications, Inc. v. Perry*, 1997 WL 23180, at \*8-9 (S.D.N.Y. Jan. 11, 1997) (applying *R.A.V.* in the indecency context).

87. The response to this type of argument is, of course, that Congress must not solve every problem at once; it should be allowed to address issues incrementally. This is recognized in a number of cases, but the decision on where this balance is struck is often an ad hoc one. See *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 316 (1993); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955); *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61, 69-70 (1913).

television channels as "places" that can be dedicated to particular public expressive purposes? To whom does the right of ownership and thus presumptive control go, as the history of establishing cable systems is full of public sector entanglement?<sup>88</sup> Does ownership solely belong to the cable operator, or does earlier public sector involvement give governmental organizations legitimate claims that the channels at issue are public fora?

The fifth potential area for analyzing these restrictions is a challenge based on unconstitutional vagueness. The vagueness doctrine has a valuable and storied history,<sup>89</sup> but now seems to be a dead letter as applied to restrictions on nonobscene sexually explicit speech as defined in *Pacifica*.<sup>90</sup> *Denver Area* represents the last nail in the coffin; the FCC's definition of indecent material as that which depicts "sexual or excretory activity or organs" in a "patently offensive" manner did not raise hackles from any of the Justices.<sup>91</sup> Because of their dismissal of the clearly raised vagueness claims, it would be fruitless to analyze the issue further here.

An outline of how the *Denver Area* opinions address or avoid these four major issues will lead us in two directions. First, we will understand the contours of the holding. Second, we will be better prepared to examine in Parts III and IV the implications of the Justices' map-drawing for the Communications Decency Act, the V-chip agreement, and the concept of medium-specific analysis.

### B. Justice Breyer's Plurality Opinion

After describing the relevant attributes of the cable industry, noting the particular question at stake in *Denver Area*, and covering the case's fractured history before the FCC and the District of Columbia Circuit

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88. See *Denver Area*, 116 S. Ct. at 2407-09 (Kennedy, J., concurring and dissenting) (discussing the history of PEG channels).

89. The doctrine was used in its most famous incarnations to overturn state trespassing laws in civil rights sit-in cases. See, e.g., *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

90. While on the District of Columbia Circuit, Justice Ruth Bader Ginsburg captured this sentiment well: "[I]f acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge is not implicit in *Pacifica*, we have misunderstood Higher Authority and welcome correction." *Action for Children's Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988).

91. The vagueness claim is addressed only in the plurality opinion, and rejected. See *Denver Area*, 116 S. Ct. at 2389-90.

below,<sup>92</sup> Justice Breyer's opinion for the plurality (and for the Court on section 10(b)) addresses each of the four fault lines.

### 1. Standards

On the issue of which standard to apply, the plurality is openly practical, admitting the necessity for sufficient power and authority to address serious problems, even when they involve a right as strongly protected as speech. The clearest statement of the plurality's view on the standard issue comes in its explanation of why section 10(a) passes constitutional muster:

[T]he 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. This Court, in different contexts, has consistently held that the 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.<sup>93</sup>

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92. After the FCC promulgated the rules associated with these statutory provisions, an initial panel of the D.C. Circuit (special review for FCC orders goes directly to the United States Court of Appeals for the District of Columbia, *see* 47 U.S.C. § 402 (1994)) found that all the provisions violated the First Amendment. Judge Wald cast the issue in terms of general government control through regulation: "Not only does the First Amendment prohibit the government from banning all indecent speech from access channels, it also prevents the government from deputizing cable operators with the power to effect such a ban." *Alliance for Community Media v. FCC*, 10 F.3d 812, 815 (D.C. Cir.), *judgment vacated and reh'g en banc granted*, 15 F.3d 186 (D.C. Cir. 1994). In reconsidering the regulations en banc, the D.C. Circuit found exactly the opposite, that all the provisions were constitutional, with four judges dissenting. *See Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir. 1995). The foundation of the majority opinion was that there was no "state action" in delegating the power of content regulation for indecency to cable operators, largely because the operators own the physical network and are thus responsible for transmitting the content to viewers. *See id.* at 113-21. Of the dissenters, two (Judges Wald and Tatel) would have struck down all the restrictions, *see id.* at 129 (Wald, J., dissenting); one would have struck down §§ 10(a) and 10(b) while upholding § 10(c), *see id.* at 145-46 (Edwards, C.J., concurring and dissenting); and one would have struck down only § 10(b), *see id.* at 149-51 (Rogers, J., concurring and dissenting).

93. *Denver Area*, 116 S. Ct. at 2385.

In looking to a standard requiring that restrictions on protected speech be "appropriately tailored" to resolve "extraordinary problems," the plurality departs from the traditional regime of strict scrutiny for content-based restrictions. They accomplish this without declaring that indecency restrictions are somehow not content-based, which would then classify the scrutiny as intermediate.<sup>94</sup> Justice Breyer's plurality opinion goes above and beyond assuring that government is able to address "extraordinary problems" because of his recognition of the radical changes in the telecommunications area. He explains that "aware as we are of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications [citing the Telecommunications Act of 1996], we believe it unwise and unnecessarily definitive to pick one analogy or one specific set of words now."<sup>95</sup> This appeal to practicality in a changing environment is the hallmark of the plurality's approach, and provides for much that is attractive about Justice Breyer's opinion. But it also is a rejection of the traditional position of adopting rigid, clear standards in First Amendment cases to promote the expansive American view of free speech.<sup>96</sup> By avoiding the standards debate that Justices Kennedy and Thomas want to initiate immediately, the plurality wishes to allow for more technological and industrial change to happen in the cable television field before the issue comes before them again. Unfortunately, this may not be helpful if the underlying constitutional questions do not change.

Moving to the assessment of section 10(b), Justice Breyer, now writing for the Court, avoids the standards question by focusing on the common elements between the strict, intermediate, and undetermined scrutiny approaches. Justices Kennedy and Ginsburg are comfortable joining this part of the opinion to provide six solid votes, as it argues that the "separate and block" requirements are not acceptable under any form of heightened scrutiny, whether the strict standard, the intermediate standard applied in *Turner*, or the somewhat mushy one applied by the plurality in assessing sections 10(a) and 10(c).<sup>97</sup>

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94. Exactly how this would be accomplished is not clear, though there have been some attempts to describe the accepted direct content-based regulation of certain types of speech as targeted not at the content, but at the regulable elements of that speech. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (applying this approach to fighting words). Some content-based restrictions do pass strict scrutiny in the classic way — where the government interest is compelling and the means narrowly tailored (in the sense of a "perfect fit"). I explore another means of escaping the equation that content-based regulation equals strict scrutiny in Part III.

95. *Denver Area*, 116 S. Ct. at 2385.

96. See *id.* at 2404 (Kennedy, J., concurring and dissenting); *id.* at 2402 (Souter, J., concurring).

97. *Id.* at 2390.

Turning to section 10(c), this time only for a plurality of three (losing Justice O'Connor), Justice Breyer again applies the hesitating and uncertain standard used to assess section 10(a), but further defines the strictness of the scrutiny by overturning the provision. The plurality finds indecency restrictions that are identical to those on leased access channels constitutionally infirm for four reasons. First is the historical background of PEG channels — cable operators never had control over these channels due to their origination in an exchange of broadcast transmission for access to rights-of-way to originally lay down the cable. Because they have never had any legal control over these channels, no residual content-control rights exist that the cable operators could properly claim.<sup>98</sup> This argument addresses the state action question more than it provides a precise definition of the standard itself, but it indicates that the outcome under Justice Breyer's mushy standard would differ according to the structure of the government/private actor relationship. Second is the historical development of PEG channels — the local agencies overseeing the channels are capable of conducting their own content control. Congress found no problems with those controls before enacting section 10(c).<sup>99</sup> This indicates that the standard tends toward a stricter scrutiny because it requires Congressional findings on the ineffectiveness of local control before allowing the delegation of power to the cable operator. Third, Justice Breyer reasons that the channels' focus on providing community service presents less of a threat to children than the leased access channels' open market.<sup>100</sup> This again indicates a searching review of the provisions, with only limited deference to Congressional decisions. Finally, he points specifically to the systems in place that minimize problems with "patently offensive" programming,<sup>101</sup> again showing that while the standard is not "strict scrutiny," it is nonetheless significantly heightened.

For these reasons, the plurality concludes 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."<sup>102</sup> Thus the standard applied by the plurality is at least somewhat strict in that it requires some findings of efficacy before Congress can act in a way that limits speech. Most of the practical burden, however, is placed on the "narrow tailoring" aspect of the standard, to be examined in Part II.B.3 below.

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98. *See id.* at 2394.

99. *See id.* at 2394-95.

100. *See id.* at 2395.

101. *Id.* at 2395-96.

102. *Id.* at 2397.

## 2. Basic Justification in Context

Justice Breyer's opinion best explains the plurality's compelling government interest in assessing whether section 10(a) is sufficiently tailored to meet constitutional strictures. Therefore, we will address their reasoning here for the purpose of pinpointing the ultimate justification, though we will also examine in Part II.B.3 how those same arguments indicate the Justices' approach to tailoring. The plurality offers four reasons why 10(a) is "a sufficiently tailored response to an extraordinarily important problem."<sup>103</sup>

First, "the need to protect children from exposure to patently offensive sex-related material" is "extremely important,"<sup>104</sup> thus initially highlighting the most commonly cited justification. Second, the plurality points to the complex situation under which these provisions arise — Congress granted permission to cable operators to regulate content on certain channels where they would not normally be able to do so — and argues that the complexity makes for a confusing balance of First Amendment interests.<sup>105</sup> It is not explained here why the fact that the balance of interests is difficult might lead to lessened First Amendment protection, but the suggestion is nonetheless posited.

These reasons provide a good start in pointing to an underlying principle of child-protection, but it is the third justification for section 10(a) that clearly affirms that rationale. The plurality first notes the similarity of the problem to that addressed in *Pacifica*, and claims that "the balance Congress struck is commensurate with the balance we approved there."<sup>106</sup> It then highlights language from *Pacifica* recognizing that children may be exposed to improper material and that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans."<sup>107</sup> Furthermore, the opinion focuses on this material "confront[ing] the citizen, not only in public, but also in the privacy of the home,"<sup>108</sup> and notes that alternate means exist for adults to have access to indecent material. In examining these four issues from *Pacifica* — special risk to children, pervasive presence in American life, confrontation in the home, and the availability of alternate means for

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103. *Denver Area*, 116 S. Ct. at 2385-86.

104. *Id.* at 2386.

105. *See id.*

106. *Id.*

107. *Id.* (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978)).

108. *Id.*

adults — the plurality, after noting evidence for each point, concludes that “all these factors are present here.”<sup>109</sup>

The final reason for finding section 10(a) appropriate bolsters these factors and drives home the point that the primary concern of the plurality is the protection of children (more specifically, facilitating cable operator control to protect children).<sup>110</sup> This last justification, focusing on the permissive nature of the provision, is explained with explicit reference to *Pacifica* — that its “permissive nature . . . means that it likely restricts speech less than . . . the ban at issue in *Pacifica*.”<sup>111</sup> Delegation of this task to private parties, while state action that implicates the First Amendment through the Fourteenth Amendment,<sup>112</sup> does not run afoul of the plurality’s vision of the First Amendment because it is not a state command that speech be restricted. Rather, it is the advancement of such an option to the private cable operator, who may choose to restrict indecency. The plurality stresses the flexibility of the provision, in that it would “allow cable operators, for example, not to ban broadcasts, but . . . to rearrange broadcast times, better to fit the desires of adult audiences while lessening the risks of harm to children.”<sup>113</sup> Justice Breyer contends that allowing this permissive restriction then protects children in an appropriate fashion. while at the same time applying some more traditional dictates of the First Amendment. Thus, the plurality sums up its approach to section 10(a) in this fashion:

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109. With regard to accessibility, the plurality cites evidence that children see more television from a broader variety of channels than do their parents. See *id.* On pervasiveness, they note that 63% of American households subscribe to cable. See *id.* With regard to indecent material confronting people in the home without warning, they point to studies indicating that cable subscribers are more likely to channel-surf before settling on a program, “thereby making them more, not less susceptible to random exposure to unwanted materials.” *Id.* at 2386-87 (quoting *Pacifica*, 438 U.S. at 750). Finally, Justice Breyer’s opinion notes the easy accessibility for “adults who feel the need” to watch indecent material, through videotapes and theaters, and mentions the possibilities for broadcast and direct broadcast satellites. *Id.* at 2387.

110. The slight difference between these formulations may well be significant in determining the constitutionality of the Communications Decency Act and the V-Chip agreement. See *infra* Part II.G (discussing Justice Thomas’ recharacterization of the government interest); *infra* Parts III.A-B.

111. *Denver Area*, 116 S. Ct. at 2387. Note that the *Pacifica* “ban” was only a restriction on broadcast during certain hours, and was explicitly justified on that basis. See *Pacifica*, 438 U.S. at 750-51 (1978).

112. The D.C. Circuit’s en banc majority had found no state action here, and thus no constitutional violation. See *Alliance for Community Media v. FCC*, 56 F.3d 105, 113-21 (D.C. Cir. 1995).

113. *Denver Area*, 116 S. Ct. at 2387. This raises the question of why Congress did not merely allow for time channeling of indecent material on all channels, a question not answered by the plurality.

The permissive nature of the provision, coupled with its viewpoint-neutral application, is a constitutionally permissible way to protect children from the type of sexual material that concerned Congress, while accommodating both the First Amendment interests served by the access requirements and those served in restoring to cable operators a degree of the editorial control that Congress removed in [the] 1984 [Cable Act].<sup>114</sup>

The child-protection rationale is further underscored by the plurality's response to Justice Kennedy's claim that section 10(a) cannot be constitutional under *Sable*<sup>115</sup> or *Turner*.<sup>116</sup> After arguing that Justice Kennedy's attempt to apply categorical analysis and the resulting strict scrutiny of this content-based provision leads him to ignore the interests of the cable operator, Justice Breyer attempts to distinguish *Sable* and *Turner* from the case at hand.<sup>117</sup> *Sable*, he contends, is distinguishable because telephone service is less likely to expose children to the banned material, less intrusive, and allows for more control over the indecent material's entry into the home. He notes the *Turner* Court's rejection of the "spectrum scarcity" rationale for broadcast, making it more likely that strict scrutiny would apply. But he dismisses Justice Kennedy's *Turner*-based approach because *Turner*'s content-neutral/content-based distinction between intermediate and strict scrutiny "has little to do with a case that involves the effects of television viewing on children."<sup>118</sup> With regard to the manner in which parents and children watch television and the pervasiveness and intrusion of that programming into the home, "cable and broadcast television differ little, if at all."<sup>119</sup> This treatment illustrates the importance of placing government interest in context; here the plurality finds that the government interest affects the selection of the standard, and that the similarity of issues posed by different media can overcome the barriers that medium-specific analysis places between them.

With respect to sections 10(b) and 10(c), the focus on protecting children as the basic rationale of the plurality opinion is clarified and strengthened. In the discussion of section 10(b) for the Court, the Breyer opinion specifically notes and agrees with the government's goal of

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114. *Id.* at 2387. See also Cable Communications Policy Act § 2, 47 U.S.C. § 544 (1984).

115. 492 U.S. 115 (1989).

116. 512 U.S. 622 (1994).

117. See *Denver Area*, 116 S. Ct. at 2387-88.

118. *Id.* at 2388.

119. *Id.*



"protecting the physical and psychological well-being of minors."<sup>120</sup> But it rejects the government's contention that the "segregate and block" requirements meet any type of heightened scrutiny, whether the scrutiny is strict, intermediate, or the "other" adopted by the plurality. They conclude that section 10(b) "does not reveal the caution and care that the standards underlying these various verbal formulas impose upon laws that seek to reconcile the critically important interest in protecting free speech with very important, or even compelling, interests that sometimes warrant restrictions."<sup>121</sup> In his discussion of section 10(c), Justice Breyer questions whether the statute can meet the admittedly compelling purpose of protecting children; he concludes after reviewing the examples of programming that prompted the restriction that "[i]t is difficult to see how such borderline examples could show a compelling need, nationally, to protect children from significantly harmful materials."<sup>122</sup>

### 3. Narrow Tailoring

Effectiveness of the government action taken in achieving the desired compelling or important interest — the analysis of whether the government has "narrowly tailored" a provision to meet the sought goal — is always a key step in examining whether or not a speech-affecting action can withstand constitutional challenge.<sup>123</sup> In a case where there is an intervening broadcaster and a wide variety of potential conduits through which speech may reach intended and unintended listeners, separating this inquiry allows for proper consideration of this sometimes improperly obscured factor. When considered with the rest of the standard tests, one is tempted to assume that some minimal effectiveness is all that is needed to pass muster. But when the threat is present that, in the often cited words of Justice Frankfurter from *Buller v. Michigan*,<sup>124</sup> restriction will "reduce the adult population . . . to reading what is fit for children,"<sup>125</sup> effectiveness takes on increasing importance.

The language used to make the "narrow tailoring" assessment appears throughout Justice Breyer's opinion, but one notices its presence most in the section discussing section 10(b).<sup>126</sup> Both intermediate and

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120. *Id.* at 2391 (quoting *Sable*, 492 U.S. at 126).

121. *Id.* at 2392.

122. *Id.* at 2396-97.

123. See, e.g., *Sable*, 492 U.S. at 126-28.

124. 352 U.S. 380 (1957).

125. *Id.* at 383.

126. See *Denver Area*, 116 S. Ct. at 2390-91. Both §§ 10(a) and 10(c) must meet the requirement that they avoid both being overinclusive and underinclusive, but the opinion ascribes this avoidance to those provisions largely on the grounds that they allow the cable

strict scrutiny-associated phrases such as "least restrictive alternative" and "narrowly tailored" are highlighted, as well as the requirement that a provision be "no more extensive than necessary."<sup>127</sup> All these words serve to describe the strict scrutiny requirements, that there be no plausible alternative that would better serve the articulated goal, and that the provision at issue serve the goal very well, without potentially including much protected speech.<sup>128</sup> As noted above, these can mean both that a statute limiting speech includes too much protected material to be constitutionally sound ("overbreadth"), or that it does not capture enough of the regulable speech to meet its objective ("underbreadth").<sup>129</sup> Either one can be fatal to a statute.

Justice Breyer, writing here for the Court, focuses on three potential alternatives that would be better tailored than section 10(b). First, the requirement from the new Telecommunications Act of 1996 that cable operators "scramble or . . . block" primarily sexually oriented programming on unleased channels (those in the cable operator's primary control);<sup>130</sup> second, the future availability of the V-chip;<sup>131</sup> and third, the availability of "lockboxes" that prevent certain channels from being broadcast in the home, required by the 1984 Cable Communications Policy Act.<sup>132</sup> He argues that each of these easily available alternatives imposes less of a burden on speech than the rigid approach taken by Congress. The Court is especially concerned with the idea that one who wants to receive the channel must make a written request to the cable operator and thus "fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel."<sup>133</sup>

Justice Breyer's opinion considers that each of the provisions may be overbroad, but neglects a possible underbreadth analysis. Section 10(a) is acceptably tailored largely because "the permissive nature of the

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operators only the right of decision they would have absent government intervention. See *id.* at 2390 (regarding § 10(a)); *id.* at 2394 (regarding § 10(c)).

127. *Id.*

128. See *Turner Broad. Sys., Inc. v. FCC*, 910 F. Supp. 734, 747 (D.D.C. 1996) ("Under intermediate scrutiny, there need not be a perfect fit between the means and the ends as with strict scrutiny analysis.").

129. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). See generally Nesson & Marglin, *supra* note 83.

130. See *Denver Area*, 116 S. Ct. at 2392. See also 1996 Telecommunications Act, Pub. L. No. 104-104, § 505, 110 Stat. 56, 136 (1996).

131. See 116 S. Ct. at 2392; 1996 Telecommunications Act, Pub. L. No. 104-104, § 551, 110 Stat. 56, 139-42 (1996); see also *infra* Part III.B.

132. See 116 S. Ct. at 2393; Cable Communications Policy Act § 2, 47 U.S.C. § 544(d)(2) (1994).

133. 116 S. Ct. at 2391 (citing *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965)).

provision" is "coupled with its viewpoint-neutral application . . .".<sup>134</sup> His assessment of section 10(b) for the Court, after rejecting the claim that there is less First Amendment protection for indecent speech,<sup>135</sup> finds that the three provisions just discussed are less intrusive than the "segregate and block" requirements at issue.<sup>136</sup> Because of the availability of the less-restrictive alternatives, he argues section 10(b) is overbroad.<sup>137</sup> Section 10(c) is overly broad in setting forth a ban on indecent material without sufficient showing that this problem was inadequately addressed by the current regime that controls the PEG channels.<sup>138</sup>

The plurality opinion's sole focus on the possibility of overbreadth may be of no consequence; one might argue that the neglect of the underbreadth analysis makes no clear difference in the outcome of the case. There are, however, statutory interpretation problems with neglecting the underbreadth analysis. One would presume that the Court would give some purposive interpretation of the statute at issue as a whole.<sup>139</sup> The 1996 Telecommunications Bill was designed to promote competition both within and among different media sources, including cable television. Prior acts such as the 1992 and 1984 Cable Acts had been designed to enhance competition in the industry.<sup>140</sup> Congress's purpose is thwarted by section 10(a)'s underbroad delegation of authority to the cable programmer, in that it does not achieve the goal of protecting children from indecency on a cable system. The goal is not to protect children from such indecency on leased access, or public access channels, but to protect them in general from indecency coming into their home. Congress's action is not effective because it is not sufficient; it permits a cable operator to transmit indecent material, with or without blocking, segregation, or a limit on the number of channels, twenty-four hours a day. (This is not a likely scenario — one can imagine the cancellations from concerned parents if the Playboy Channel were made part of basic cable — but the overall point remains valid.)<sup>141</sup>

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134. *Id.* at 2387.

135. *See id.* at 2391.

136. *See id.* at 2392. The Court was careful to say that they cannot and did not decide whether these provisions are themselves constitutional.

137. *See id.* at 2393.

138. *See id.* at 2394-97.

139. *See generally* WILLIAM N. ESKRIDGE & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 513-632 (1988).

140. *See* Al Gore, *Bringing Information to the World: The Global Information Infrastructure*, 9 HARV. J. L. & TECH. 1, 6 (1996).

141. In any event, this unlikely scenario has been barred by the Congress. *See* 1996 Telecommunications Act, Pub. L. No. 104-104, § 505, 110 Stat. 56, 136 (1996) (Feinstein amend.). The blocking provision also bars less than perfect scrambling of indecent pay-per-view channels; the signal bleed that sometimes exposed children to random body parts and

Furthermore, it does this while allowing that same operator to bar any competition from leased-access channels in the lucrative area of sexually-oriented programming, undermining the broader purposes of the statute.<sup>142</sup> The provision could thus be quite ineffective at achieving its goal of protecting children from indecent material under strict scrutiny, although it may meet the requirement under something less strict.<sup>143</sup>

Overall, Justices Breyer, Stevens, Souter, and O'Connor find section 10(a) neither over- nor underbroad because it is a permissive provision, not a mandatory one, and is applied in a viewpoint neutral manner. They find section 10(b)'s requirements unacceptably overbroad because there are less restrictive alternatives, both prior to and originating in the 1996 Telecommunications Act. Finally, Justices Breyer, Stevens, and Souter find section 10(c) overbroad as well because of a dearth of evidence that current local control of indecency on the PEG channels is ineffective.

#### 4. Public Forum

Public forum analysis, developed extensively by the Court over the past twenty-five years, and having its roots even further back,<sup>144</sup> is classically applied to government-owned property where expression has traditionally been allowed, such as streets or parks.<sup>145</sup> But the analysis has also been used to constrain government restrictions on speech in locales not admitting of the openness of the traditional street corner or public park. In some cases, it has even applied to private property.<sup>146</sup>

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heavy breathing on channels to which their parents did not subscribe is a thing of the past. See *id.*; *Playboy Entertainment Group, Inc. v. United States*, 945 F. Supp. 772 (D. Del. 1996), *aff'd*, 117 S. Ct. 1309 (1997) (mem.).

142. This possibility was noted at oral argument by Justice Ginsburg. See Oral Argument, *Denver Area Educ. Telecomm. Consortium v. FCC*, 1996 WL 82192, at \*33-34.

143. Of course, one might argue that Congress should be responsible for its own screw-ups and fix this legislatively, but the First Amendment problem still remains, as well as the irony that such an allegedly useful provision could be easily twisted to thwart the purpose of the bill to which it was attached. After overlooking the problem in 1992, Congress did enact a legislative fix in the 1996 Telecommunications Act requiring that cable operators "scramble or . . . block" "patently offensive" material on any channel "primarily dedicated to sexually-oriented programming." See 1996 Telecommunications Act, Pub. L. No. 104-104, § 505, 110 Stat. 56, 136 (1996); see also *Denver Area*, 116 S. Ct. at 2392.

144. See *Hague v. CIO*, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they 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.").

145. See Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1718-19 (1987). See generally Harry Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

146. See *Denver Area*, 116 S. Ct. at 2388 (noting cases).

Public forum analysis would be applicable here if leased access and PEG channels were to be seen as analogous to those public or quasi-public spaces such as shopping centers and airports where at least a type of public forum analysis has already been applied.<sup>147</sup> Especially in view of attempts at creative analogical application of the concept to spaces like teacher mailboxes in the context of a union dispute,<sup>148</sup> the federal government's annual charitable giving program,<sup>149</sup> and the University of Virginia's student publication reimbursement program,<sup>150</sup> such an analysis might seem quite plausible.

In addressing the possible applicability of public forum analysis to both the leased access and PEG channels, the plurality again avoids traditional First Amendment doctrine by citing the changing nature of the medium and its uncertainty over the proper application of the doctrine. With regard to application to leased access channels, the plurality offers three reasons for the impropriety of the public forum approach. First, Justice Breyer contends that "it is not at all clear that the public forum doctrine should be imported wholesale into the area of common carriage regulation," because of concerns about applying "a partial analogy in one context . . . in such a new and changing area."<sup>151</sup> Second, he properly notes the possibility of "limited purpose" public fora, within which only certain types of speech are proper. He worries that lack of clarity in this area could lead to the needless propagation of uncertainty, especially if his third claim is true: that "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."<sup>152</sup> He contends that precisely

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147. See *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (striking down ban on "First Amendment activities" in Los Angeles International Airport); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (finding state constitutional interpretation requiring access to private shopping center for speech activities not violative of owner's property or free speech rights protected by federal Constitution). But see *International Society of Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (finding, by a 5-4 vote, airport terminal a nonpublic forum).

148. See *Perry Educ. Assoc. v. Perry Local Educators Assoc.*, 460 U.S. 37, 46-47 (1983) (holding that teacher mailboxes are not a "limited public forum").

149. See *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) (rejecting claim that federal charity drive is a public forum).

150. See *Rosenberger v. University of Va.*, 115 S. Ct. 2510, 2517 (1995) ("The SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable."); see generally *Finley v. National Endowment for the Arts*, 100 F.3d 671, 686 (9th Cir. 1996) (Kleinfeld, J., dissenting) (describing "money-as-a-public-forum cases," and citing *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502 (9th Cir. 1980) and *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980)).

151. *Denver Area*, 116 S. Ct. at 2389.

152. *Id.*

because limited public fora are available under this doctrine that "the government's interest in protecting children, the 'permissive' aspect of the statute, and the nature of the medium . . . sufficiently justify the 'limitation' on the availability of this forum."<sup>153</sup> Application of this analysis to the PEG channels is not discussed directly, though the same or similar arguments evidently dissuade the plurality from applying public forum analysis.<sup>154</sup>

As far as they go, these justifications do provide compelling reasons to forego applying public forum analysis to leased access and PEG channels. But it is important to note that working behind all these justifications are attacks on another implicit idea: that the cablecasters have a clear property interest in every channel on their system. This type of claim will be addressed most extensively below in the discussion of Justice Thomas's opinion, but we can note here that viewing these channels as wholly private property is questionable given both the heavily regulated character of the industry and the explicit deal made between cable operators and local franchise agencies, granting those agencies PEG channels in exchange for easements to lay cable over public rights-of-way.<sup>155</sup> There is no doubt a significant property interest at stake for the cable operators here; to hold otherwise would be a grave constitutional mistake and would discourage investment that we desperately need in the telecommunications infrastructure.<sup>156</sup> But it does not follow that the cable operators have unfettered property interests over every channel on their system.<sup>157</sup> The important fact to take from this discussion is that the extent of the government's power to declare a cable

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153. *Id.*

154. *See id.* at 2394-97 (addressing § 10(c), but not mentioning public forum analysis).

155. *See Denver Area*, 116 S. Ct. at 2408-09 (Kennedy, J.).

156. On the benefits of and need for telecommunications investment, see, e.g., Stanford Diehl, *Data's New Voice: Real-time Voice Technologies for the Internet and New Telecommunications Standards for Integrated Multimedia Transmissions Say a Lot about Convergence*, BYTE, Sept. 1, 1996, at 129.

157. Note also that some systems have expanded channel capacity under minimum technical standards established by federal law. *See* 47 U.S.C. § 544(e) (1994). It is not clear which way this cuts on the property analysis — there is a potential argument that the government could not constitutionally mandate the expansion of a system merely to allow for leased access channels. But there is also an argument that they could do so under general interstate commerce power, with only the intermediate scrutiny of *Turner* to stop them. With a sufficiently compelling justification, such structural regulation of the industry seems to be within Congress's power, especially after the latest *Turner* decision. *See Turner Broad. Sys., Inc. v. FCC*, 117 S. Ct. 1174 (1997).

To the extent that there are property interests, they would be addressed under a takings analysis, an issue that has been raised by the cable industry in the *Turner* remand. *See Turner Broad. Sys., Inc. v. FCC*, 910 F. Supp. 734, 749-50 (D.D.C. 1996). The three-judge panel assessing the adequacy of Congress's factual findings on the must-carry regulations dismissed the takings claim without prejudice, leaving it for another day. *See id.* at 750.

system a public forum depends directly on the extent to which the cable operator can be said to have a property interest.

Overall, the plurality is dismissive of the public forum approach. As Justice Breyer sums up:

Unless a label alone were to make a critical First Amendment difference (and we think here it does not), the features of this case that we have already discussed — the government's interest in protecting children, the "permissive" aspect of the statute, and the nature of the medium — sufficiently justify the "limitation" on the availability of this forum.<sup>158</sup>

### C. Justice Stevens's Concurrence

Having joined the plurality opinion, Justice Stevens wrote separately to emphasize several issues that sway the balance toward finding section 10(a) acceptable and section 10(c) unacceptable, despite their almost identical provisions.<sup>159</sup> The overall thrust of Justice Stevens's opinion is captured in the opening sentence: "The difference between section 10(a) and section 10(c) is the difference between a permit and a prohibition."<sup>160</sup> This statement is in some ways misleading, because section 10(c) does allow cable operators to carry PEG channels that include indecent material. But it would have allowed cable operators to refuse to carry PEG channels unless the PEG channel operators agreed not to broadcast indecent material. Thus, the cable operators would have been granted power that neither the cable operator nor the federal government could properly have had. The cable operators especially would never have had this power because the PEG channels arose as conditions on franchise agreements between cable operators and local governments. In explaining this distinction, Justice Stevens addresses each of the four fault lines.

#### 1. Standards

Justice Stevens begins his opinion by agreeing with the plurality and especially Justice Souter that the dynamic nature of the cable and general television industries counsels against any categorical application of First Amendment doctrine.<sup>161</sup> Otherwise, the application of public forum

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158. *Denver Area*, 116 S. Ct. at 2389.

159. *See id.* at 2398. Justice Stevens did not separately address § 10(b).

160. *Id.*

161. *See id.* at 2398.

doctrine would potentially require Congress to make "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."<sup>162</sup> Avoiding this type of choice is the hallmark of the plurality's approach, and Justice Stevens signs on wholeheartedly.

## 2. Basic Justification in Context

Breaking from the plurality's focus on child protection, Justice Stevens seems more interested in highlighting the structural, limited, and thus proper power granted to cable operators by section 10(a), as distinguished from the improper power granted by section 10(c).<sup>163</sup> The interest of protecting children is not entirely absent from Stevens's discussion, but it serves primarily as a device to underscore that "protect[ing] children from sexually explicit programming on a pervasive medium," is "both viewpoint-neutral and legitimate,"<sup>164</sup> echoing his concerns as the author of *Pacifica*. Viewpoint-neutrality, as opposed to the avoidance of governmental interference in content selection, seems to be Justice Stevens's primary concern. It is a concern that will become much more critical in Part III's consideration of the V-chip and Part IV's consideration of government power over the architecture of speech distribution networks.

The structural nature of the provisions at issue is highlighted by Justice Stevens's analogy of section 10(a) to the must-carry rules addressed in *Turner*. As he explains, section 10(a) is "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."<sup>165</sup> In conferring access to programmers unaffiliated with the cable operators, Justice Stevens argues not only that Congress may permissibly do this, but that "it may also limit, within certain reasonable bounds, the extent of the access that it confers upon those programmers."<sup>166</sup> Congress may not "evade First Amendment constraints by selectively choosing which speech should be excepted from private control,"<sup>167</sup> but it may make subject-based special access provisions if it has, for example, "a

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162. *Id.* at 2398.

163. *See id.*

164. *Id.* at 2399 (citing *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989) and *FCC v. Pacifica Found.*, 438 U.S. 726 (1978)).

165. *Id.* at 2398.

166. *Id.*

167. *Id.* at 2399.



reasonable basis for concluding that there were already enough classical musical programs or cartoons being telecast — or, perhaps, even enough political debate . . . .”<sup>168</sup> In such a circumstance, Justice Stevens argues, there would be no First Amendment violation in excluding those programs from special access to the airwaves, because the choice to exclude the programs would be based on the subject they covered, not the viewpoint they espoused. Thus, because section 10(a) only puts a reasonable, viewpoint-neutral access condition on the leased-access channels (namely, that they not broadcast indecent material without the permission of the cable operator), it is acceptable under the First Amendment.<sup>169</sup>

By contrast, Justice Stevens argues that section 10(c) improperly allocates to cable operators the power to block indecent material on PEG channels, because the PEG channels “owe their existence to contracts forged between cable operators and local cable franchising authorities.”<sup>170</sup> The special history of the PEG channels’ creation means that cable operators never possessed authority over the content on these channels, in contrast to the authority the operators would have possessed over leased-access channels absent the federally created channel access rights covered by section 10(a). Thus, giving the cable operator power to block the content of PEG channels (often controlled by local governments or affiliated entities) “would inject federally authorized private censors into forums from which they might otherwise be excluded . . . .”<sup>171</sup> This is then “a direct restriction on speech that, in the absence of federal intervention, might flow freely,” and thus must be held up to a very strong scrutiny.<sup>172</sup> Though Justice Stevens notes that “the Government may have a compelling interest in protecting children from indecent speech on such a pervasive medium,”<sup>173</sup> he also expressly agrees with the plurality opinion in its assessments that “the Government has made no effort to identify the harm caused by permitting local franchising authorities to determine the quantum of so-called ‘indecent’ speech that may be aired in their communities,” and that there is no indication that cable operators are the proper means of doing so.<sup>174</sup> Without such a finding, he argues, section 10(c) cannot be consistent with the First Amendment.

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168. *Id.* at 2398-99.

169. *See id.* at 2400.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 2400-01.

### 3. Narrow Tailoring

In Justice Stevens's narrow tailoring analysis, only overbreadth comes up explicitly, both in his rejection of the classic *Butler* claim that section 10(a) "reduces the programming available to the adult population to what is suitable for children,"<sup>175</sup> and in his rejection of section 10(c)'s narrow tailoring claim with regard to the protection of children from indecent speech on PEG channels.<sup>176</sup> On the latter point, Justice Stevens agrees with Justice Breyer's analysis that Congress's justification is inadequate, but neglects to consider adequately the possibility that, in failing to reach another likely source of indecent material (i.e., those channels controlled by the cable operator), the provision is also ineffective. This is not to say, though, that Justice Stevens ignores a possible underinclusiveness argument. He instead uses such an approach to parry the possible claim that there is not an effective outlet for expression of indecent material other than on leased access channels.<sup>177</sup> This willingness to use an underinclusiveness analysis to *bolster* section 10(a)'s constitutionality probably reflects Justice Stevens's longstanding view, expressly avoided in the Breyer opinion,<sup>178</sup> that indecent speech is subject to less protection under the First Amendment than core political speech.<sup>179</sup>

### 4. Public Forum

Justice Stevens offers an interesting perspective on the public forum question. He rejects Justice Kennedy's use of public forum analysis for both leased access and PEG channels, but otherwise essentially agrees with Justice Kennedy's reasoning. He argues that leased access channels are not public forums because "the Federal Government created leased access channels in the course of its legitimate regulation of the communications industry."<sup>180</sup> Because of their origin, the forums are limited to unaffiliated programmers. In this way, Justice Stevens's argument for rejecting public forum analysis is much the same as Justice Breyer's — calling the leased access channels "public forums," though limited ones, changes nothing significant about the particular analysis, while threatening to import wholesale the developed rules about analyzing public

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175. *Id.* at 2399 (citing *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

176. *See Denver Area*, 116 S. Ct. at 2400-01.

177. *See id.* at 2399.

178. *See id.* at 2391.

179. *See id.* at 2399; *FCC v. Pacifica Found.*, 438 U.S. 726, 743; *see also Denver Area*, 116 S. Ct. at 2401 (Souter, J., concurring) (characterizing indecent speech as "at the First Amendment's periphery"); *infra* note 301.

180. *Denver Area*, 116 S. Ct. at 2398.

forums into an area of immense change. Justice Stevens's wariness is underscored by his concerns about forcing Congress into "an all or nothing-at-all choice" in setting up access for somewhat disadvantaged cable programmers.<sup>181</sup> And his notation that government has a possible role in encouraging certain types of speech on a viewpoint-neutral basis also plays a role here.<sup>182</sup>

With regard to the PEG channels, Justice Stevens comes even closer to public forum analysis in explicitly agreeing with section III-B of Justice Kennedy's opinion, which sets forth the reasons that section 10(c) improperly intrudes into the realm of protected speech. But he again stops just short of declaring those channels public forums, explicitly rejecting such a designation.<sup>183</sup>

#### D. Justice Souter's Concurrence

Justice Souter's concurrence directly responds to the need to clarify the First Amendment's signal in these confusing cases, most notably represented in *Denver Area* by Justice Kennedy's opinion. As he puts it, "[r]eviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said."<sup>184</sup> But he too joins the plurality, and is especially concerned about the radical changes coming in the telecommunications industry. The Court's prior analysis of cable has depended upon certain characteristics of the medium, he notes, but "[a]ll of the relevant characteristics of cable are presently in a state of technological and regulatory flux."<sup>185</sup> Justice Souter notes the recently passed Telecommunications Act of 1996, and particularly the advent of the V-chip's blocking technology. He also argues, as noted in one of the epigraphs to this Note, that "as broadcast, cable, and the cyber-technology 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."<sup>186</sup> Concern about the future leads Justice Souter to eschew rigid standards, and this concern

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181. *See id.*

182. *See id.* at 2399-2400.

183. *See id.* at 2400.

184. *Id.* at 2401 (citing Blasi, *supra* note 76).

185. *Id.* at 2402.

186. *Id.* (footnote omitted). The omitted footnote here contains cites to an article concerning competition between cable and telephone companies and a press release concerning a combination computer/television. Both of these documents are available on and cited to the World Wide Web, the first time that a Supreme Court decision has included a citation to the Web. *See id.*

runs through each of our four fault lines. But because of Justice Souter's focus on the standards issue, I will not separately consider his approach to the effectiveness and public forum questions.

### 1. Standards

In selecting a standard to apply, Justice Souter first affirms the general approach he sees in Justice Kennedy's opinion: "categorizing speech protection according to the respective characters of the expression, its context, and the restriction at issue."<sup>187</sup> Beyond this, he emphasizes how these types of restrictions on cable systems are hard to categorize. Though these options are not set forth in Justice Souter's opinion, two points might be made: first, cable lies outside the broadcast, print, and common carrier paradigms; and second, restrictions on indecent speech in one sense target content (focusing on the sexual nature of the speech might be thought to trigger strict scrutiny), but in another sense do not (in that they can be described as viewpoint neutral).<sup>188</sup> He contends that, "[n]either the speech nor the limitation at issue may be characterized simply by content," because both are "at the First Amendment's periphery" and the speech is "readily received in the household and difficult or impossible to control without immediate supervision."<sup>189</sup> For these reasons, and because of similarities to the situation in *Pacifica*, "the appropriate category for cable indecency should be as contextually detailed as the *Pacifica* example . . . ."<sup>190</sup> Justice Souter rejects the idea of settling on a standard here largely for these reasons, and expresses a great deal of worry about what will happen:

[W]e 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

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187. *Id.* at 2401.

188. On viewpoint neutrality in the pornography context, see *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

189. *Denver Area*, 116 S. Ct. at 2401.

190. *Id.* at 2402.

saying the final word today about what will be accepted as reasonable tomorrow.<sup>191</sup>

Because of this incredible uncertainty, Souter argues that the best approach at this time may be Justice Breyer's direct analogy to *Pacifica* in the plurality opinion.<sup>192</sup> Justice Souter concludes with the classic provision of the Hippocratic oath: "First, do no harm."<sup>193</sup> What Justice Souter neglects to explain is why the harm is not in restricting the speech, rather than in allowing it,<sup>194</sup> especially when there are no restrictions on indecent programming on the regular cable channels.

## 2. Basic Justification in Context

Child protection again plays an extensive role here, because these programs are "easily available to children through broadcasts readily received in the household and difficult or impossible to control without immediate supervision."<sup>195</sup> Justice Souter also describes the relevant *Pacifica* rationales as being based on "intrusion into the house and accessibility to children," and notes that the rationales apply equally to cable television.<sup>196</sup> Again, this line of reasoning leads Justice Souter to argue that the right standard must be as "contextually detailed as the *Pacifica* example . . . ."<sup>197</sup>

But recall that the basic justification issue has two parts: the compelling nature of the interest, and the nature of the medium involved.<sup>198</sup> While the compelling nature of the interest in protecting children remains constant across all the opinions, there is wild variation in the assessments of the current and future character of the medium. Justice Souter rightly insists that the Court take into account the future likelihood of digital convergence in considering the nature of the medium with his worry about the "day of using a common receiver," and the fact that today's decisions for one medium may have "immense, but now unknown and unknowable, effects on the others."<sup>199</sup> While Justice Souter's final assessment of section 10(a) can be critiqued for applying the wrong default position (speech restrictive instead of speech protec-

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191. *Id.*

192. *See id.*

193. *Id.* at 2403.

194. Justice Kennedy makes precisely this point. *See id.* at 2407 (Kennedy, J., concurring and dissenting).

195. *Id.* at 2401.

196. *Id.* at 2402.

197. *Id.*

198. *See supra* Part II.A.3.

199. *Denver Area*, 116 S. Ct. at 2402 (footnote omitted).

tive), his opinion uniquely considers the rapid convergence of telecommunications media. His discussion here even includes the Court's initial foray into citations to articles on the World Wide Web.<sup>200</sup> The inevitability of the impending convergence of media will play a large role in the assessment of the CDA, the V-chip agreement, and medium specific analysis in Parts III and IV.

### *E. Justice O'Connor's Concurrence and Dissent*

Justice O'Connor's position is reasonably similar to that of the other plurality Justices on standards, the basic justification of child protection, and the pervasiveness/accessibility context of the cable medium. She is thus able to join the plurality opinion on section 10(a) and the opinion for the Court on section 10(b). However, she sees section 10(c) in a different light than the other plurality Justices, arguing that the minor differences in origin between the leased access and PEG channels do not justify treating the two any differently for constitutional purposes. Justice O'Connor's assessment of the four issues that have been our focus is sufficiently cursory to justify addressing them only very briefly.

On the standard to be applied, Justice O'Connor begins by implicitly rejecting the rigidity of much of the language that permeates the standards debate. First, she talks about sections 10(a) and 10(c) serving an "important governmental interest," which she then specifies as the "compelling interest of protecting children from exposure to indecent material."<sup>201</sup> With this implicit notation and a later explicit adoption of Justice Breyer's resistance to any categorical approach, Justice O'Connor specifically traces her perspective to the new communications media being considered and the special situation of regulations designed to protect children.<sup>202</sup> The protective interest is again the central justification for why cable television is treated specially: "Cable television, like broadcast television, is a medium that is uniquely accessible to children. . . ."<sup>203</sup> Based on the flexible standard and the important goal behind the regulation, two reasons lead Justice O'Connor to find sections 10(a) and 10(c) acceptable: first, both provisions are permissive, and thus differ from the ban at issue in *Sable*; and second, neither provision is more restrictive than the regulation upheld in *Pacifica*.<sup>204</sup> By rejecting full adaptation of First Amendment jurisprudence to this context, Justice O'Connor also shrinks from the public forum doctrine and an application

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200. See *id.* at 2402 n.4.

201. *Id.* at 2403.

202. See *id.*

203. *Id.*

204. See *id.*

of the narrow tailoring analysis in both its over- and underinclusiveness permutations.

What is most interesting about Justice O'Connor's statement of her position is that she does not draw any distinction between section 10(a) and section 10(c). This indicates that her threshold for requiring Congressional findings before pursuing a potentially speech-restrictive approach is lower than that of the other plurality Justices. While Justice Breyer's opinion focused on the need for hard evidence and congressional findings that the current restrictions on PEG channels were not working before section 10(c) could be constitutional, Justice O'Connor focuses only on the facial similarities between the two provisions.<sup>205</sup> This deference to Congress's restriction of indecent speech without making detailed findings perhaps shows that her First Amendment requirements are less stringent for indecent speech than for other constitutionally protected categories, and implies that her evaluation of indecency cases may be more fact-specific than that of the other plurality Justices.<sup>206</sup>

#### *F. Justice Kennedy's Concurrence and Dissent*

The opinion by Justice Kennedy, joined by Justice Ginsburg, is unquestionably the most rigorous with respect to traditional First Amendment analysis. It accuses the plurality opinion of being "adrift," "treat[ing] concepts such as public forum, broadcaster, and common carrier as mere labels rather than as categories with settled legal significance."<sup>207</sup> Applying his vision of a more categorical First Amendment, Justice Kennedy finds all of the provisions unconstitutional, offering trenchant critiques of the plurality opinion with the exception of the section addressing section 10(b), which he and Justice Ginsburg join to make it an opinion for the Court. His opinion makes important decisions in each of the four areas we have examined, and is especially interesting because of its adoption of the public forum approach.

##### 1. Standards

Justice Kennedy's opinion is based largely on the claim that "the 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."<sup>208</sup> He attacks the

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205. *See id.*

206. *See infra* note 303.

207. *Id.* at 2404.

208. *Id.* at 2406.

plurality's unwillingness to adopt a particular standard, and notes two problematic consequences. First, avoiding the traditional strict/intermediate scrutiny division and the First Amendment doctrinal categories makes "principles intended to protect speech easy to manipulate," and merely "a legalistic cover for an ad hoc balancing of interests."<sup>209</sup> Second, lower courts are likely to be confused if there is no clear standard adopted by the Supreme Court.<sup>210</sup> As the plurality and concurring opinions make clear, flexibility does have its benefits in rapidly changing communications media,<sup>211</sup> but he responds that "[t]he novelty and complexity of the case is a reason to look for help from other areas of our First Amendment jurisprudence, not a license to wander into uncharted areas of the law with no compass other than our own opinions about good policy."<sup>212</sup> Furthering this analysis, Justice Kennedy rejects what he takes to be an implicit premise of the plurality opinion (a premise most clearly expressed by Justice Souter): that uncertainty about future new media developments gives Congress more room to restrict speech. "If the plurality is concerned about technology's direction," he contends, "it ought to begin by allowing speech, not suppressing it."<sup>213</sup> Strict scrutiny is valuable to this process because it "at least confines the balancing process in a manner protective of speech; it does not disable government from addressing serious problems, but does ensure that the solutions do not sacrifice speech to a greater extent than necessary."<sup>214</sup>

## 2. Basic Justification in Context

The basic justification for restrictions takes a back seat to the doctrinal analysis in Justice Kennedy's opinion, but is nevertheless significant. In this area, Justice Kennedy is primarily concerned with resisting the government's contention that *Pacifica* established a lower standard of review for restrictions on indecent speech. He resists in two ways, and in doing so reveals where he stands on both basic justification questions: first, that of the strong government interest that permits the content-affecting scrutiny; and second, that of the nature of the medium. On the latter, Kennedy argues that *Pacifica* was based not on a separate standard for indecent speech, but on broadcasting's traditionally limited First Amendment protections.<sup>215</sup> He contends that application of such a

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209. *Id.* at 2407.

210. *See id.*

211. *See supra* Parts II.B-E.

212. *Denver Area*, 116 S. Ct. at 2407.

213. *Id.*

214. *Id.* at 2406.

215. *See id.* at 2415.



diminished standard to the cable realm was rejected by *Turner*.<sup>216</sup> Addressing the former question, Justice Kennedy notes two familiar issues in assessing the cable medium: first, that it confronts the citizen in the privacy of the home; and second, that transmission over cable television is "uniquely accessible to children."<sup>217</sup> It is because children spend so much time watching television that these considerations come into play. Yet for Justice Kennedy, the considerations "do not justify . . . a blanket rule of lesser protection for indecent speech."<sup>218</sup> He notes that their importance is properly weighed under a strict scrutiny analysis, which must apply because of the traditional "skepticism about the possibility of courts drawing principled distinctions to use in judging governmental restrictions on speech and ideas."<sup>219</sup> Strict scrutiny's dual requirements of a compelling state interest and narrow tailoring to achieve that interest strike the proper balance for Justice Kennedy. The compelling state interest of the protection of children serves to justify restrictions, then, only when the restrictions are quite closely tailored to reach no more speech than necessary.

### 3. Narrow Tailoring

Justice Kennedy gives the proper consideration to both the over- and underinclusiveness rationales present in the Court's jurisprudence. His focus on underinclusiveness is unique among the opinions, and is slightly different from traditional underinclusiveness analysis. He contends that sections 10(a) and 10(c) are not narrowly tailored because some cable operators may in fact allow indecent programming, so that "children in localities those operators serve will be left unprotected."<sup>220</sup> This does not meet strict scrutiny's narrow tailoring requirement because "[p]artial service of a compelling interest is not narrow tailoring."<sup>221</sup> In his critique of the majority opinion, Justice Kennedy also worries about the statutory purpose argument mentioned in Part II.A.2 above: "Perhaps some operators will choose to show the indecent programming they now may banish if they can command a better price than other access programmers are willing to pay."<sup>222</sup> On the overbreadth issue, a role is also played by *Butler* concerns that adults have access to material other than what is fit for children. Justice Kennedy argues that the block-and-segregate

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216. See *id.* at 2416.

217. *Id.* at 2415.

218. *Id.*

219. *Id.*

220. *Id.* at 2416.

221. *Id.*

222. *Id.* at 2418.

provisions of section 10(b), absent the particularly onerous list requirement, would serve the child-protective role much more precisely than would allowing cable operators to ban all indecent material on their access channels.<sup>223</sup>

#### 4. Public Forum

This is the critical doctrinal category informing Justice Kennedy's analysis. He argues strenuously that the PEG channels at issue in section 10(c) are without doubt public forums because of the history of their creation,<sup>224</sup> and also applies the concept of public forum doctrine by analogy to what he describes as the common carrier regulation of leased access channels.<sup>225</sup> This categorization has the effect of mandating strict scrutiny for the indecent speech restrictions at issue, and strict scrutiny's usual outcome is reached: the overturning of the regulations.

Categorization of the property interests here is critically important to understanding whether public forum doctrine can properly apply, and Justice Kennedy joins this issue from the beginning. The concept of private property carries as a major tenet the right of the owner to exclude speakers, but the cable operators have never held clear and unfettered title to the channels at issue. The access channels covered under sections 10(a) and 10(c) are "property of the cable operator dedicated or otherwise reserved for programming of other speakers or the government."<sup>226</sup> For purposes of First Amendment doctrine, Justice Kennedy contends, this restriction on the property leads to clear categorization: "A public access channel is a public forum, and laws requiring leased access channels create common carrier obligations."<sup>227</sup> The natural First Amendment consequences follow: "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."<sup>228</sup>

This does not end the analysis, though it points strongly toward the conclusion that the restrictions at issue are invalid. Justice Kennedy traces the history of the PEG channels at issue in section 10(c) back to both negotiation between local governments and cable franchise operators and the agreements' recognition in Federal law.<sup>229</sup> He focuses on the public access channels, largely because educational and govern-

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223. *See id.* at 2417.

224. *See id.* at 2407-10.

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

226. *Id.* at 2405.

227. *Id.*

228. *Id.*

229. *See id.* at 2407-09.

mental channels are not among the petitioners,<sup>230</sup> and he finds public access channels to be "a designated public forum of unlimited character," the most expansive type of forum, where restrictions are subject to the greatest scrutiny.<sup>231</sup> This is largely because of the way that Congress has described public access channels,<sup>232</sup> and the manner in which the channels are used.<sup>233</sup>

The leased access channels at issue in section 10(a) pose a different question in that they are not reserved for the use of the public, but instead for the use of programmers unaffiliated with the cable operator. Justice Kennedy rightly notes that the "question remains whether a dispensation from strict scrutiny might be appropriate because § 10(a) restores in part an editorial discretion once exercised by the cable operator over speech occurring on its property."<sup>234</sup> But he avoids this possible distinction by equating the idea of designated public forums with common carrier requirements, and then by rejecting any attempt to reclassify an impermissible, content-based *exclusion* in terms of a permissible, content-based *limitation* on any such public forum.<sup>235</sup> Leased access requirements are "the practical equivalent of making [cable operators] common carriers, analogous in this respect to telephone companies: They are obliged to provide a conduit for the speech of others."<sup>236</sup> This conduit cannot be regulated in any content-specific way because of concerns about government censorship. Under this analytical regime, as we have seen, Justice Kennedy found the delegation of censorship power to the cable operator not narrowly tailored to meet the goal of protecting children.<sup>237</sup>

Public forum doctrine is valuable because it recognizes a legitimate interest in regulating the character of a place. Extending this interest to the nonphysical world does make sense, but applying it to cable television's outpost on the edge of cyberspace, and especially to cyberspace's interior, poses particular problems, to be discussed in more detail

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230. See *id.* at 2408-09.

231. *Id.* at 2409.

232. See *id.* (public access channels are "the video equivalent of the speaker's soapbox or the electronic parallel to the printed leaflet") (quoting H.R. REP. NO. 98-934, at 30, reprinted in 1984 U.S.C.C.A.N. 4655, 4667)); see also James N. Horwood, *Public, Educational, and Governmental Access on Cable Television: A Model to Assure Reasonable Access to the Information Superhighway for All People in Fulfillment of the First Amendment Guarantee of Free Speech*, 25 SETON HALL L. REV. 1413 (1995).

233. See *Denver Area*, 116 S. Ct. at 2409 (noting that time on the channels is usually available with no special restrictions, with all responsibility for the show being taken by its producer).

234. *Id.* at 2413.

235. See *id.* at 2413-14.

236. *Id.* at 2411.

237. See *supra* Part II.F.3.

below.<sup>238</sup> Negotiating the difficult transition to the nonphysical world inevitably leads again to the battle of the analogies: while the plurality rejects the public forum doctrine in order to avoid applying strict scrutiny to a decision to "build[] a band shell in the park and dedicat[e] it to classical music (but not to jazz),"<sup>239</sup> Justice Kennedy attacks this analogy. He argues instead that the proper analogy would be "the Government's creation of a band shell in which all types of music might be performed except for rap music." He rightly worries that because more and more public debate happens on electronic media, "[g]iving government free rein to exclude speech it dislikes by delimiting public forums (or common carriage provisions) would have pernicious effects in the modern age."<sup>240</sup> But he does not fully answer the core questions of the plurality, best articulated by Justice Souter: how and why should the categorical treatments of attempted government restrictions through the public forum doctrine apply when media that have been given different degrees of protection in the past are converging? What justifies treating these ephemeral channels as areas opened to public discourse? The implications of this battle will be traced below, as we move into a consideration of the CDA and the manner in which the V-chip alters broadcast and cable television as media devices.

#### G. Justice Thomas's Concurrence and Dissent

Finally, Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, offered a partial concurrence and partial dissent arguing that all the section 10 provisions are constitutional. In contrast to the plurality, and agreeing in form but not substance with Justices Kennedy and Ginsburg, these three Justices find that *Denver Area* presents an opportunity to set clear guidelines on First Amendment protection for cable television. Justice Thomas attempts to allow the delegation of indecency policing rights to private operators in this realm while following a more traditional, formal First Amendment analysis than that of the plurality. He also attempts to avoid Justice Kennedy's problematic public forum analysis, but does so by mischaracterizing the cable operators' property interest in the channels at issue. Most interestingly, though, he recasts the proper government compelling interest in terms of parental authority rather than the blanket protection of children.

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238. See *infra* Part III.A.2.d.

239. *Denver Area*, 116 S. Ct. at 2389.

240. *Id.* at 2414.

## 1. Standards

Beginning with a declaration that the time has come to address the First Amendment's applicability to cable television regulation directly, Justice Thomas examines the Court's muddled assessment of governmental authority in this area. He notes that medium-specific analysis 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."<sup>241</sup> But he also sketches the Court's previous move, especially in *Turner*, toward the idea that cable is not sufficiently different from the nonbroadcast media to justify some lower level of scrutiny.<sup>242</sup>

The plurality's move away from the convergence of standards in *Denver Area* leads to a strong reproach from Justice Thomas. Their opinion, he argues, is "facially subjective and openly invites balancing of asserted speech interests to a degree not ordinarily permitted."<sup>243</sup> This is especially problematic here because *Turner* was in part an attempt to define such a cable standard, and because the growth of various media even since the *Turner* opinion diminishes the "bottleneck" problem that was still used there as justification for slightly different First Amendment treatment for cable.<sup>244</sup>

Apparently, then, strict scrutiny should apply to this content-based restriction on the cable programmers' speech. But because of his property-based establishment of a hierarchy of First Amendment interests, Justice Thomas instead forecloses analysis of the sections 10(a) and (c) claims because the petitioning cable programmers purportedly do not have relevant rights. For him, the programmers' claims are entirely subordinate to the rights of cable operators, who exercise editorial discretion over the mix of channels.<sup>245</sup> He argues that because the cable operators are merely given the power to decide whether to carry indecent programming, power that the operators would otherwise have possessed absent the leased access or PEG provisions of the laws at issue, the programmer's rights are not violated at all. This standing-type argument holds up only if one makes the controversial assumption that the world at the moment of cable's inception comprised cable operators with nearly absolute control over their property and government actors with no

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241. *Id.* at 2420 (citing *Los Angeles v. Preferred Communications*, 476 U.S. 488 (1986)).

242. *Id.* at 2420-21.

243. *Id.* at 2422.

244. *See id.* at 2422 & 2422 n.3.

245. *See id.* at 2422.

interest in the medium. Because history belies this,<sup>246</sup> Justice Thomas's approach on sections 10(a) and (c) cannot properly be adopted.

With respect to section 10(b), on the other hand, the government action clearly implicates the free speech rights of the petitioners on the basis of content, and Justice Thomas easily and simply claims to apply strict scrutiny to it. But his application of strict scrutiny shows that even the strong power of categorical analysis (as argued for by Justice Kennedy, and respected by Justice Souter), can be manipulated to create an outcome inconsistent with most Court precedent and clashing directly with the other six Justices' reading of the prior cases.

Justice Thomas begins by redefining the relevant compelling government interest here: instead of the vague protection of the "physical and psychological well-being of minors," the reformulated claim is that "government may support parental authority to direct the moral upbringing of . . . children."<sup>247</sup> In and of itself, this presents no particular problem; government should be able to assist parents in their duties to protect their children, especially if government is (rightfully) restricted from imposing content regulations except in extraordinary circumstances.<sup>248</sup> The problem comes in the application of this standard: he argues that it supports parental authority to impose the blocking requirement (ignoring the segregation and one-channel requirements) as a default position, and that the supposedly less-restrictive alternatives of the lockbox and reverse-blocking do not effectively further parental authority. Regardless of whether one believes Justice Thomas or the plurality as to the workability of the alternatives listed in the statute and FCC regulations, a holding requiring strict scrutiny's narrow tailoring would more clearly support parental authority by requiring cable companies, for example, to offer an installation option as to whether channels containing "indecentcy" should be blocked or unblocked by default.<sup>249</sup> It is only the manipulation and unimaginative application of the standard here that allows this regulation to pass strict scrutiny for Justice Thomas.

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246. See H.R. REP. NO. 98-934, at 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667.

247. *Denver Area*, 116 S. Ct. at 2429.

248. See *Ginsberg v. New York*, 390 U.S. 629 (1968).

249. This does pose the "list" problem noted in the Court opinion (Part III of the Breyer opinion), see *supra* Part II.B.3, but in a much less worrisome way. By gathering this data as part of the subscriber data taken at service initiation, it is not set out by specific written request to receive "the 'patently offensive' channel." *Denver Area*, 116 S. Ct. at 2391. In any case, as Justice Thomas points out, there are subscriber data privacy protections so that *Lamont v. Postmaster General*, 381 U.S. 301 (1965), is not at all on point.

## 2. Basic Justification in Context

Two issues are joined in considering the basic justification in Justice Thomas's opinion: first, whether there are different First Amendment claims to be considered under sections 10(a) and 10(c) on the one hand, and section 10(b) on the other; and second, the government interest to use in assessing section 10(b) if the claims are different. The contours of the first issue are described above, but deserve more attention here. In his discussion of *Turner*, Justice Thomas attempts (without citation to *Turner*) to argue that *Turner* "implicitly recognized" the paramount position of the cable operator's rights.<sup>250</sup> Cable programmers are said to be like freelance writers attempting to have their articles published in a newspaper or magazine, and cable viewers, though having the right to see what the broadcaster wants to present, have no claim on forcing the broadcaster to "say" what they want to hear (at least through governmental means).<sup>251</sup> All power of decision is presumptively lodged in the cable operators, because every channel is said to be their property. If this is the case, then sections 10(a) and 10(c) are radically different from section 10(b), since only the latter implicates the rights of cable programmers.

Our traditional compelling interest of protecting children is clearly paramount in section 10(b), but, as also noted above, it takes on the interesting twist of "parental authority to direct the moral upbringing of . . . children."<sup>252</sup> This reformulation may very well be a better expression of the goal that can constitutionally be sought, though it makes little difference in the cable context. Where it may make a difference is in assessing whether a blanket government action, such as the Communications Decency Act, that criminalizes a type of speech is narrowly tailored to meet the asserted interest.<sup>253</sup>

## 3. Narrow Tailoring

The effectiveness issue is addressed most directly under Justice Thomas's consideration of section 10(b). The plurality's analysis of less restrictive alternatives is noted (including V-chips), but ultimately those

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250. *Denver Area*, 116 S. Ct. at 2421.

251. *See id.* at 2421-22. Market means are of course appropriate — television seeks advertising dollars based on viewership, and low ratings thus generally sound the death knell for most programs.

252. *Id.* at 2429.

253. *See infra* Part III.A.

alternatives are cast as merely additional, possibly ineffective measures<sup>254</sup> that do not address the proper default regime:

Congress enacted in § 10(b) a default setting under which a subscriber receives no blocked programming without a written request . . . . Given the limited scope of § 10(b) as a default setting, I see nothing constitutionally infirm about Congress' decision to permit the cable operator 30 days to unblock or reblock the segregated channel.<sup>255</sup>

Though there may be a valid reason to see section 10(b)'s provisions as relatively uncontroversial were the standard somewhat relaxed, a strict scrutiny analysis generally requires more than dismissing a lengthy speech restriction as a mere "default setting."<sup>256</sup> As noted above, requiring that cable operators either provide a lock box, or else an installation option as to how set-top cable boxes would default, might both better serve the goals of promoting parental choice and authority, and also the simultaneous goal of minimizing restrictiveness.<sup>257</sup>

In addition to his dismissal of the overbreadth claim, Justice Thomas disregards the underbreadth challenge based on the indecency restrictions' applicability only to leased access channels.<sup>258</sup> He cites the rejection in *R.A.V. v. St. Paul* of a separate underinclusiveness analysis,<sup>259</sup> but does not explain how a speech-restricting provision could be narrowly tailored under strict scrutiny when that provision is substantially ineffective in fulfilling the proffered compelling interest. The *Butler* worry remains here: we want to respect adult choices enough to allow access to indecent material, protected under the First Amendment, but we also want to allow actions to be taken to protect children, and to enhance parental choice. In Justice Frankfurter's phrase, we do not want to "burn the house to roast the pig."<sup>260</sup> Only provisions that substantially achieve their goal can be construed as "narrowly tailored." By omitting the regulation of the other channels on a cable system (a problem remedied in part by an indecency blocking requirement in the 1996 Telecommunications Act),<sup>261</sup> the provisions are probably insuffi-

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254. See *Denver Area*, 116 S. Ct. at 2429.

255. *Id.* at 2429.

256. *Id.*

257. See *supra* Part II.G.2.

258. See *id.* at 2431.

259. *Id.* at 2431 (citing *R.A.V.*, 505 U.S. at 387).

260. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

261. See *supra* note 141 and accompanying text.



ciently protective, and hence not narrowly tailored under a true strict scrutiny analysis.

#### 4. Public Forum

Justice Thomas offers a strong critique of the idea that any cable channel could be a public forum, but does so solely by relying on an implausibly strong notion of property. As he asserts, "[c]able 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."<sup>262</sup> All of these assertions are technically accurate, but they overlook both the developmental history of leased access and PEG channels (treated in a sophisticated manner by the other opinions), and the background regulatory authority possessed by Congress in this area. The property interests of the cable operators are indeed at issue here, as they are the owners of most of the equipment involved, but the operators hold no preexisting right to control every channel on their system.<sup>263</sup>

Justice Thomas uses a "restoration of rights" approach to avoid analyzing the petitioners' claims under sections 10(a) and 10(c), claiming that Congress was merely restoring to cable operators basic property rights. But the idea that cable operators had full property rights over leased access and PEG channels is unfortunately not supported by anything other than blind assertion. At least with respect to the PEG channel arrangements addressed by section 10(c), had the cable operators not reserved those channels for local community use in the franchise agreement, the cable operators would possess no property at all. The PEG channels are a necessary condition of the existence of the cable operators' rights. Treating them in any other way is improper, especially when bolstered against the plurality's and Justice Kennedy's notation that these channels are effectively easements<sup>264</sup> by the false claim that a formal contractual easement is required.<sup>265</sup> Justice Thomas

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262. *Denver Area*, 116 S. Ct. at 2426 (footnote omitted). *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), comes fairly close on the last score, however, in its refusal to block a state constitutional interpretation that effectively made the shopping center's private property a public forum.

263. The agreement to cede control over the PEG channels effectively gives local franchising authorities an easement upon which the cable operators cannot intrude in a content-based manner. See *Denver Area*, 116 S. Ct. at 2394; *id.* at 2410 (Kennedy, J.).

264. See *id.* at 2394; *id.* at 2410.

265. See *id.* at 2426-27 (Thomas, J.) ("[N]othing in the record suggests that local franchising authorities take any formal easement or other property interest in those channels that would permit the government to designate that property as a public forum."). Justice Kennedy's response that a state court would likely find an easement created for these channels effectively dismisses this claim. See *id.* at 2410.

attempts to shore up his position by arguing that the interest in avoiding compelled speech would be paramount because with respect to PEG channels, "[c]able operators regularly retain some level of managerial and operational control over their public access channels . . . ."<sup>266</sup> The answer to this argument was stated above: without the agreement to provide these services as a quid-pro-quo for access to public rights-of-way, the cable operators would be unable to lay and maintain their cable, and thus would possess no working system (hence no property interest). PEG channels are, then, rightfully seen as public-private partnerships to provide outlets for speakers who might otherwise lack access to any video transmission system. In constituting the PEG channels as forums for the public, the application of public forum analysis (as it has developed) cannot be wrong, unless there is some problem with applying public forum analysis in the digital age.<sup>267</sup>

The argument that section 10(a) restores preexisting rights to cable operators is stronger because leased access channels were not part of the initial bargain that allowed creation of the cable system, but to treat the systems as private property without limitation by some legitimate regulatory interest is to view cable systems in an entirely novel way. It is more appropriate instead, as Justice Kennedy's opinion argues, to see cable operators as common carriers with respect to leased access channels, making content-based regulation of these channels by the cable operator suspect at best.<sup>268</sup>

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266. *Id.* at 2427.

267. Public forum analysis has been savagely criticized by many commentators. See Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1718-19 (1987) (collecting critical literature). Though I am somewhat sympathetic to these attacks on the grounds that the public forum doctrine often adds an unnecessary extra layer to the First Amendment analysis, I explore that criticism only briefly as it applies to the digital age. See *infra* Part III.A.2.d.

268. See *id.* at 2412. But see *id.* at 2425 (Thomas, J.) (citing 47 U.S.C. § 541(c)'s language that "[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service"). Justice Thomas's notation poses initial problems for the view that PEG channels can be properly examined with common carrier analysis, but the language bears the fair reading that the provision only bars the general finding that cable television systems are common carriers. For PEG channels, the common carrier obligations are created not "by reason of providing any cable service," but by reason of the agreement the cable operators sign with the franchising authority.

Figure 1: *Denver Area Opinions*

	Holding	First Amendment Fault Lines			
		Standard	Gov't Interest	Narrow Tailoring	Public Forum/Private Property
Justice Breyer	plurality	"close judicial scrutiny"	protection of children	loose overbreadth analysis	nonpublic forum, leased access regulatory incursion OK
Justice Stevens	concurrency	"close judicial scrutiny"	protection of children	loose overbreadth analysis	public forum analysis attractive but unadopted
Justice Souter	concurrency	"close judicial scrutiny" but acknowledges importance of clear standards	protection of children	loose overbreadth analysis	nonpublic forum, leased access regulatory incursion OK
Justice O'Connor	concurrency/dissent	"close judicial scrutiny"	protection of children	loose overbreadth analysis	nonpublic forum, including PEG channels
Justice Kennedy	concurrency/dissent	strict scrutiny	protection of children	strong overbreadth and underbreadth analysis	PEG - public forum, common carrier for leased access
Justice Thomas	concurrency/dissent	"strict scrutiny"	parental control	weak overbreadth analysis	private property

### *H. Encapsulating the Perspectives*

In examining each of the opinions, we have seen the Justices take a variety of approaches to the four critical questions: the standard to apply, the basic justification in context, the degree of narrow tailoring required, and the applicability of the public forum doctrine. Justice Breyer's plurality opinion and the concurrences of Justices Stevens, Souter, and O'Connor argue for a flexible standard (at least for the time being) because the evolution of communications technology is impossi-

ble to predict. Justices Souter, Breyer, and Stevens seem to think that future alterations in filtering technology will make a difference in the analysis to be applied. Justice O'Connor resists this notion somewhat in refusing to distinguish between sections 10(a) and 10(c); the five other justices reject it outright, though the blocs represented by Justices Kennedy and Thomas come down on opposite sides of the speech-protection divide.

On the basic justification issue, all the opinions unsurprisingly agree that the protection of children is a compelling government interest, and seven Justices find that easy access by children makes cable television somewhat more similar to broadcast than to print or telephone media. Justice Thomas's slightly different formulation of the government's interest, emphasizing parental control, makes little analytical difference in the cable context. But it may have a significantly different impact in assessing the CDA and V-chip.<sup>269</sup> In assessing narrow tailoring, most of the Justices pay careful attention to overinclusiveness worries, but neglect underinclusiveness or ineffectiveness concerns. A seven-Justice majority rejects the characterization of PEG or leased access channels as public forums. The plurality does so because of skepticism about whether such a characterization is useful, while three Justices refuse to designate as a public forum what they regard as private property.

In the next Part, I consider two practical issues, one the Court is facing now, and another that it will address in the near future. It will be helpful to keep in mind the big questions to which *Denver Area* provides only provisional answers. Will future changes alter the constitutional analysis? Do existing standards properly characterize the media in question? Is the child-protection interest properly defined? What makes one medium different from another, especially with respect to the articulated government interest? Must government attempts to regulate communications media and respect our values be perfect in the eyes of the court, or merely pay lip service to balancing First Amendment interests with other legitimate goals? Does the public forum doctrine add anything to our understanding of electronic media? And the ultimate question that I will address in Part IV: should the medium-specific First Amendment analysis that has dominated the Court's communications media jurisprudence survive in a convergent world?

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269. See *infra* Part III.A.

### III. THE FUTURE HAS ARRIVED

Because of the Court's fractured holding in *Denver Area*, any claim about the future import of the decision and its rationales will be terribly speculative. But the plurality's general reluctance to make a sweeping doctrinal declaration and its mention of specific issues such as the V-chip do reveal that the Court, though somewhat puzzled by the convergence of digital media, is thinking about the shape of emerging technology. From the opinions, we may be able to predict how *Denver Area's* approaches could be applied in current and future cases.

Consider, for example, the Communications Decency Act ("CDA") controversy. In a medium-specific world it will be difficult to apply cable television holdings to the Internet.<sup>270</sup> But because of convergence (and especially its explicit recognition in Justice Souter's opinion),<sup>271</sup> it seems fruitful to investigate *Denver Area's* possible application. We will also look into an issue not covered in *Denver Area*, but that pertains to any discussion of allowing different protections in differing contexts — the creative application of the zoning exception to strict First Amendment scrutiny in the familiar arena of atom-based space.<sup>272</sup>

Now consider the V-chip agreement. Applying broadcast and cable television holdings to the V-chip agreement seems on first glance to avoid the medium-specificity problem. But attempts to apply earlier media holdings will, paradoxically, lead to questions about whether they have anything to do with V-chip equipped televisions. The addition of a user-controlled filtration device, I will contend, changes the medium radically, and should result in a concomitant shift toward a more protective First Amendment analysis. A zoning analogy looms here as well, and allows the V-chip agreement to survive against a compelled speech challenge. This leads to a result that is, on balance, less restrictive of First Amendment interests than our current broadcast regime. Consideration of these issues will lead nicely into Part IV's broader explanation of how convergence undermines medium-specificity and why its decline is a good thing.

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270. See *ACLU v. Reno*, 929 F. Supp. 824, 862 n.7 (E.D. Pa.) (Buckwalter, J.) (noting that the vagueness of language in a cable context is not dispositive of its status in cyberspace), *prob. jurisd. noted*, 117 S. Ct. 554 (1996) (mem.) (No. 96-511).

271. See *Denver Area*, 116 S. Ct. at 2402-03.

272. There are of course atoms in cyberspace, but they are not the most interesting material. Bits and their manipulation determine the reality of cyberspace, while it is the manipulation of conglomerations of atoms that determine the reality of our everyday experience.

In looking to these questions, I aim to wear two hats. The first is a very Holmesian one,<sup>273</sup> using *Denver Area* to predict what the Court will do with the CDA and V-chip. The second is a more personal, evaluative one, assessing the Justices' choices along the First Amendment fault lines we have seen in *Denver Area*.

#### A. *Reno v. ACLU and Congressional Attempts at Content Control*

Congress passed the CDA<sup>274</sup> as part of the Telecommunications Act on February 1, 1996,<sup>275</sup> to the great consternation of most of the Internet community.<sup>276</sup> Championed primarily by conservative Democratic Senator James Exon of Nebraska, the CDA makes it unlawful to use a "telecommunications device" or "interactive computer network" to provide "indecent" materials to any person under eighteen years of age, and provides for punishment of up to two years in prison and a fine of up to \$200,000.<sup>277</sup> Indecency is defined in terms almost identical to the 1992 Cable Act provisions discussed in *Denver Area*, as encompassing the "patently offensive" display of "sexual or excretory activities or organs."<sup>278</sup> The CDA sets out a number of defenses to prosecution, providing for a variety of options for age verification that will allow a person posting indecent content on the World Wide Web, for instance,

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273. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

274. Telecommunications Act of 1996, Pub. L. No. 104-104, tit. 5, 110 Stat. 56, 133-43 (1996) (to be codified in scattered sections of 18 U.S.C. & 47 U.S.C.).

275. The overall bill was signed into law by President Clinton on February 8, 1996. See Kathy Lewis, *Telecom Bill Signed by Clinton; Firms Rush to Compete in Each Others' Markets*, DALLAS MORNING NEWS, Feb. 9, 1996, at 1A.

276. See, e.g., Amy Harmon, *Lobby Emerging to Fight Restrictions on the Internet*, L.A. TIMES, Feb. 27, 1996, at D1; David Post, *Understanding the Techno Evolution*, AM. LAW., Sept. 1996, at 104 (criticizing the CDA and describing *ACLU v. Reno* as "the Scopes trial for the electronic age").

277. Telecommunications Act § 502, 110 Stat. at 133-34 (to be codified at 47 U.S.C. § 223(a) & (d)).

278. Telecommunications Act § 502, 110 Stat. at 134 (to be codified at 47 U.S.C. § 223(d)(1)(B)). There is actually a statutory interpretation issue to be addressed before this statement is entirely accurate. Section 223(a) bars "indecent" speech transmitted "by means of a telecommunications device," but offers no definition of indecent. Section 223(d) provides the more extensive definition noted in the text, which is almost identical to that considered in *Pacifica*. Though two of the judges in *ACLU* found the terms "indecent," "in context," and "patently offensive" vague, see 929 F. Supp. at 856 (Sloviter, C.J.); *id.* at 858 (Buckwalter, J.), the better analysis is in Judge Dalzell's opinion. He found that the words in question denoted the same speech covered by past opinions such as *Pacifica*. See *id.* at 868-69. The *Denver Area* Court's dismissal of the vagueness argument makes Judge Dalzell's view on the topic likely to prevail in the Court's consideration of the CDA. See *supra* notes 89-91 and accompanying text.

to evade liability.<sup>279</sup> Among these are the provision of a valid credit card number or the use of an "adult access code."<sup>280</sup>

A First Amendment challenge to the CDA, *ACLU v. Reno*, was filed literally within minutes of its passage, leading eventually to extensive fact finding and a preliminary injunction against its enforcement by a three-judge district court panel in Philadelphia.<sup>281</sup> Another challenge was filed in New York shortly after the first, and also led to a preliminary injunction against the Act by a three-judge panel.<sup>282</sup> All six judges found that CDA facially unconstitutional because it was overly broad, and two also found it improperly vague in its definition of indecent speech and use of the words "in context" and "patently offensive."<sup>283</sup> The Supreme Court noted probable jurisdiction, and held oral argument on March 19, 1997. Noting the novelty of the question posed by the restriction of speech on the Internet, Chief Justice Rehnquist slightly extended the time allotted.<sup>284</sup> During the argument, the Justices explored the issue of how existing First Amendment jurisprudence should apply to this new and powerful communications medium. The Justices asked hard questions of both proponents and opponents of the CDA, and seemed cognizant of both the need to apply decisions from other communications media, including *Denver Area*, to cyberspace and the difficulty of doing so.<sup>285</sup>

### 1. Describing the Internet as a Communications Medium

Though medium-specific analysis may not survive digital convergence in the long run, the Court's picture of cyberspace as a distinct telecommunications medium will for the time being determine what constitutes acceptable regulation. This does not mean that analogies to

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279. The CDA applies to all transmission of material using a "telecommunications device" or an "interactive computer network," but most of the discussion here will focus on the World Wide Web. Other transmission "media" on the Internet include e-mail, chat rooms, Internet Relay Chat, Multi-User Dungeons/Domains ("MUDs"), and MOOs (Object Oriented MUDs). See generally *ACLU*, 929 F. Supp. at 834-38 (describing various transmission media in cyberspace).

280. Telecommunications Act § 502, 110 Stat. at 135 (to be codified at 47 U.S.C. § 223(e)(5)).

281. See *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa.), *prob. jurisd. noted*, 117 S. Ct. 554 (1996) (mem.) (No. 96-511).

282. See *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996).

283. Judges Sloviter and Buckwalter found the provisions vague in the Pennsylvania case. See *supra* note 279.

284. See Tony Mauro, *Extra Time, Extraordinary Argument*, *LEGAL TIMES*, Mar. 24, 1997, at 8.

285. See Linda Greenhouse, *Spirited Debate in High Court on Decency Rules for the Internet*, *N.Y. TIMES*, Mar. 20, 1997, at B10; see also Oral Argument, *Reno v. ACLU* (U.S. Mar. 19, 1997), available at 1997 WL 136253.

the other regimes are inappropriate or unimportant. Justice Souter's worry in his *Denver Area* concurring opinion that adoption of a definite standard in the cable medium would have "immense, but now unknown or unknowable, effects" on other media is initially appropriate because of the power of analogy.<sup>286</sup> Worry over the standard is also appropriate because, as Justice Souter noted, we are "approach[ing] the day of using a common receiver" for information.<sup>287</sup> Digital media moves us into a world where the communication of information is merely the transmission and reassembly of bits, with any transmission potentially using both the airwaves and wires to reach its intended destination.

Each of the four fault lines has some effect on the analysis here. The choices made by the *Denver Area* Justices in selecting a level of scrutiny, adopting a core compelling interest, analyzing the effectiveness of a regulation in serving that goal, and determining whether or not a medium or certain aspects of it are public forums, will have an impact on how the Court will evaluate the CDA. Of course, the possibility remains that the Justices will seize on some unique aspect of the Internet that has escaped my grasp to justify a different level of regulation, but *Turner's* clear attempt to move cable into a fully protected realm, interrupted perhaps only briefly by *Denver Area*, indicates a desire to avoid the creation of new categories. The *Denver Area* plurality's wait-and-see approach does, after all, imply the selection of a more definite standard at some point in the future.<sup>288</sup>

An analysis of each of the fault lines examined above and their outcome in *Denver Area* indicates that the CDA will probably be struck down. The most important of these is narrow tailoring, and specifically overbreadth — the CDA threatens too much protected speech in its attempt to accomplish the legitimate purpose of allowing some parental choice in childrens' viewing habits. In *Denver Area*, five Justices took the narrow tailoring analysis seriously, striking down the more onerous provisions as not appropriately limited, and Justice O'Connor added her vote with respect to the most restrictive provision (section 10(b)). With no changes in the composition of the Court, and indications from oral

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286. *Denver Area*, 116 S. Ct. at 2402; see also Cass Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993). Judges considering the CDA have found the most appropriate analogy to be the print regime, sometimes reaching back to point out that the classic debates of our Nation's and world history could have taken place in cyberspace. See, e.g., *ACLU*, 929 F. Supp. at 881 (Dalzell, J.) ("Federalists and Anti-Federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern-day Luthers still post their theses, but to electronic bulletin boards rather than the door of the Wittenberg Schlosskirche.").

287. *Denver Area*, 116 S. Ct. at 2402.

288. See *id.* at 2385 ("[W]e believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now.") (emphasis added).



argument that a number of Justices understand that the Internet is not so radically different from all other media as to need its own more restrictive regime,<sup>289</sup> the plurality Justices, as well as Justices Kennedy and Ginsburg, are likely to do the same here and strike down the CDA.<sup>290</sup>

## 2. Fault Lines and the CDA

### a. Standard

In choosing a standard to govern the Internet, the Court is likely to adopt the *Turner* setup because of both the Court's increasingly skeptical approach to giving different analysis to media other than broadcast,<sup>291</sup> a string of cases broken partially by *Denver Area*, and the Internet's status as a democratizing medium.<sup>292</sup> This would lead to intermediate scrutiny for structural regulation, with a thorough review to determine whether the action was in fact content-based, and then strict scrutiny for content-based regulation. In form, this is almost identical to the analysis in the traditional speech realm: intermediate scrutiny for speech-affecting regulations not targeted at content<sup>293</sup> and strict scrutiny for content-based regulations.<sup>294</sup> Adding to the *Turner* precedent and *Denver Area*'s vague reinforcement of it by striking down the most restrictive provisions, the Internet's democratic character and rapidly developing filtering capabilities may help move the court in this direction.<sup>295</sup> The Internet is

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289. See, e.g., Mauro, *supra* note 284 (discussing the Justices' analogies to public sidewalks and telephones).

290. The likely decisions of the other three Justices are less clear. Chief Justice Rehnquist and Justice Scalia have sometimes been more protective of speech interests than expected. See *Hustler v. Falwell*, 485 U.S. 46 (1988) (Rehnquist, C.J.); *Texas v. Johnson*, 491 U.S. 397 (1990) (opinion of the Court joined by Scalia, J.). Justice Thomas has not yet participated in enough free speech cases to gather a full indication of his approach, though his *Denver Area* opinion does not bode well for broad First Amendment interests. See *supra* Part II.G.

291. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 639 (1994).

292. It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country — and indeed the world — has yet seen. The plaintiffs in these actions correctly describe the "democratizing" effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them.

*ACLU*, 929 F. Supp. at 881 (Dalzell, J.).

293. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *O'Brien v. United States*, 391 U.S. 367 (1968).

294. See, e.g., *Simon & Schuster v. New York State Crime Victims Bd.*, 502 U.S. 105 (1991).

295. See *ACLU*, 929 F. Supp. at 881 (Dalzell, J.) (discussing democratic character); *id.* at 838-40 (discussing the PICS content filtration system).

potentially a broadcast medium in that it is technologically based and will have a huge cultural effect (someday even attaining "pervasiveness"),<sup>296</sup> but it also acts as a newspaper or magazine,<sup>297</sup> a book,<sup>298</sup> and a telephone.<sup>299</sup> For both sets of lower court judges considering the CDA, the comparisons appropriately ran much more closely to the open print medium and concomitant protective First Amendment regime than to the less protective possibilities.<sup>300</sup>

Two other factors strengthen the conclusion that cyberspace will and should get full First Amendment protection in *Reno v. ACLU*. First, because the restriction at issue in the CDA is clearly content-based and undertaken by the government, and not the largely private action at issue in *Denver Area*, strict scrutiny should apply.<sup>301</sup> Second, the criminal penalties at issue will also push the Court in such a direction, if only in

296. See *id.* at 877 (finding the Internet "an abundant and growing resource"). On the varied meanings of pervasiveness, see *infra* Part III.A.2.b.ii.

297. There are currently thousands of newspapers online. For pioneering examples, see *San Jose Mercury News* <<http://www.sjmercury.com>>; *Los Angeles Times* <<http://www.latimes.com>>. Magazines can also be found on the web, both those that have started there, see *Slate Magazine* <<http://www.slate.com>>, and those that migrated there from print, see *U.S. News & World Report* <<http://www.usnews.com>>.

298. See William Mitchell, *City of Bits* (posted 1995) <[http://www.mitpress.mit.edu/City\\_of\\_Bits/](http://www.mitpress.mit.edu/City_of_Bits/)> (online book); see also Eugene Volokh, *Cheap Speech and What It Will Do*, 105 YALE L.J. 1805, 1823-24 (1995) (describing an online "cbook").

299. The Netscape browser package, for example, includes a program called Cool Talk that allows for voice "telephone" connections over the Internet. See *Introducing Navigator 3.0* (last visited May 2, 1997) <[http://www.netscape.com/comprod/products/navigator/version\\_3.0](http://www.netscape.com/comprod/products/navigator/version_3.0)>.

300. See, e.g., *ACLU*, 929 F. Supp. at 881 (Dalzell, J.); *Shea v. Reno*, 930 F. Supp. 919, 923 (S.D.N.Y. 1996) (describing plaintiff Shea's newsletter as "a daily newspaper distributed solely by electronic means").

301. This will not be the case if the Court holds that indecent speech is subject to lesser protection under the First Amendment, or if it holds that the CDA targeted only the secondary effects of the speech in question. Justice Stevens has implicitly advocated the former perspective, often mixed with the latter. See, e.g., *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976) (upholding anti-smut business zoning and saying, "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance"). Justice Souter may have endorsed a similar view in *Denver Area*. See *Denver Area*, 116 S. Ct. at 2401 (noting that *Pacifica* did not address "a separate category of indecency at the First Amendment's periphery"). Justice O'Connor's inability to find a difference between § 10(a) and § 10(c) may also be traceable to this proposition. See *id.* at 2403-04. Though such an approach was not followed in Justice Thomas's concurrence/dissent, one might contend that his weak version of "strict scrutiny" in effect reaches the same result. Thus, it is within the realm of possibility that six Justices could hold that indecent speech is subject to less constitutional protection, on the order of intermediate scrutiny. Such an outcome is unlikely to happen in any clear fashion, though, because of the other divisions among the Justices, analyzed in Part II, and the failure of the secondary effects doctrine here, traced in Part III.A.3 below.

deference to the rule of lenity.<sup>302</sup> Such an approach would again fit well with *Denver Area* in that the provision upheld there was merely permissive for private actors (a fact noted in a number of the opinions),<sup>303</sup> and involved no criminal penalties. This would also accord well with *Sable* and *Pacifica*. The CDA owes much more in its provisions to the dial-a-porn ban passed by Congress in *Sable* than the time-specific restriction on profane speech covered in *Pacifica*.<sup>304</sup> The CDA's provisions are criminal, and the barrier to access is greater than merely turning on a TV set and inadvertently finding indecent material on one's screen. As Judge Dalzell explains in *ACLU v. Reno*, "[t]he Government may well be right that sexually explicit content is just a few clicks of a mouse away from the user, but there is an immense legal significance to those few clicks."<sup>305</sup>

## b. Core Justification in Context

### (i) Child Protection or Parental Control?

Formulating the government interest that can properly be protected is critical to assessing the CDA's operation in cyberspace. While the choice between Justice Breyer's formulation of the interest as "child protection," and Justice Thomas's more precise "facilitation of parental control of a child's upbringing" made little difference in *Denver Area*, it could potentially determine the life or death of broad measures like the CDA. If the former is judged legitimate, then the government is much more free to restrict speech, while the latter requires a more nuanced approach.

In determining the proper formulation of the government's interest, one quite salient point about the CDA is that it criminalizes a parent's action in using a computer to show "indecent" material to a child.<sup>306</sup> Recall that indecency is not necessarily the same as pornography, even though the latter is clearly the target — it can potentially be a graphic educational demonstration of the mechanics of sex, or information on AIDS transmission, etc., material that some parents may want to give their children. Barring parental provision of such material to children is

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302. See ESKRIDGE & FRICKEY, *supra* note 139, at 655-75 (describing rule of lenity).

303. See *Denver Area*, 116 S. Ct. at 2387 (plurality); *id.* at 2403-04 (O'Connor, J.).

304. The CDA will, for example, be codified in the same section of the U.S. Code (47 U.S.C. § 223) as the revised dial-a-porn provisions upheld after *Sable*.

305. *ACLU v. Reno*, 929 F. Supp. 824, 876 n.19 (E.D. Pa.) (Dalzell, J.), *prob. juris.* noted, 117 S. Ct. 554 (1996) (mem.) (No. 96-511); see *infra* notes 316-25 and accompanying text.

306. Thanks here to Larry Lessig for helping my thinking on this point.

certainly constitutionally problematic under *Meyer v. Nebraska*<sup>307</sup> and *Pierce v. Society of Sisters*,<sup>308</sup> which allow parents extensive due process rights in determining the educational material to which their children are exposed. To avoid this problem, the Court could find that the proper scope of government interest extends only to furthering parental control.<sup>309</sup> Though merely applying the CDA to commercial pornography organizations, as the Justice Department has pledged to do,<sup>310</sup> would seem to allow the statute to survive without harming parental rights, the statute is not limited on its face in such a manner. As long as parental provision of indecent material is criminalized, it is clear that the government action is not narrowly tailored to enhance parental authority. Indeed, if it is criminalized even as to the parents, then it undermines that authority, and increases the chance that the Justices will strike down the law.

(ii) Scarcity and Pervasiveness in Cyberspace

Because this is the Court's first encounter with the Internet, there remains some possibility that it will reach back to earlier justifications such as scarcity or pervasiveness. One journalist captured the worry that the Justices might not understand the radically transformative nature of the medium by noting that "[t]he court has no Web site, and it still hands out quill pens to the lawyers who argue before it."<sup>311</sup> While *Turner* and *Denver Area* intimated a complete turn away from the scarcity rationale and its resultant allocation of content-based power to the government, the very slight possibility of some bootstrapping remains. But such an approach should not succeed because one of the major justifications for the different treatment of broadcasting offered in *Red Lion* is not and cannot be true of the Internet: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."<sup>312</sup> For the Internet, positing just such an unabridgeable right is not idle at all — it expresses one of the most attractive features of the medium. With only a relatively minimal investment, a speaker may broadcast his

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307. 262 U.S. 390 (1923).

308. 268 U.S. 510 (1925).

309. Cf. *United States v. X-Citement Video*, 115 S. Ct. 464, 470 (1994) (limiting a statute by its purpose to save its constitutionality); ESKRIDGE & FRICKEY, *supra* note 139, at 675-87.

310. See *ACLU*, 929 F. Supp. at 854-55 (Sloviter, C.J.).

311. Tony Mauro, *High Court Decidedly Disconnected from Case*, USA TODAY (Mar. 19, 1997) <<http://usatoday.com/life/cyber/tech/cta021.htm>>.

312. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969).

or her views to the world by e-mail, Usenet, or a Web page in a way that blocks no other speaker.<sup>313</sup> The rejection of the scarcity rationale in the cable regime, reaffirmed in *Denver Area*, fully applies here.

The real fear and uncertainty that the Court will find broad government power over the Internet comes from *Pacifica's* pervasiveness rationale, even if the CDA is struck down.<sup>314</sup> With the move to "push broadcasting" and the increasing predictions that the Internet will be more like television — indeed that the two will converge into one information appliance<sup>315</sup> — the Internet community becomes more and more worried that such an establishment of trading posts and channels in cyberspace will lead to the rampant regulation they have always feared.<sup>316</sup>

This worry has been fostered lately by Justice Scalia's questioning at oral argument in *Reno v. ACLU* and by writings in the pages of this *Journal* that the recharacterization of the Internet as a channel-based medium could allow for extensive regulation like that of the CDA.<sup>317</sup> In the lower court consideration of *ACLU* and *Shea*, the Internet was treated as an abundant and growing, but presumably not "pervasive" medium, at least not in the *Pacifica* sense.<sup>318</sup> This conclusion could change if the rapid growth of the Internet continues.<sup>319</sup> If "pervasiveness" is given a narrow meaning that allows for easy qualification as part of the less-restrictive broadcast regime, broadcast-style regulation is a legitimate fear. Indecent material could potentially enter into the home and confront someone clicking around, "surfing the web," just as indecent material can be reached by a channel surfer.<sup>320</sup> With the push media

313. See *ACLU*, 929 F. Supp. at 834-38 (describing means of communicating over the Internet).

314. The most interesting possible permutation has the CDA being struck down, and then later revived as the medium becomes more pervasive. See Nesson & Marglin, *supra* note 83, at 127-30.

315. See, e.g., Frank Rose, *The End of TV As We Know It*, FORTUNE, Dec. 1996, at 58.

316. See Brock N. Meeks, *The CDA in the Land of the Undead*, MSNBC (visited Apr. 24, 1997) <<http://www.msnbc.com/news/64679.asp>>.

317. See *id.* ¶ 10 (noting Justice Scalia's question in the CDA oral argument whether it is "possible that this statute is unconstitutional today, or was unconstitutional two years ago . . . but will be constitutional next week? Or in a year or two years?"); *id.* ¶ 13 (discussing Nesson & Marglin, *supra* note 83).

318. See *ACLU*, 929 F. Supp. at 877 (distinguishing *Pacifica*); *Shea*, 930 F. Supp. at 940 (holding that lack of evidence on accidental viewing risk distinguishes *Pacifica* and allows application of strict scrutiny).

319. See Nesson & Marglin, *supra* note 83, at 121; Meeks, *supra* note 316, ¶ 4.

320. On channel surfing in the cable context, see, for example, *Geary v. Goldstein*, 831 F. Supp. 269, 275 n.5, 277 n.7 (S.D.N.Y. 1993), reconsidered in *Geary v. Goldstein*, 1996 WL 447776, \*2-3 (S.D.N.Y. 1996). The program at issue in *Goldstein* was broadcast on Manhattan cable's famous Channel 35, which was one of the main targets of Sen. Helms in passing the § 10 provisions at issue in *Denver Area*.

mentioned above, a subscriber to a channel may not always have warning before indecent material might be transferred to her computer.

Many factors, however, distinguish channels in cyberspace from those on television and radio. First is the fact that many Web sites are already labeled with a number of clues as to their content, from titles, to entry screens, to warnings using the common gateway interface ("CGI") scripts that Justice O'Connor's questioning addressed in the CDA oral argument.<sup>321</sup> On the Web, it is almost impossible merely to cycle through options aimlessly — to surf — and accidentally come upon some indecent material. There is no reason to think that channeled push material would be any different. Channels would be clearly labeled to attract their intended audience, with much more information than "NBC" or "Channel Four" gives us today. Second, there are so many sites from which to choose that television "channel surfing" even on the most extensive cable or direct broadcast satellite systems is nothing compared to surfing on the Web. Even if there is a move to push media, where an individual subscribes to certain channels established by content providers and willingly accepts whatever the content provider puts on them (until unsubscribing), there could be fifty, five thousand, or five million channels.<sup>322</sup> Third (and most important) is the current availability of blocking software for sexually-oriented sites,<sup>323</sup> and the rapid development of nongovernmental systems for third-party rating such as the Platform for Internet Content Selection ("PICS") that will be supported by the most prominent web browsers, Netscape's Navigator/Communicator and Microsoft's Internet Explorer.<sup>324</sup> As these

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321. See Steven Levy, *U.S. v. the Internet*, NEWSWK., Mar. 31, 1997, at 77.

322. On push technology, see Kevin Kelly and Gary Wolf, "Push", WIRED, Mar. 1997 at cover, 12. For examples of the technology, look to the Marimba web site at <<http://www.marimba.com>> or Pointcast's site at <<http://www.pointcast.com>>.

323. See *ACLU*, 929 F. Supp. at 838-42 (discussing available and planned blocking software).

324. See Paul Resnick & James Miller, *PICS: Internet Access Controls Without Censorship*, COMMUNICATIONS OF THE ACM, Oct. 1996, at 87 (available at <<http://www.w3.org/pub/WWW/PICS/iacwcv2.htm>>). Many in the Internet community have objected to the power of PICS as a tool for censorship. See Jeffrey Rosen, *Can the Government Stop Cyberporn?*, THE NEW REPUBLIC, Mar. 31, 1997, at 15 (describing Larry Lessig's argument that "PICS is the devil" because it allows censorship throughout a distribution chain). The objections here seem to be more to the potential misuse of the technology than to the technology itself, though there may be legitimate worries about anti-social effects of further subdividing into interest-defined communities. Cf. Robert D. Putnam, *The Strange Disappearance of Civic America*, THE AMERICAN PROSPECT, Winter 1996, at 34 (available at <<http://epn.org/prospect/24/24putn.html>>). China's censorship plans are often cited as a special concern of those who criticize PICS. See Rosen, *supra*. But the current state of Internet connection in China — requiring that international communications come through one state-owned distribution network with stranglehold control, see Tim Healy & David Hsieh, *Great Firewall of China? Beijing Slaps*

features become built-in to Internet access devices because of customer demand, the need for the government to step in and mandate controls such as the CDA is significantly diminished.

Thus, while the medium is or will be "pervasive" in the most ordinary sense of the word, the nature of its place in the home and the material that enters will not be so, at least not in the same way that broadcast radio or television is today. Interactivity and user control change the analysis drastically, as they should.<sup>325</sup> Notably, the plurality opinion and Justice Souter's concurrence in *Denver Area* approvingly mentioned the coming V-chip, though they of course reserved judgment on its constitutionality.<sup>326</sup> I will address the similarities between PICS and the V-chip more extensively below, but it will suffice here to note that they are both automated content filters that can be applied by parents when they are not present. There is no reason that a medium like cyberspace, with current and potential filtering devices, should be disadvantaged when those devices are built-in parts of its nascent pervasiveness.

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*Restrictions on Internet Access*, ASIARK, Oct. 18, 1996, at 33 — is a much greater threat to freedom than PICS. Critics seem to assume that, absent PICS or a similar system, China would not develop themselves, or hire foreign (even American) companies to write, software or structure hardware to accomplish PICS' content filtration capabilities more successfully. See Gary Chapman, *The Cutting Edge: China Represents Ethical Quagmire in High-Tech Age*, L.A. TIMES, Jan. 27, 1997, at D1 (noting Bay Networks' joint venture with the Chinese government to build the "China Wide Web" intranet). A totalitarian system will attempt to censor any material that threatens its control; though worries about the possible misuse of otherwise useful and easily created technology are not unreasonable, they should not prevent legitimate advances. If PICS were required to be bundled with all browser software in China, that could diminish the pressure for more restrictive measures like the "Great Firewall of China." This would allow for more virtual ports of entry that could be hacked through, and a greater chance that human rights and other information could flow in and out of China and other repressive regimes. See Michael Clough, *U.S. Business Could Help Undercut China's Internet Controls*, L.A. TIMES, Sept. 15, 1996, at M2 (describing China newsgroup participant's offer to circumvent proposed controls); *Hacker Leaves His Mark on Telekom Internet Site*, SINGAPORE STRAITS TIMES, Feb. 20, 1997, available in LEXIS, News Library, Curnws File.

325. See Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1629-35 (1995).

326. See *Denver Area*, 116 S. Ct. at 2392 (plurality); *id.* at 2402 (Souter, J.); see also *id.* at 2430 (Thomas, J.)

## (iii) Defining Pervasiveness for the Digital Age

Moving away from specific differences among media, we might try to determine whether *Pacifica* and *Denver Area*'s holding on section 10(a) threaten cyberspace by asking two questions: what does "pervasiveness" mean, and how does it justify special First Amendment treatment for broadcasting? The answers effectively determine whether the *Pacifica* regime can be properly applied to the Internet. Professor Jack Balkin has quite helpfully set forth five separate possible meanings of "pervasiveness" as applied to broadcasting, only the last of which (on his reading) should have legal significance: first, it means that the media in question is powerful; second, that it is ubiquitous; third, that it is constitutive of our culture; fourth, that it poses questions of captive audiences; and finally, that it poses difficult problems of parental control.<sup>327</sup> His rejection of the first four as irrelevant to the constitutional analysis is entirely appropriate: all of these justifications apply equally to print media and content delivered by common carrier lines, and all will apply to cyberspace as well.<sup>328</sup>

It is under the fifth possible meaning, that of parental control, that the Internet poses the classic *Pacifica* problem of how to avoid "enlarg[ing] a child's vocabulary in an instant."<sup>329</sup> *Pacifica* clearly held that a broad government action — a time-channeled ban — to prevent children from hearing indecent material was permissible on broadcast stations, while *Sable* just as clearly stated that broad restrictions — overall bans — on disseminating indecent material over the telephone are improper. The issue is a different and more sophisticated one than whether a new medium is more like known medium A or known medium B; the issue is now how much government regulation is justified to protect children from this material.

The matter can be broken down into three questions: When can government pursue a blanket, content-based strategy of disfavoring or prohibiting indecent speech? May the government go so far as to assure that even parents do not expose their children to indecency? If not, then

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327. See J.M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1137-38 (1996).

328. As Michael Kinsley has noted, with tongue planted firmly in cheek, the medium of paper is the real problem, with all the awful ideas it has propagated. Above and beyond the terrible accounts it has carried, the medium is pervasive: "[N]o parent can realistically patrol a child's access to paper. It's everywhere — even at the library and other taxpayer supported institutions. Rating systems do not exist. Filtering software is not available." Michael Kinsley, *Editorial: A Dangerous Medium*, ¶ 8 (Apr. 5, 1997) <<http://www.slate.com/Readme/97-04-05/Readme.asp>>.

329. *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978).



how does the reconstitution of this interest as "parental control" affect the analysis of particular restrictions?

The answer to the first question in every medium except for broadcast has been "virtually never," and the answer to the second has been a flat "no."<sup>330</sup> Government may help parents in filtering this material out by restricting the sales of indecent materials to minors,<sup>331</sup> but it may not ban indecent speech altogether on even a technologically-based medium, as the Court found in *Sable*. The *Denver Area* Court's action in upholding section 10(a)'s delegation of review power over leased access channels is distinguishable here, as it rested in large part on the delegation of indecency patrols on channels cable operators would control as private speakers if not for government regulation requiring they be turned over to other entities.<sup>332</sup> The *Pacifica* opinion thus stands alone, with broadcast's special situation of technologically allowing only de minimis parental control providing the major basis of distinction.

Choosing whether to characterize the government interest as furthering parental control or the general protection of children brings us back to *Denver Area*. Recall that the four Justice plurality and Justices Kennedy and Ginsburg in concurrence all focused on generally protecting children, while Justice Thomas's opinion for himself, Chief Justice Rehnquist, and Justice Scalia keyed in on parental control. In the context of indecency restrictions, using the protection of children rationale could militate toward allowing such a restriction as extensive as the CDA, especially when considering the generous safe harbor provisions, not to mention the fact that children often know more than their parents about technology.<sup>333</sup> If parental control is the issue, including parental choice

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330. The third question will be answered throughout this Part.

331. See *Ginsberg v. New York*, 390 U.S. 629 (1968).

332. See *supra* Parts II.B & II.F.

333. This results in some irony, as the more libertarian plurality and concurrence in *Denver Area* could end up over time protecting less speech through their focus on the protection-of-children rationale rather than the parental control rationale articulated by the bloc of Justices who would have upheld all the speech-restrictive measures. Such an outcome would be especially ironic in light of Justice Souter's worry that the Court not adopt standards that would "have unknown and unknowable effects" on the First Amendment's development in cyberspace. *Denver Area*, 116 S. Ct. at 2402 (Souter, J.). If this is ultimately the outcome, it would give special force to Justice Kennedy's suggestion that the Court "ought to begin by allowing speech, not suppressing it." *Id.* at 2407 (Kennedy, J.).

to expose children to some indecent material,<sup>334</sup> then the proper scope of government intrusion is somewhat lessened.

Looking back at Professor Balkin's analysis of the meaning of pervasiveness, and the Court's treatment of issues such as public exposure to indecent material, the more proper characterization of the true compelling interest is to allow for parental choice in determining the influences to which their child is exposed. The idea that the government can properly override even express parental decisions that their children be exposed to constitutionally protected speech is one foreign to the Constitution. Rejection of similar claims has an extensive history as a due process doctrine, with *Meyer v. Nebraska*<sup>335</sup> protecting foreign language instruction, in part on parental authority grounds, and *Pierce v. Society of Sisters*<sup>336</sup> protecting the right to send children to private schools.<sup>337</sup> Indeed, this principle has even been previously applied in the indecent speech context. Justice Brennan's opinion in *Ginsberg v. New York*, upholding the criminalization of pornography sales to minors, relied on just this rationale, concluding that it is within legislative power to assist parental authority through a shaping of the marketplace:

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334. To take portions of a fairly recent controversy where parental consent clashed with potential government control, we can imagine that Steven Spielberg had chosen to show *Schindler's List* for free over the World Wide Web. (While video quality is not quite good enough to do this right now, it will be soon). Though the graphic violence in *Schindler's List* and the nudity of the concentration camp victims would not have fit within the CDA's definition of indecency, its portrayal of sexual activity between Oskar Schindler and a variety of women very well may have, even though that was clearly not the focus of the film. See *SCHINDLER'S LIST* (Universal Pictures 1995). We can imagine that Spielberg's introduction to the webcast would be similar to that when it was shown uncut on broadcast television — noting that he had not yet allowed his younger children to see it, but that he thought allowing high school students to watch was entirely appropriate, despite the fact that it carried the TV-M rating. See Caryn James, *Bringing Home the Horror of the Holocaust*, N.Y. TIMES, Feb. 23, 1997, § 2, at 36. In the broadcast situation, Oklahoma Republican Congressman Tom Coburn severely criticized NBC for showing the movie from 7:30 to 11 p.m., pointing to the scenes involving Schindler and women and the nudity of concentration camp victims. See Judith A. Garbo, *Critic's Views Offensive, Irresponsible*, ORLANDO SENTINEL, Feb. 28, 1997, at A19. We can thus quite easily imagine him or another conservative figure doing the same for the webcast. He was rightly upbraided for insensitivity, a lack of understanding of context, and a misunderstanding about the parental role in choosing what their children should see. See *id.* Exactly the same criticisms should be leveled at the CDA. It does not allow parental choice in how to teach their children about the real experiences of the world, substituting government filtering where private technological and other means are available. I offer a number of reasons throughout this Note why the Court will find it unconstitutional, and why it should. But regardless of whether this is constitutional, it is not a good idea.

335. See *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

336. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

337. See *supra* Part III.A.2.b.ii.

[C]onstitutional 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 . . . . The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.<sup>338</sup>

With a parental authority characterization, necessary because of prior case law and a need to refine the meaning of pervasiveness, the CDA should not survive, as it does not further the interest of parental choice in a narrowly tailored manner.<sup>339</sup>

### c. Narrow Tailoring

While the standard of review and characterization of the government interest are important, especially in the Court's first encounter with the Internet, the critical area in *Reno v. ACLU* will likely be whether the CDA is narrowly tailored to serve the recognized government interest, whatever degree of scrutiny is applied. The contrast between the heightened scrutiny of the *Denver Area* plurality's approach, the strict scrutiny applied in Justice Kennedy's opinion, and the "strict scrutiny" applied in Justice Thomas's opinion, however, should give some pause as to what exactly this distinction means. Not only are there potential underbreadth and overbreadth arguments here, there are also worries about whether the standards for assessing provisions under strict scrutiny are firm enough to do the work they are expected to do. The narrow tailoring required under intermediate scrutiny is less stringent than that under strict scrutiny, and does not require a perfect fit, but since the provisions of the CDA are without question content-based, intermediate scrutiny should not come into play.<sup>340</sup>

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338. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

339. For precisely this reason, Deputy Solicitor General Seth Waxman attempted to rewrite the CDA in the *Reno v. ACLU* oral argument by encouraging the Justices to find a parental exemption. See Mauro, *supra* note 284. Justice Ginsburg properly dismissed the possibility: "That kind of tinkering, courts don't do." See *id.*

340. One way in which an attempt might be made to push the analysis into intermediate scrutiny is to play up the "safe harbor" provisions of the CDA, arguing that though the default is criminal prosecution for providing indecency to minors, such prosecution is easily avoided in a number of affordable ways set out in the statute itself. See Rosen, *supra* note 324; Brief for Appellants, *Computers, Freedom, and Privacy Conference Moot Court* (visited Apr. 26, 1997) <<http://www.c-span.org/mootbri.htm>>.

What *Denver Area* shows is that six of the nine Justices are dedicated to applying the narrow tailoring criteria in a fairly strict way, demanding that the fit between means and goal be relatively tight. The Justices found the segregate and block requirements of section 10(b) overly broad to accomplish the purposes of protecting children from indecent speech. This indicates that the CDA's broad criminalization of providing indecent material to minors will be constitutionally suspect. If the government interest is characterized as parental control, the CDA will not survive, as the law is not parent-empowering, but parent-disempowering through its criminalization of all provision of indecent materials to minors. If the more general protection of children rationale is accepted by a majority of the Court, the CDA is more likely to survive, but there are still many challenges under strict scrutiny to whether it is appropriately tailored to reach no more speech than is necessary to accomplish its purpose, and, significantly, to reach enough speech to be reasonably effective. On the former claim of overbreadth, the CDA risks criminalizing, as Justice Breyer noted at oral argument, an online discussion of teen sexual experiences<sup>341</sup> that may in fact dissuade children from early sexual activity. On the latter underbreadth claim, it is significant that a large portion of sites on the World Wide Web are foreign, and which CDA does not, and cannot, reach.<sup>342</sup> The Court seemed hostile to an underbreadth claim at oral argument, but it is not a dead issue.<sup>343</sup> Even if the underbreadth argument does not succeed, the overbreadth claim should, because the classic worry of overreaching in this realm — that adult access not suffer excessively — comes to the fore, at least for six of the Justices.<sup>344</sup>

#### d. Public Forum

While this approach has not been attempted with regard to the CDA, an argument that the Internet is some type of public forum might be attempted in the next set of Internet restrictions, tracing the origins of the network to its initial federal funding and support over the years, or to its public function.<sup>345</sup> This may well arise in challenges to library exclusion or content-blocking policies such as that adopted in Boston after children

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341. See Mauro, *supra* note 284.

342. This argument is developed in Nesson & Marglin, *supra* note 83, at 130-33.

343. See Mauro, *supra* note 284, at 9.

344. Again, the approaches of Chief Justice Rehnquist and Justices Scalia and Thomas here are uncertain, as all have indicated more extensive devotion to rigorous First Amendment analysis than *Denver Area* suggests. See *supra* note 290.

345. See generally David J. Goldstone, *The Public Forum Doctrine in the Age of the Information Superhighway (Where are the Public Forums on the Information Superhighway?)*, 46 HASTINGS L.J. 335 (1995).

used library computers to access pornography.<sup>346</sup> Because the public forum doctrine is usually used to attack exclusion of certain material from public spaces, someone challenging the CDA or one of its progeny might call for its designation as a general public forum with the resultant strict scrutiny of content-based regulation. This would not necessarily eliminate regulation: governments are allowed to regulate general public forums to restrict the time, place, and manner of speech with restrictions not targeted at content,<sup>347</sup> and there is of course the limited public forum possibility noted by the plurality in *Denver Area*.<sup>348</sup> But what would a court do in negotiating a regime that is asynchronous, effectively exists in no specific place, and where almost all regulation of the manner of speech will inevitably have effects on content because of the visual nature of the medium?<sup>349</sup> A future Court might be willing to go along with such an approach, but the Court as currently constituted shows clear resistance in *Denver Area*. In any case, this may make little difference in the indecency realm, as empowering parents to keep this material out of the hands of children is undoubtedly a compelling interest under strict scrutiny, though the selection of standards does affect the degree of narrow tailoring that is required.

Claims that the Internet is a public forum neglect one major factor that was a significant dividing line among the Justices in *Denver Area*: one of the primary questions in determining whether a potential "place" for speech can be a public forum is whether it is in fact public. Privately controlled space cannot generally be deemed a forum open to expression without some prior regulatory involvement. There are of course the hard cases of company towns and shopping malls that make this distinction a bit more blurry.<sup>350</sup> But that does not mean that there is no public/private property distinction, especially when it comes to government action that "opens up" a space for speech access.

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346. See Amy Argetsinger, *Libraries Urged to Nip Internet in the Buff, Explicit Material Spurs Calls for Curbs, Opponents Cry Censorship*, WASH. POST, Apr. 21, 1997, at B1.

347. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *United States v. O'Brien*, 391 U.S. 367 (1968).

348. See *supra* Part II.B.4.

349. See *O'Brien*, 391 U.S. at 376 (distinguishing protected speech from conduct). Even e-mail now incorporates visual elements. The classic speech-affecting regulations subject to intermediate scrutiny have been those aimed at conduct as opposed to the speech that goes along with it. Thus, *O'Brien* was tried and convicted for burning his draft card, and the conviction was upheld by the Supreme Court. Can posting something on the Web be conduct rather than speech, or otherwise be removed from the realm of content-based restrictions subject to strict scrutiny? Cf. *infra* Part III.B.2.

350. See *Marsh v. Alabama*, 326 U.S. 501 (1946); *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

The different approaches of the plurality, Justice Kennedy, and Justice Thomas above indicate how characterization of the space at issue affects the outcome. Establishing a World Wide Web site, for example, requires both the use of a portion of cyberspace that is generally public in character — the network of networks that comprises the Internet — and one that is generally private in character — the host computer that the individual posting the page either owns or on which she has leased space. When another user aims to access an individual's web page, she goes through the public network to reach the private one. Does this somehow trigger a public forum analysis?

The perhaps too-easy extension of the concept in Justice Kennedy's *Denver Area* opinion to leased access channels (as opposed to the PEG channels, which are clearly intended to be public forums), indicates that the idea might be applied too liberally.<sup>351</sup> But the general lack of understanding of cyberspace and its implications should point the Court toward resistance of radical doctrinal innovation at a time when so little is understood about its ultimate meaning. In this area, at least, the *Denver Area* plurality's caution is encouraging. Public forum analysis may be appropriate in areas set aside for general expressive purposes in cyberspace, but its wholesale importation of rigid categorical analysis threatens to do more harm than good.

### 3. A Final Analogical Challenge — Zoning

Looking over the fault lines, and prior analysis from *Denver Area*, *Sable*, and *Pacifica*, it is unlikely that the CDA will survive. This is in large part because the proper governmental interest in the Internet medium is enhancing parental control, and, on a practical level, because of the current availability of blocking software, especially the introduction of PICS. There is some worry that more of a move toward "channeling" or "push media" could tempt the Court to find that the Internet is more like broadcast, but as I hope I have shown above, such a move would be improper. One powerful analogy does remain, however, that might be used to save the CDA: that of zoning.<sup>352</sup>

The zoning theory does not fit directly into any of the other categories, though it does relate to the property considerations. Zoning in the everyday world allows governments to restrict the placement of

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351. See *Denver Area*, 116 S. Ct. at 2411-12 (Kennedy, J.).

352. See, e.g., Rosen, *supra* note 324; Brief for Appellants, *supra* note 340. I am again indebted to Larry Lessig for his assistance in exploring this argument, both in discussions and in his piece *The Constitution in Cyberspace*, 45 EMORY L.J. 869 (1996). I should also note that I participated in the writing of the cited brief as an intellectual exercise, and my true views are presented in this Note, not in the brief.

indecent material establishments such as adult bookstores near each other (to avoid development of "red light" districts) and near other facilities such as schools, playgrounds, and other areas where children might congregate.<sup>353</sup> Towns and cities usually use their zoning power to relegate adult establishments to out-of-the-way places, in more run-down areas. By confining these businesses to less-favored locations, local authorities do not bar speech, but do disfavor it. These provisions targeted at sex-oriented establishments have been upheld by the Supreme Court against First Amendment challenges in *Young v. American Mini-Theatres, Inc.*<sup>354</sup> and *City of Renton v. Playtime Theaters, Inc.*<sup>355</sup>

An attempt to apply these holdings to cyberspace would highlight that a number of natural restrictions on pornographic purchases disappear with the move to the digital domain.<sup>356</sup> One need not travel to an adult bookstore or show proof of age to a bouncer screening out underage patrons at the door. As Deputy Solicitor General Seth Waxman explained in the *Reno v. ACLU* oral argument, the unzoned Internet offers children a "free pass into the equivalent of every adult bookstore and theater in the country."<sup>357</sup> The CDA on this reading, then, is just an attempt to apply to cyberspace the barriers that we take for granted in our atom-based existence.<sup>358</sup> To not do so, strong adherents might contend, is to neglect the extensive power that we have to shape cyberspace, and to give away power that we should not cede, especially not for the protection of pornographers.

The claims about our extensive power to shape cyberspace are by and large true, but the zoning argument faces a problem that should be fatal to its gaining constitutional acceptance. In the real world, zoning against adult book and video establishments is justified under the "secondary effects" doctrine.<sup>359</sup> The secondary effects doctrine claims that a questioned regulation is not directed at the speech itself, but instead at the secondary effects caused by the establishments that engage in such speech. For example, adult bookstores are associated with increased criminal activity.<sup>360</sup> Where a factual finding is made that regulation is targeted at secondary effects, it escapes strict scrutiny. Without a clear showing that a legislative body actually was targeting

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353. On zoning, see generally JOSEPH W. SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 601-05 (1992).

354. 427 U.S. 50 (1976).

355. 475 U.S. 41 (1986).

356. See Lessig, *supra* note 352, at 885-87.

357. Mauro, *supra* note 284.

358. See Lessig, *supra* note 352, at 885-87.

359. See *Young*, 427 U.S. at 71 n.34; *Renton*, 475 U.S. at 51-53.

360. See, e.g., *Barnes v. Glen Theatre*, 501 U.S. 560, 582 (1991) (Souter, J., concurring).

secondary effects, or that measurable secondary effects occur from not having zoning restrictions, the Constitution still favors the protection of nonobscene speech.<sup>361</sup>

Thus, for a cyberspace zoning claim to succeed, it would need to show how the CDA is focused on the secondary effects of indecent speech on the Internet. But what constitutes a secondary effect when the medium is almost entirely composed of speech? The fact that indecent material can easily reach children could arguably be enough to invoke the secondary effects doctrine (indeed, one might characterize the *Denver Area* plurality decision as doing that *sub silentio* in upholding section 10(a)). But in the end, such an approach would probably not suffice.

First of all, *Boos v. Berry*<sup>362</sup> limited the scope of the doctrine in finding that the "emotive impact of speech on its audience is not a 'secondary effect.'"<sup>363</sup> Thus, the mere viewing of indecent material by children probably does not qualify as a secondary effect for purposes of freeing the regulation from strict scrutiny. This is bolstered by the classic *Cohen v. California* holding that a publicly-worn jacket's indecently phrased message is not regulable under the First Amendment.<sup>364</sup> It is also helped immensely by the unanimous holding in *Bolger v. Youngs Drug Products Co.* that unsolicited mailing of materials about contraceptives to homes could not be barred, even when parental authority to teach children about birth control is claimed as the compelling state interest.<sup>365</sup>

Additionally, in both *Young* and *Renton*, the Court required a specific finding both that secondary effects were targeted by the legislative body and that they did in fact exist.<sup>366</sup> Neither finding is possible with respect to unzoned areas of the Internet. First, there is substantial evidence that Congress did not target the secondary effects, but the speech itself.<sup>367</sup> Second, the focus in *Renton* and *Young* was on the prostitution, crime, and decline in property values that often occur near adult businesses, areas traditionally within the ambit of state police power.<sup>368</sup> None of these effects, or ones that could be said to be as

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361. See *Renton*, 475 U.S. at 51-53.

362. 485 U.S. 312 (1988).

363. *Id.* at 321.

364. See *Cohen v. California*, 403 U.S. 15 (1971).

365. See *Bolger v. Youngs Drug Prod. Co.*, 463 U.S. 60, 72-75 (1983).

366. See *Young*, 427 U.S. at 48-49. In *Renton*, a reliance on the experience of a neighboring city (Seattle) was deemed acceptable. See *Renton*, 475 U.S. at 51-52.

367. See Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 53-57 (1996) (describing actions of various Members of Congress).

368. See *Young*, 427 U.S. at 71 n.34; *Renton*, 475 U.S. at 47-49.



serious, are likely to occur as a result of indecent speech over computer networks. An argument that there are clear detrimental effects to long-term exposure to indecent material is likely to fail on the grounds that data on actual exposure to such material via the Internet is inconclusive at best.<sup>369</sup> A potential analogy might also be made between a property value decline and a disincentive to use an unzoned cyberspace because of the availability of pornography,<sup>370</sup> but such an approach is somewhat tenuous and lacking data. Without more extensive Congressional findings, both these claims should properly be treated like section 10(c)'s restrictions on PEG channels in *Denver Area*. The presumption would be that a broad regulation is improper until data shows that current efforts to filter content are rampantly ineffective.

Cyberspace will thus probably remain safe from onerous government regulation like the CDA, but assaults on it will continue until some workable arrangement is found that both respects constitutional restraints and gives parents adequate control over the content that comes into their homes. The failure of the zoning analogy to save the CDA, though, does not mean that government is entirely barred from addressing pornography on the Internet. Other possible strategies are requiring that Internet service providers provide their customers blocking software, like the mandatory availability of cable television "lockboxes," and perhaps the mandatory "tagging" of sites containing adult content.<sup>371</sup> If adopted, these certainly would be challenged, but may very well be found constitutional.<sup>372</sup> In rejecting the zoning analogy for the CDA and turning to these other possibilities, I do not mean to say that the government has no role in the debate over media filtering technologies — just that its role must be limited to furthering parental authority. The

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369. Proponents of the CDA will inevitably point to Marty Rimm's infamous survey on Internet pornography as good evidence. See Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories*, 83 GEO. L.J. 1849 (1995). The survey prompted a cover story in *Time* magazine, see Philip Elmer-De Witt, *On a Screen Near You: Cyberporn*, *TIME*, July 3, 1995, at 38, and much consternation, but was later conclusively shown to be overblown and erroneous in many respects. See Cannon, *supra* note 367, at 53-56 (describing literature critical of Rimm's survey).

370. The worry that, in Waxman's words above, see *supra* text accompanying note 361, the Internet provides carte blanche to children seeking pornography leads fairly well into a claim that parents are thereby discouraged from getting their children hooked up.

371. Laws mandating the provision of blocking software are already in the works. See Internet Freedom and Child Protection Act of 1997, *supra* note 38.

372. See *infra* Part III.B.2 for a constitutional analysis of mandatory filtration and labeling regimes.

zoning analogy is quite apt in fact, as it more appropriately applies to the technology we turn to next: the V-chip.

### B. Content Rating and the V-chip

Another part of the 1996 Telecommunications Act takes a bold step toward a different type of regulation of broadcast and cable television, and will help turn these regimes into an environment more fully akin to cyberspace. The mandatory inclusion of a device, colloquially called the "V-chip" because it allows automatic screening out of violent programming,<sup>373</sup> in almost all new televisions to be sold in the United States after 1998<sup>374</sup> raises First Amendment concerns as an extensive government intrusion into the speech marketplace. While mandating this device is slightly worrisome, as it does inject government into the general area of content filtering, the truly problematic First Amendment issue posed by the scheme is its need for a reliable program rating system. Unless certain information about the program being broadcast is provided as part of the signal sent to V-chip-equipped televisions, the chip would serve the same purpose as the technologically obsolete vacuum tube. Some Supreme Court precedent indicates that a compelled speech challenge to a ratings system could succeed.<sup>375</sup>

Understanding the First Amendment issues involved, President Clinton and Congress gave the television industry one year to develop a rating system, to be reviewed at that point by the Federal Communications Commission.<sup>376</sup> If the FCC is unsatisfied with the system, an advisory commission must be appointed to draft ratings standards, though this commission would not have the power under current law to impose the system on broadcasters.<sup>377</sup> All legal conflict over the V-chip setup might be avoided if political considerations push broadcasters into accepting a more detailed ratings system than the current vague one based on the ratings of the Motion Picture Association of America.<sup>378</sup> But if broadcasters refuse to go along, the prospect is good for more

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373. The V-chip's inventor originally intended that the V stand for "viewer control," but it has generally been taken to signify "violence" in the United States. See Dirk Smillie, *TV Ratings Rate Poorly With V-Chip Inventor And Father of Three*, CHRISTIAN SCI. MONITOR, Feb. 27, 1997, at 14.

374. See Telecommunications Act of 1996 § 551(c), 110 Stat. 56, 142 (to be codified at 47 U.S.C. § 303(x)).

375. See *infra* Part III.B.2.a.

376. See Telecommunications Act § 551(b), 110 Stat. at 141 (to be codified at 47 U.S.C. § 303(w)).

377. See *id.*

378. See *TV Executives Willing to Make Ratings Changes*, CHARLESTON GAZETTE, Feb. 28, 1997, at 5D.

extensive government involvement in the ratings system.<sup>379</sup> Should the federal government make a more extensive foray into the ratings with enforceable ratings guidelines, for example, then broadcasters are sure to file suit.<sup>380</sup>

Would a free speech claim here succeed, and should it? The answer depends on whether the addition of a reliable ratings system would change the nature of the medium, and whether doing so is within the government's proper power under the First Amendment. To connect this with a compelling government interest, the question can be reformulated: can the government mandate a change in television's basic structure in the name of enhancing parental control? Does that interest justify the compelled speech of a ratings system?

In the next section, I explain that a "V-chipped" television is actually a different medium from today's television, one presenting questions more akin to those considered in the CDA's cyberspace context than *Denver Area's* cable regime. I then turn to three of the *Denver Area* fault lines to examine the Court's thinking on standards, justification in context, and narrow tailoring. Within this section, I explain how the zoning argument introduced and rejected in the CDA context might allow government action promoting a V-chip to escape strict scrutiny, and why requirements even stricter than those in the 1996 Telecommunications Act could and should survive. Finally, I note how convergence between the television and the computer might and should affect what the V-chip will look like when it becomes a widespread reality.

### 1. The V-Chipped Television in a Medium-Specific World

Though there were potential translation problems in applying other media holdings to the Internet when considering the CDA, medium-specific analysis does not initially seem to pose problems for the V-chip. It is, after all, to become part of what we call a "television." But the question should be considered another way: is a television broadcasting system that includes a V-chip and ratings system the same as one without such an addition? I would submit that it is not. The addition of a

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379. See Brooks Boliek, *FCC Takes Full Aim at Ratings*, HOLLYWOOD REP., Apr. 24, 1997, available in LEXIS, News Library, Curnws File; Brooks Boliek, *Content Ratings Put in Motion*, HOLLYWOOD REP., Feb. 27, 1997, available in LEXIS, News Library, Curnws File.

380. Though most television networks and producers are currently on board with the V-chip ratings system, they have repeatedly threatened to litigate over the requirements, and someone particularly agitated about the perceived intrusion on free speech is almost certain to file suit. See Richard Zoglin, *Prime-Time Summit. TV Execs Bowed to Public Sentiment. Clinton Won a P.R. Triumph. Result: Ratings for Sex and Violence*, TIME, Mar. 11, 1996, at 64.

content-based filter for users of the equipment changes the nature of the medium in such a way that it is truly not the same as before. A V-chipped television transforms the television medium into something entirely different from today's regime, one where the control is not with programmers at the networks, but with individual viewers and, most importantly, with parents.<sup>381</sup> No longer are broadcasters the equivalent of sound truck drivers bombarding homes with unfiltered content,<sup>382</sup> using the electromagnetic spectrum rather than sound waves. In the V-chip world, they become speakers on streetcorners in cyberspace — or, more appropriately, inside their own enclosures, or in monitored newsracks<sup>383</sup> — beckoning potential viewers to stop and watch. The V-chip allows parents to determine, whether or not they are physically present, if their children can tune in. In a time when children spend less time under direct parental supervision, and with the move of televisions into children's bedrooms,<sup>384</sup> this is a powerfully attractive feature. Regardless of whether the Court ultimately takes the step of declaring V-chip equipped televisions to be a separate medium more like print than broadcast or expressly dismantles medium-specificity as convergence occurs, the radical transformation is the same.<sup>385</sup>

The question is then whether Congress has the power to mandate such a system, especially when its success depends upon a ratings system — speech about the speech that is being transmitted. Though each of the four fault-lines from *Denver Area* that we have addressed bears somewhat on the V-chip requirement, only the standard selection, ultimate justification, and narrow tailoring questions have a major impact.<sup>386</sup> Ultimately, the V-chip requirement will probably be seen as a less-restrictive means of empowering parents to protect their children

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381. See Berman & Weitzner, *supra* note 325, at 1633-35.

382. See *Kovacs v. Cooper*, 336 U.S. 77 (1949).

383. The Supreme Court recently denied certiorari on a challenge to a California law barring the distribution of indecent material in street-based newsracks. See *Crawford v. Lungren*, 117 S. Ct. 1249 (1997) (mem.). The Ninth Circuit had upheld the law, which allowed a defense for racks using special tokens or identification cards. See *Crawford v. Lungren*, 96 F.3d 380, 383 n.1 (1996).

384. See, e.g., Ray Richmond, *Parents Want to Tune In and Turn Off*, TIMES UNION (Albany, N.Y.), Apr. 21, 1996, at 11; see also *Denver Area*, 116 S. Ct. at 2486 (plurality) (citing study showing children watch more television and view a wider variety of channels than their parents). As Justice Scalia explained at oral argument in *Reno v. ACLU*, "If I had to be present every time my 16-year-old is on the Internet, I would know less about this case than I do today." See Edward Felsenthal, *Justices Show Concern over Smut on the Net in Indecency Law Case*, WALL ST. J., Mar. 20, 1997, at B12. The same is surely true of Justice Scalia's television.

385. See *infra* Part IV.

386. Public forum analysis depends heavily on a right to access the space in question, and that approach to the airwaves was substantially rejected by *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

from indecent programming on television than the clearly impermissible ban and questionable channeling requirements of cases like *Denver Area*.

## 2. Fault Lines

### a. Standard selection

Is the V-chip requirement a content-based restriction on speech that should be subjected to strict scrutiny? With respect to the current legislation mandating only the chip itself and with an unenforceable ratings system, the answer would seem to be no. Despite the popular understanding about its name, it is more properly characterized as a content-filtration chip than one that only addresses violence.<sup>387</sup> There are some potential worries about legislative motive in introducing the chip restriction — the goal is at least in part to reduce the amount of violence and sexual content to which children are exposed — but the direct purpose is not to reduce the amount of violence or indecent material on television. It is instead by the legislation's very terms designed to "permit parents to block the display of video programming that they have determined is inappropriate for their children."<sup>388</sup> In any case, the Court is loath to ascribe unconstitutional motives to legislators, and especially to Congress.<sup>389</sup> But the chip itself is not the hardest issue; the ratings system raises the major controversy.

The mechanism to establish a ratings system embodied in the 1996 Telecommunications Act is perhaps the best way to assure that ratings do happen while avoiding early constitutional challenge that could scuttle the progress that has been made. This approach has lead initially to ratings based on those of the Motion Picture Association of America (G, PG, PG-13, R), and not the more informative level-based ratings (of sex, violence, and language) that many parents and consumer groups had sought.<sup>390</sup> Because of these bland and relatively uninformative ratings, the call has gone out again for something stricter to be adopted.<sup>391</sup> For

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387. See Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 Nw. U.L. REV. 1487, 1514-15 (arguing that the requirement of a filtration device "does not even come within the purview of the First Amendment").

388. Telecommunications Act of 1996 § 551(b)(1) (to be codified at 47 U.S.C. § 303(w)).

389. See *United States v. X-Citement Video*, 513 U.S. 64 (1994). But see *Wallace v. Jaffree*, 472 U.S. 38 (1985).

390. See Smillie, *supra* note 373.

391. See *id.*

purposes of making the analysis more interesting, I will assume that the government takes action to force a stricter ratings system.<sup>392</sup>

Would government action to force ratings of television programs be subject to strict scrutiny? The Court seems to be of two minds on whether strict scrutiny should govern general labeling requirements. In *Riley v. National Federation of the Blind, Inc.*,<sup>393</sup> the Court applied strict scrutiny in overturning a North Carolina requirement that professional fundraisers disclose the average percentage of gross receipts they had actually turned over to charities in the past year. Relying on two previous cases addressing similar restrictions, and reaching back to *Miami Herald Publishing Co. v. Tornillo*'s invalidation of a newspaper right of reply statute, the Court stated its conclusion in broad terms: "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech."<sup>394</sup> In other words, because North Carolina's required disclosure had a good chance of altering the purpose of the speech, it was subject to strict scrutiny.

On the other hand, in *Meese v. Keene*,<sup>395</sup> the Court found that a labeling requirement posed "no burden on protected expression."<sup>396</sup> There, films classified as "political propaganda" under the Foreign Agents Registration Act were required to be labeled with three pieces of information: the name of the foreign agent circulating them, that a registration statement is on file with the Department of Justice, and that the United States government has not approved its contents.<sup>397</sup> The Court explained that labeling the films as "political propaganda," while not requiring the label to use those words, was acceptable because "Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda."<sup>398</sup>

The apparent irreconcilability of these two cases, decided only a year apart, might be overcome in two ways. First, a body setting up a ratings requirement could attempt to ensure that neutral labeling requirements are constructed very carefully in the first instance to steer clear of major impacts on the underlying expression. This would be rightly character-

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392. This action could take a number of different forms, each of which might tip the constitutional analysis in a different direction. It would be safest to mandate that an independent board provide ratings and make broadcasters liable, if only in license renewal proceedings, for broadcasting programs without the independent board's ratings.

393. 487 U.S. 781 (1988).

394. *Id.* at 795 (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256).

395. 481 U.S. 465 (1987).

396. *Id.* at 480.

397. *See id.* at 471.

398. *Id.* at 480.

ized as only a slightly more strenuous version of the 1996 agreement. While the broad language quoted above indicates that the trigger on *Riley*-type strict scrutiny could be easily tripped, the focus in *Riley* is on "burdening a speaker with unwanted speech during the course of a solicitation."<sup>399</sup> An effort to make the intrusion of a content-rating system de minimis on the actual speech in question, such as enforcing a strong separation between the production of the program in question and its rating, might persuade the Court that the rating is more like the *Keene* requirement. Another separation between government action and the ratings could be brought about by merely adding mandatory labeling to the current regime, or by tying a benefit like additional spectrum for digital television to a more informative, industry-policed content rating system.<sup>400</sup> These options present real possibilities for a workable V-chip system, but have the disadvantage of not addressing *Riley*'s broad language with any approach besides claims that the facts are different.

The possibility that zoning and the secondary effects doctrine could free a carefully constructed mandatory labeling system from strict scrutiny altogether, on the other hand, offers a more persuasive option for avoiding *Riley*. The findings in the V-chip legislation focus on the amount of television that children watch, the well-documented social science research on the long-term effects of viewing violence on children, and the less-documented, but significant and plausible effects of exposure to indecent material.<sup>401</sup> As the findings explain, "Studies have shown that children exposed to violent video programming at a young age have a higher tendency for violent and aggressive behavior later in life. . . ."<sup>402</sup> Thus, we might say that the secondary effect is not the immediate "emotive impact" that violent or sexual material has on children, avoiding the CDA's problem with *Boos v. Barry*,<sup>403</sup> but instead its cumulative effects. These can be credibly characterized as "second-

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399. *Riley*, 487 U.S. at 800.

400. On the issue of spectrum for digital television, see, e.g., Leslie Wayne, *Broadcast Lobby Excels at the Washington Power Game*, N.Y. TIMES, May 5, 1997, at D1.

401. See Telecommunications Act of 1996, Pub. L. No. 104-104, § 551(a)(4), 110 Stat. 56, 139; Edwards & Berman, *supra* note 387, at 1536-47 (discussing numerous studies and reaching conclusion that the studies on balance support the "claim that viewing television violence is a causal factor for antisocial and criminal aggression"). The evidence on exposure to sexual material is less clear, and the Congressional findings less sure and resounding. See Telecommunications Act § 551(a)(6), 110 Stat. at 139 ("Studies indicate that children are affected by the pervasiveness and casual treatment of sexual material on television"). If the asserted compelling government interest is parental control, as it undoubtedly is in the findings, see Telecommunications Act § 551(a)(7)-(9), 110 Stat. at 139-40, the findings would probably need to be less extensive than if the means of bringing about the interest were a ban or time-channeling.

402. Telecommunications Act § 551(a)(4), 110 Stat. at 139.

403. See *infra* text accompanying notes 362-63.

ary" because of their separation in time from immediate impacts, and especially because of the strong social science evidence that supports them. In addition, the findings focus on the "compelling governmental interest in empowering parents to limit the negative influences of video programming that is harmful to children."<sup>404</sup> By moving from a short-term focus on what speech does to the long-term effects on children, and to television's undermining of parental messages on these matters, the V-chip regime, even with a ratings system, should escape strict scrutiny.

Notably, the V-chip does not aim at reducing the amount of violent or sexually explicit material available to adults, but merely the amount that reaches children. It would do so not by limiting when programs can be shown, an action already upheld by the D.C. Circuit en banc,<sup>405</sup> but by setting up a comprehensive scheme, minimally intrusive on speech interests, that empowers parents to select appropriate programming for their children. Targeting the secondary effect of long-term exposure to violence and addressing the problem by building in a parental control device diminishes the worry that the measure is content-directed (and especially viewpoint-directed), lessening the need to apply strict scrutiny.

A ratings system could thus be seen as analogous to nutritional labeling on food,<sup>406</sup> or as the *Keene* labeling requirement's enhancement of public information. Surely requiring the statement, "this show contains violence or sexually explicit material," is less constitutionally problematic than requiring the statement, "this film is foreign speech intended to influence the U.S. government, and registered with the Department of Justice."<sup>407</sup> *Denver Area* provides more support for this view: the vaguely positive mention of the V-chip as a potentially less restrictive alternative to section 10(b) in both Justice Breyer's plurality opinion and Justice Souter's concurrence suggests that the Court

404. Telecommunications Act § 551(a)(8), 110 Stat. at 140.

405. See *Action for Children's Television v. FCC*, 58 F.3d 654 (1995), cert. denied, 116 S. Ct. 701 (1996) (mem.).

406. See, e.g., Smilie, *supra* note 373 (noting this analogy). Measurement presents problems. The fat content of a granola bar is a much more easily determined piece of information than whether a show should be TV-14 or TV-M, or rated as Violence-2 or Violence-3. But this is not to say that an independently established rating agency could not accomplish the task with written and reviewable guidelines. The Motion Picture Association of America has extensive experience in drawing these fine distinctions, and might have a great deal to contribute once the ideological objections of its Chairman are overcome. See Brooks Boliek, *Valenti to B'casters: Beware*, HOLLYWOOD REP., Apr. 8, 1997, available in LEXIS, News Library, Cumwv File.

407. *Meese v. Keene*, 481 U.S. 465, 471. Also of note in *Keene* is its rampantly political context. The suit was brought by a California state senator who was undoubtedly worried that a future opponent would trumpet his showing of films that the Justice Department described as "political propaganda." The films in question were Canadian documentaries about acid rain. See *id.* at 467-68.



considers the V-chip more acceptable than some other regulatory possibilities.<sup>408</sup> A final piece of support might come from the recent upholding of the "must carry" provisions in a reconsideration of *Turner*.<sup>409</sup> There, the Court largely deferred to Congress's findings of fact about the economic rationale for the provisions.<sup>410</sup> If they are equally deferential to Congress's claims that they have targeted secondary effects, not protected violent and sexually explicit speech — emphasizing that such speech reaches children and has long-term effects — then the application of strict scrutiny will be less likely.

To be sure, the effect of violent programming on children is a less concrete worry than the prostitution and crime that are the relevant secondary effects in *Young v. American Mini-Theatres, Inc.*<sup>411</sup> and *City of Renton v. Playtime Theaters, Inc.*<sup>412,413</sup> But the social science evidence is strong enough, the loss of parental control real enough, and at least current Administration and Congressional appreciation of the proper constraints of the First Amendment significant enough, for even a ratings requirement to escape strict scrutiny.

#### b. Basic Justification in Context

As I have analyzed the provisions so far, the focus has been on parental control as the relevant compelling interest. Honing in on this, and not the protection of children in general, is the stronger argument for those seeking to protect both the current and a possibly stricter V-chip regime. This is an especially important fact to take away from the discussion throughout this Note, as both the CDA analysis in Part III.A and that of section 10(c) in *Denver Area* show that the generic protection of children rationale is often not sufficiently defined to allow restrictions that arguably affect protected speech.<sup>414</sup> Parental control necessarily affects less speech than the broader protection of children in general, and is thus more likely to be preferred by a Court worried about restricting too much adult speech.

The importance of the government interest in enhancing parental control and the pervasiveness of television today — meaning both its ubiquity and the lack of parental control<sup>415</sup> — will likely assure that the unfettered ability of broadcasters to choose their programming while

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408. See *Denver Area*, 116 S. Ct. at 2392 (plurality); *id.* at 2404 (Souter, J.).

409. *Turner Broad. Sys., Inc. v. FCC*, 117 S. Ct. 1174 (1997).

410. See *id.* at 1189.

411. 427 U.S. 50 (1976).

412. 475 U.S. 41 (1986).

413. See *supra* Part III.A.3.

414. See *supra* Parts II.H & III.A.

415. See *supra* Part III.A.2.iii.

avoiding rating it ends with the V-chip arrangement. Parental control has been threatened from the beginning by the television's incursion into the household, a fact recognized by the Court in *Pacifica*.<sup>416</sup> The development of a technology that restores the balance that prevailed before the incursion, where automated, user-selected blocking keeps out unapproved content, will be very unlikely to meet with constitutional disapproval.

### c. Narrow Tailoring

Because strict scrutiny should not apply, a perfect fit between the goal and the means of achieving it would no longer required, though the language of narrow tailoring remains roughly the same. Two different V-chip regimes — both the current voluntary ratings system and the more stringent requirement explored above — could face narrow tailoring analysis, depending on the recalcitrance of broadcasters in adopting a ratings system more descriptive of a show's content. I will treat them in turn, focusing only on overinclusiveness worries because the medium-transforming character of the regime raises few underinclusiveness concerns.<sup>417</sup>

In the 1996 Telecommunications Act, Congress chose, significantly, to allow a period for industry self-regulation followed by FCC review, instead of instituting a ratings system itself in the first instance or delegating it to the FCC. This less-intrusive mechanism for prodding a resistant industry, even when accomplished in part with a threat of government action in the area, should be found narrowly tailored to serve the asserted interest (especially if formulated as the furtherance of parental authority as in *Ginsberg v. New York*)<sup>418</sup> and thus constitutional. It serves the interest of parental control without requiring that speech be altered, or even shunted to odd hours of night. Mandating the V-chip and reviewing the ratings system is certainly a less-restrictive means than outright bans or time-channeling, providing the right fit between means and ends. Only excessive devotion to the principle that government has no role at all in regulating speech marketplaces could lead to the conclusion that the fit here is constitutionally improper. Such an approach would ignore both the general exceptions to this valuable principle that I set out in Part I, and the more particular ones having to

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

417. Some underinclusiveness worries might come from a ratings system that aimed at, say, only particular types of violence, or at only sexual behavior between unmarried people. Because of broadcast industry resistance and First Amendment problems with a viewpoint-based approach, such a ratings system is highly unlikely.

418. 390 U.S. 629, 639 (1968).

do with improper material reaching minors, like those at issue in *Ginsberg*. Through zoning's secondary effects doctrine, the adoption of an intermediate scrutiny that allows for greater "play" between the goals and means than might otherwise be proper, leads to the conclusion that the V-chip requirement and concomitant ratings system are constitutional.

Even a less voluntary regime may pass constitutional muster here. The compelled speech worries I have raised apply in their strongest form only if the ratings system merges with the broadcaster's speech, and that problem can be solved with a disclaimer.<sup>419</sup> The argument that requiring ratings will affect the speech at issue, pushing television producers toward tamer fare to avoid the stigma of a heavy violence or sexual content rating, depends on a prior assumption that the right to speak entails the right to reach every potential viewer. As *Ginsberg* and the newsrack case mentioned above show,<sup>420</sup> not even print media purveyors have that right. Once over the compelled speech hurdle, requiring a ratings system poses few problems. The secondary effects doctrine again properly enters the picture to bolster this conclusion. Its willingness to allow legislative factfinding on significant evidence where compelling values besides speech interests are also at stake offers an ideal path to uphold the V-chip requirement and a ratings system.

### 3. Convergence of Computers and Television, and of Internet Content Filters and the V-Chip

Two final points deserve brief attention here. First, as computers and televisions converge at a rapid rate,<sup>421</sup> the content targeted by the CDA and that targeted by FCC indecency regulations will be showing up on Justice Souter's "common receiver."<sup>422</sup> This indicates that the computer and television industries should be talking among themselves and with the FCC about the future of content filters.<sup>423</sup> I hope that the constitutional analysis here, and especially the prospect of harmonizing

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419. See Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters*, 45 DUKE L.J. 1089, 1127-28 (1996) (discussing the disclaimer possibility).

420. See *supra* note 383 and accompanying text.

421. See, e.g., Marla Matzer, *Broadcasters Ready for "Convergence" of TVs, PCs*, L.A. TIMES, Apr. 28, 1997, at D8.

422. *Denver Area*, 116 S. Ct. at 2402.

423. Some discussions have occurred between the World Wide Web Consortium, home of the PICS standard, and FCC Chairman Reed Hundt, but little definite work has been done on this convergence. Interview with Jim Miller, Domain Leader, Technology and Society Domain, World Wide Web Consortium, in Cambridge, Mass. (Feb. 19, 1996).

the First Amendment regimes among media, renders this an attractive option for the various media providers.

Second, a look to the future effect of changes in the media points us back toward *Denver Area*. The widespread adoption of V-chips with effective ratings systems will ironically make even the section 10(a) delegation of filtration power to the cable operator upheld there unconstitutional. It is worth noting that the ruling on section 10(a) had no majority rationale, and is thus quite unstable.<sup>424</sup> The analysis here indicates that cable operators should and will be found an insufficiently tailored agent for protecting children. When there is the capability of having real parental control through the V-chip, delegating filtration power to the cable operator is inappropriate. There may be some further analysis focusing on the cable operators as "speakers" in their channel selection that could save section 10(a),<sup>425</sup> but as a means of protecting children, it will be insufficiently tailored.

This is not a rock-solid conclusion. In *Denver Area*, the Court was willing to overlook the requirement that cable companies provide lockboxes in finding less-restrictive means to section 10(a), so the availability of technological blocking mechanisms does not necessarily make restrictions improper under the First Amendment. But Congress may have addressed this by requiring that V-chips be built into television sets, making them as pervasive as the medium itself.

Thus, a properly designed, effective V-chip should allow cable television, and probably even the broadcast medium,<sup>426</sup> to be again governed under a fully protective First Amendment regime. The ratings system needed to make the V-chip work is an incursion — it compels speech in its requirement of labeling — but it is speech compelled so that there can be more and freer speech while our interest in promoting parental prerogative to protect children from uncontrolled exposure is also met. A V-chip is thus just like PICS, in that it shapes the architecture of a speech transmission medium to alter control over that medium.<sup>427</sup> Cyberspace's dependence on computer code comes with the capability of filtration built into the architecture; because computers are so powerful and versatile, only software design changes such as PICS are needed to enable content filters. As television becomes more and more a part of cyberspace — just one "channel" on Justice Souter's common receiver — the same will be true of it.

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424. See *supra* Part II.B.

425. See *supra* Part II.G.

426. There would undoubtedly need to be some phase-out period to take into account older receivers and the old medium. For one view on the specifics of how this would work, see Balkin, *supra* note 327, at 1156-57.

427. See Lessig, *supra* note 352, at 893-95.

This of course leads to a final question: can the government mandate a PICS-type filter for the Internet? The answer seems to be yes, but I address the issue of how such a power might be constrained, and why it might actually be valuable for cyberspace, now.

#### IV. CONCLUSION: ARCHITECTURAL CONTROL AND THE FUTURE OF MEDIUM-SPECIFIC ANALYSIS IN CYBERSPACE

*[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them.*<sup>428</sup>

In a speech to the first Computers, Freedom, and Privacy Conference,<sup>429</sup> Professor Laurence Tribe proposed a constitutional amendment to assure that the civil liberties protections American citizens expect in their everyday lives will apply in cyberspace.<sup>430</sup> There is of course a good argument that such an amendment should not be necessary, and especially not with respect to free speech — that the First Amendment does in fact not allow for distinctions among media. Case law, as the quotation from *Red Lion* shows, has clearly taken us in another direction. The notion that different media pose different First Amendment questions has become an ingrained part of our jurisprudence. But what happens as the media converge, facilitating even the reconceptualization of television as merely a window into cyberspace? What are the limits on government as we have more control over the networks that transmit speech? What does it mean to be haunted by the “spectre of a ‘wired’ nation”?

As the colonization of cyberspace continues, some of the members of Congress who supported the CDA have specifically posed the question of whether the Court should extend its medium-specific interpretation of the First Amendment.<sup>431</sup> They argue that the Court

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428. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969).

429. This conference was held March 26, 1991, in Burlingame, California.

430. Its language is comprehensive:

This Constitution's protections for the freedoms of speech, press, petition, and assembly, and its protections against unreasonable searches and seizures and the deprivation of life, liberty, or property without due process of law, shall be construed as fully applicable without regard to the technological method or medium through which information content is generated; stored; altered; transmitted, or controlled.

Laurence H. Tribe, *The Constitution in Cyberspace: Law and Liberty beyond the Electronic Frontier* (visited May 2, 1997) <<http://www.cpsr.org/dox/conferences/cfp91/tribe2.html>>.

431. See Brief of Members of Congress, *Reno v. ACLU*, 1997 WL 22918 (U.S.) (No. 96-511).

should apply a standard of "online indecency" because of the availability of the medium.<sup>432</sup> Attempts to treat new media differently while all media is actually becoming more similar will persist until a more definite decision is reached on the meaning of medium-specificity. With the *Denver Area* plurality's unwillingness to select a standard for cable indecency, even after the apparent inclusion of cable television under the default First Amendment regime in *Turner*, the field is as confused as ever. It is time for the Court to clarify and amplify the First Amendment's signal.

The critical question is this: do we have a medium-specific First Amendment regime because we believe that one technology is metaphysically different from another, or because some technologies' usage and design hold greater potential to threaten other values that we cherish? To ask this question in a convergent world is to illustrate the absurdity of the former approach, and to refocus our attention on identifying the critical values to be protected in the latter. The digitization of media turns us away from accepting technology as a given factor outside our control, and toward a focus on how we want to structure technology to protect core values. When technological means arise to protect those values on a formerly less-protected medium, then the special, less-protective regime governing that medium of expression should cease.

I have highlighted a particularly important value, that of parental control, and shown how it is treated in *Denver Area*, appropriately furthered by the V-chip requirement, and undermined by the CDA. I have also shown how the generic protection of children rationale can be overextended, but can be reformulated as an interest in restoring parental control. Of course, there are other values that should be considered and respected. But the goal of parental control, when discretely and clearly posed, offers a tailored means to examine the most likely governmental use of architectural control. Some values will be served well by the market and network architecture, and others, like the protection of children and parental prerogatives, will not. Government has a limited role to step in to correct market failure in these instances, just as it can control market failures in the everyday market for land use through zoning.

While we have much more power in cyberspace because "the constraints of code in cyberspace are written by people,"<sup>433</sup> classic worries remain in allowing government any power over the architecture. Many adhere to the First Amendment conception that I described in Part I: that the Amendment requires courts to declare all (or almost

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432. *Id.* at \*2.

433. Lessig, *supra* note 352, at 897.

ally<sup>434</sup> content-based regulations improper. Most government power over deciding "good" and "bad" speech must of course be proscribed. We are and should be devotees of a marketplace view, at least to the point that we give wide berth to citizens' choices among perspectives. There is a very persuasive argument to be made that even the worst type of speech should be allowed because it helps people develop the capacity for tolerance.<sup>435</sup> But this does not mean that all restrictions connected to content are invalid. Most should be required to meet strict scrutiny; that is, they must serve a compelling state interest, and be narrowly tailored to serve that interest. Where government action is not as tightly tied to the content itself, but to assuring that network architecture does not threaten other deeply held values, as in the V-chip case, the zoning analogy allows for escape from the rigidity of strict scrutiny. In the classic parlance, it allows for a limited class of content-based time, place, and manner restrictions without presenting the threat of unbounded balancing that legitimately alarmed Justice Kennedy in *Denver Area*.<sup>436</sup>

Some commentators doubt approaches such as these, arguing that the porting of concepts directly from our mundane atom-based existence ignores the nature of cyberspace as a separate jurisdiction, or as an entirely free place.<sup>437</sup> They especially fear opening architectural design issues even to minimal government incursion by a zoning analogy, or any other.<sup>438</sup> But there are good reasons to ask whether cyberspace has a nature, and to worry that if we keep government out, private decisionmaking could use architectural means to foist on citizens of the new medium exactly what they fear from government. Cyberspace is currently being shaped by the market into the familiar — mail, television, telephone, radio — but it may be improperly shaped into technologies of control even by private entities. The openness of cyberspace does not by itself threaten our values, but potential uses such as ubiquitous monitoring — whether by government<sup>439</sup> or private actors<sup>440</sup> — might.

434. As I pointed out in Part I, many categories of content-based regulation have been found not just constitutionally acceptable, but not "content-based" as a matter of constitutional law. See *supra* notes 6-10 and accompanying text.

435. See generally LEE BOLLINGER, *THE TOLERANT SOCIETY* (1986).

436. See *Denver Area*, 116 S. Ct. at 2404; *supra* Part II.F.1.

437. See, e.g., David Johnson and David Post, *Law and Borders — The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); John Perry Barlow, *A Cyberspace Independence Declaration* (visited April 30, 1997) <[http://www.eff.org/pub/Publications/John\\_Perry\\_Barlow/barlow\\_0296.declaration](http://www.eff.org/pub/Publications/John_Perry_Barlow/barlow_0296.declaration)>.

438. See Barlow, *supra* note 437. For a more sophisticated discussion of what is at stake, see Lessig, *supra* note 352, at 895-910.

439. This is of course the worry about the China example. See *supra* note 324.

440. A Note in the *Yale Law Journal* posed the question of whether government searches for contraband over the Internet would violate the Fourth Amendment. See Michael Adler, *Cyberspace, General Searches, and Digital Contraband: The Fourth*

Allowing a zoning exception for content-based (but viewpoint-neutral and technologically tailored) mechanisms to serve important values thus serves to assure that the medium remains an open one. It disallows crude attempts that strike at the heart of cyberspace, like the Communications Decency Act. It allows carefully tailored government actions to protect values through architectural design when constraints on the availability of sensitive information to children disappear, diminishing parental control. Finally, it permits convergence to take its natural course toward a unified First Amendment jurisprudence.

*Denver Area* is an important case not in its setting of standards, but in its illustration of how difficult it is to do so. The fault lines I have traced are breaking points, choices that the Justices must make in defining the First Amendment. Looking at how the fault lines were treated in *Denver Area*, as well as how they apply to the CDA and V-chip controversies, reveals the need for a clearer and simpler approach. The zoning analogy, applied carefully, provides one part of the solution.